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Cape of Good Hope. Supreme Court.
"CAPE TIMES" LAW REPORTS

OF ALL CASES DECIDED

IN THE SUPREME COURT

OF THE

CAPE OF GOOD HOPE,

DURING THE YEAR 1905

(WITH INDEX OF CASES AND DIGEST).

REPORTED BY

S. H. ROWSON, B.A., LL.B.,

ADVOCATE OF THE SUPREME COURT.

VOL. XV.

CAPE TOWN :

PRINTED AND PUBLISHED BY THE CAPE TIMES LTD., KEEBOM STREET,

1906.

**JUDGES OF THE SUPREME COURT DURING THE
YEAR 1905.**

DE VILLIERS, RIGHT HON. SIR J. H., P.C., K.C.M.G., LL.D. (Chief Justice).

Absent from May 5th to December 1st.

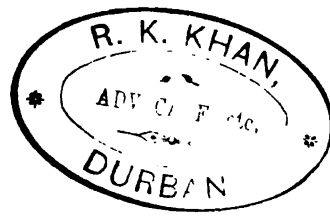
BUCHANAN, HON. SIR E. J., Knt. (Senior Puisne Judge).

MAASDORP, HON. C. J. (Junior Puisne Judge).

HOPLEY, HON. W. M. (Puisne Judge of the High Court).

ATTORNEY-GENERAL :

SAMPSON, THE HON. VICTOR, K.C.



"Cape Times" Law Reports.

CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY
and a Special Jury.]

BACHELOR V. S. A.
BREWRIES.

1905.
Jan. 10th.
" 11th.
" 12th.
" 13th.
" 16th.

Building contract—Extension of time—Ejection of con- tractor—Measure of damages.

This was an action to recover damages for breach of contract. The declaration was as follows:—

1. The plaintiff is a builder and contractor carrying on business at East London. The defendant is a Company duly registered under the Companies' Act, 1902 and carrying on business at East London and elsewhere in South Africa.

2. On or about the 17th June, 1903, the parties entered into a certain contract to which the plaintiff craves leave to refer when produced at the trial, whereunder the plaintiff agreed in consideration of the sum of £17,829 to be paid him by the defendant to erect in accordance with certain plans and specifications certain buildings at East London, one portion of which buildings was to be an hotel to be known as the "Grand Hotel" and the other portion a brewery depot.

3. It was provided by the said contract that the plaintiff should complete the brewery depot on or before the 17th December, 1903, and the whole of the buildings on or before the 17th May, 1904, unless the work should be delayed by reason of any inclement weather or causes not under the control of the contractor.

4. The plaintiff commenced work under the said contract on or about the 23rd June, 1903, and thereafter duly proceeded with the said work and continued so to proceed until the defendant broke and cancelled the contract and took possession of the site with all materials and plant thereon and ejected the plaintiff and his workmen as hereinafter set forth in paragraph 9.

5. The progress of the work was delayed by reason of certain causes for which the plaintiff was not responsible, but which arose through the acts or defaults of the defendant or his architects whereby it became and was wholly impossible to complete the brewery depot building by the 17th December, 1903. The said causes are more particularly set forth in paragraphs 6, 7, and 8 hereof.

6. The defendant after the execution of the said contract failed and neglected to deliver to the plaintiff forthwith possession of the whole of the site for the said buildings, but remained in use and occupation of a certain portion from the date of the said contract until early in November, 1903, and of a certain other portion from the date of the contract until on or about the 16th December, 1903. By reason of the retention by the defendant of the said portions the plaintiff was delayed and hindered in proceeding with the work.

7. After the execution of the contract the defendant caused a survey to be made of the site, which survey showed a length of frontage on a street known as Cambridge Street differing from the length of frontage shown on the plans annexed to the contract. The plaintiff duly applied to the defendant's architects for instructions as to what length of frontage he was to adopt, but the said architects unduly delayed to give him such instructions until September, 1903, when they supplied him with an amended plan

showing an increased length of frontage. By reason of the said delay in giving instructions and of the said alterations of the plans, the progress of the works was hindered and retarded.

8. It was provided by the specifications that the defendant should supply certain iron and steel work for the buildings. The defendant failed and neglected duly to supply the said iron and steel work and the plaintiff was for a long time kept waiting for it and was delayed in his progress with the buildings.

9. In or about January, 1904, the defendant wrongfully and unlawfully broke and cancelled the said contract and took possession of the site and works to wit, both the "Grand Hotel" and the brewery depot and of the material and plant thereon and ordered the plaintiff and his workmen to leave the said site and works and refused to allow them to return thereto.

10. There is due to the plaintiff the sum of £3,092 15s. 3d., being for work and labour done, materials supplied and disbursements made in, about and for the said buildings. Particulars of the said sum have been supplied to the defendant.

11. Further by reason of the aforesaid breach and cancellation of contract the plaintiff has sustained damages by way of loss of profit on the contract in the sum of £1,755 19s. 9d.

12. All things have happened, all times have elapsed and all conditions have been fulfilled necessary to entitle plaintiff to payment of the said sums but the defendant refuses to make such payment.

Wherefore the plaintiff claims:—

- (a) Judgment for £3,092 15s. 3d.
- (b) £1,755 19s. 9d. damages.
- (c) Interest *a tempore morae*.
- (d) Costs of suit.

To this declaration defendant's plea and claim in reconvention were as follows:—

1. Paragraph 1 is admitted.

2. The defendant company admits that on or about the 17th day of June, 1903, the parties executed a written contract contained in a certain document of the said date together with certain general conditions and specifications embodied therein and attached thereto. The defendant company craves leave to refer for greater certainty to the terms thereof when produced at the trial, but save as above admits the allegations in paragraph 2.

3. Subject to the matters hereinafter set forth, the defendant company admits the allegations in paragraph 3.

4. By clause 15 of the said general conditions it is provided that "The contractor is to complete the whole of the works by the seventeenth day of May, 1904, unless the works be de-

layed by reason of any inclement weather, or causes not under control of the contractor, or in case of combination of workmen, or strikes, or lock-out affecting any of the building trades, for which due allowance shall be made by the architect, and then the contractor is to complete the works within such time as the architect shall consider to be reasonable, and shall from time to time in writing appoint, and in case of default, the contractor is to pay or allow to the employer as and by way of liquidated and agreed damages the sum of £5 per day for every day during which they shall be in default, until the whole of the works (except as aforesaid) shall be so completed, provided the architect shall in writing certify that the works could have been reasonably completed within the time appointed."

5. By clause 16 thereof it is further provided:—

"If the contractor shall become bankrupt, or compound with or make any assignment for the benefit of their creditors, or shall suspend or delay the performance of their part of the contract (except on account of causes mentioned in clause 15, or on account of being restrained or hindered under any proceedings taken by parties interested in any neighbouring property, or in consequence of not having proper instructions for which the contractor shall have duly applied), the employer, by the architect, may give to the contractors or their assignees or trustees, as the case may be, notice requiring the works to be proceeded with, and in case of default on the part of the contractor or their assignees or trustees for a period of three days, it shall be lawful for the employer, by the architect, to enter upon and take possession of the works, and to employ any other person or persons to carry on and complete the same, and to authorise him or them to use the plant, materials, and property of the contractor upon the works, and the costs and charges incurred in any way in carrying on and completing the same are to be paid to the employer by the contractor or may be set off by the employer against any moneys due or to become due to the contractor."

6. By the said specifications it is provided that the work is to be carried out so as to allow the employees (meaning the defendant company) to carry on the business of the hotel as far as the temporary bar is concerned and the present temporary bar is to remain until portion of the new building is ready for occupation.

7. The plaintiff did not commence work under the said contract until the 29th day of June, 1903, and did not prosecute the said work with due

diligence, and thereafter from time to time wrongfully, unlawfully, and in breach of the said contract suspended and delayed the said work.

8. The defendant company admits that in consequence it became impossible to complete the brewery depot by the 17th December, 1903, but specially denies any responsibility, or act or default causing or contributing thereto.

9. The defendant company admits that in terms of the said contract it remained in possession and occupation of a small portion of the site of the said buildings, but gave up the said possession and occupation when requested so to do. It denies that the plaintiff was thereby hindered or delayed in proceeding with the work.

10. The defendant company also admits that the length of frontage on Cambridge Street as ascertained by actual survey differed slightly from the frontage shown upon the plans but the plaintiff was duly instructed in accordance with the terms of the contract and was not hindered or delayed thereby.

11. The defendant company admits that certain girders were not available upon the 31st October, 1903, when due, and admits that the plaintiff was delayed thereby but says specially that the period for the completion of the brewery depot building was upon the arrival of the said girders on or about the 11th day of January duly extended to the 27th day of February, 1904, under the provisions of the contract and the plaintiff acquiesced therein.

12. Thereafter the plaintiff continued to unreasonably delay the performance of his part of the contract, and on or about the 21st day of January, 1904, the defendant company, by its architect, gave due notice to the plaintiff in terms of the said clause 16, requiring the said works to be proceeded with.

13. The plaintiff did not proceed with the said works within three days thereafter or at all, but continued to delay the same, and on or about the 27th day of January, 1904, the defendant company acting lawfully and under the terms of the contract entered upon and took possession of the works, material, and plant in and about the said building.

14. There is due and owing to the plaintiff in respect of work done, and materials supplied, and disbursements made after deduction of payments made from time to time the sum of £2,547 19s. 11d. and no more against which the defendants are entitled and claim to set off the sum of £1,638 14s. 11d., being the lawful and reasonable costs and charges incurred by the defendants in carrying on and completing the works as in the claim in reconvention set forth. After deduction of the said sum of £1,638 14s. 11d. there remains a balance

of £909 5s. which the defendants tender to pay the plaintiff with costs of suit.

15. The defendant company denies the breach of contract alleged in paragraph 4 or that the plaintiff has sustained any damage for which they are liable.

15. The defendant company denies the breach of contract alleged in paragraph 4 or that the plaintiff has sustained any damage for which they are liable.

16. Save as above and save that they admit that they refuse to pay the sums of £3,092 15s. 3d. and £1,755 19s. 9d., the defendant company denies each and every allegation in paragraphs 4, 5, 6, 7, 8, 9, 10, 11, and 12 as specifically as if herein set out.

Wherefore subject to the above tender the defendant company prays that the plaintiff's claim may be dismissed with costs.

And for a claim in reconvention the defendant company (now plaintiff) says:

1. It craves leave to repeat the allegations contained in the several paragraphs of the above plea.

2. In consequence of the matters set forth in paragraphs 12 and 13 of the plea the defendant company was compelled to incur reasonable costs and charges in and about the carrying out and completing of the said works amounting to the sum of £1,638 14s. 11d., which said sum the defendant company is entitled by the terms of the said contract to set off and has claimed to set off against its hereinbefore admitted liability, but the plaintiff after lawful demand duly made has refused to allow the said set off or to pay the said sum or any portion thereof.

3. By reason of the premises the defendant company, which had to the knowledge of the plaintiff, let portion of the said buildings at a rental of £150, has lost the said rent for a long while, has been deprived of the use and occupation of the whole of the said buildings and has been put to expense in rent of stores and offices, has lost large profits from the supply of beer to the said hotel and has otherwise sustained damage in the sum of £2,000 sterling.

Wherefore the defendant company (now plaintiff) claims:

- (a) Judgment for the said sum of £1,638 14s. 11d. so set off;
- (b) £2,000 damages;
- (c) Alternative relief;
- (d) Cost of suit.

The replication was general.

John Batchelor said he was a qualified building and quantity surveyor. He came out to this country in April, 1903. The contract in question was entered into between the defendants and witness's brother, Herbert Batchelor, who had been in this country for some years. Witness managed the whole of the work for his brother. They began work on the 23rd June; certain bricks had to be removed, having been

gathered together when the debris had been removed after the fire. When witness went to the site he found certain of the premises still in occupation. It was arranged that the temporary bar should remain until the new premises were ready. There was also an old store. Witness, on the 23rd June, asked the architect to give them possession of the site. On the 24th witness's brother received a letter from the architect complaining that the work had not been begun. About the second week of November they received possession of the remaining portion of the site, and the other bit they only received on the 16th December. This delay in handing possession to them of the entire site caused the contractor to be delayed in his work. He considered that if the site had been delivered to them properly they would have been able to complete the brewery portion in two months and the hotel portion in four months. Certain excavations had to be carried out; these operations were begun without block plan. There were no pegs at the commencement of the work. The architect should have supplied them with a block plan. They did not make an application to the architect for a block plan; they asked him to peg the site. The pegging was carried out between the 9th and 12th of 98 feet. The pegs on the hotel site showed a frontage to the street of 103 feet, while the plan showed a frontage of 98 feet. The pegs on Cambridge-street showed a frontage of 67 feet 2 inches, while the plan showed a frontage of 66 feet. The amended plans providing for increased rooms were received on the 4th September. When he got the plans on September 4 the work was proceeded with immediately, but up to that date the work was delayed. On September 14 the architect objected to the class of bricks that were being used. Between September 15 and September 29 he could not get the class of bricks the architect wanted. Until the excavations were finished there was no need for any material. The architect was aware that witness had great difficulty in getting bricks. Some of the broken bricks were used on the building by the new contractors, and others were used on another building. When witness received the letters he told the architect he could not understand the complaints; nothing had ever been said to witness, his brother, or the foreman on the works. On the 31st October the work in connection with the breweries was stopped. It was impossible to go on with the work until proper drawings were supplied; the girders were shorter than those specified in the bills of quantity. The architect was anxious that witness should use certain material from the Electric Light Works, and there was no reason, if witness thought

it equal to what he was using from Blaney, why he should not have it. During the last week of January, when witness was cleared out, the wages were practically double what was paid in December when no complaint was made. The work could not possibly be done in forty-seven days; the new contractors had been on the job eight months. Witness's brother asked for £600, although work to the value of £1,250 was on the ground, and received £100. About February a request was received from the architect suggesting arbitration, but witness could not see that arbitration was necessary. Witness could not make anything of the counter claim put in by the defendants. After repeated requests for particulars the defendants' attorneys furnished a statement, in which there was little or no information. The contractors who contracted for the work on the second occasion were given quantities that were misleading. According to plans supplied to witness, no excavation was shown. As a matter of fact, a quantity of excavation was done. The plaintiff claimed £3,092, while the defendants said he was only entitled to £2,547. They were agreed as to quantity fees. There was a dispute under the heading of general conditions. Plaintiff made an allowance for certain things in his bill of quantities for the whole period of the contract. He took a proportion on the basis of the actual time they were engaged upon the contract. Under this head, plaintiff's amount was £156 9s.; defendants' amount was £79. Under the head of work done at the hotel buildings, the plaintiff charged £3,079, and the defendants allowed £2,972. In regard to the brewery depot, there was no disagreement, both parties making the amount due £1,150 5s. 10d. For works generally, the plaintiff charged £317 13s., which he now reduced to £234, while the defendants allowed £214. Upon working materials on site, the plaintiff charged £195 15s., against £152 9s., allowed by defendants; on scaffolding and plant plaintiff charged £160, against £110 allowed by defendants. There was also a dispute as to the centres for carrying the concrete floor. The amount was £2 12s. 6d. A dispute had arisen in regard to a number of 6-in. drain pipes, the plaintiff claiming £35 8s. The defendants' architects said that the pipes were not in accordance with the specification. Witness contended that the pipes were quite up to specification. He estimated that if they re-sold the pipes they would lose £10. There was a further item of £90 for bricks. The plaintiff also claimed £40 for delay through being hindered in his work. Witness produced figures in order to indicate the profit he would have made on the contract. The amount expended on the work up to the time they were turned

off the contract was £4,842 2s. 2d. This amount did not include quantity fees, which were £435. The sum they were entitled to when they finished work was £5,666 18s., leaving a balance of £824 16s. 10d., thus working out at 17 per cent. on the total outlay. He calculated that their profits on the uncompleted portion of the contract would have been in still greater proportion, because of the fall in the prices of bricks and timber that had since taken place. Witness considered that his brother was able to do work more cheaply than the second contractor, Rochelle and Smith.

Cross-examined by Mr. Upington: He was not financially interested in the contract, but received a salary of £7 per week. This was not entered in the time sheets, but appeared under profit and loss account. Witness was looking after three or four other jobs at the same time. Witness would deny that the site was covered with debris when the surveyor went to the spot in August. They asked to have the site pegged out in the early part of July. Witness denied that the site had not been cleared at the end of July. On the 2nd October they expected to be well up to time with the contract. Witness admitted that no letter was written by his brother or himself to the defendants or their architect, complaining of being delayed. He knew the specification provided that not alone was the temporary bar to remain, but the work was to be carried on so as to allow defendants to carry on the hotel business. He had never asked the manager of the breweries to give them possession of the whole site. He repeated that they had asked the architect more than once to give them possession of the whole site. If the architect said that they did not make such an application to them, he was in error. The portion that the breweries continued in possession of until the middle of December was at the back of the temporary bar. They were aware on the 4th September how things stood in connection with the brewery frontage. He remembered the letter of the 28th September from the architects complaining of the rate of progress of the work, and threatening to put them off the works. They had been delayed owing to the difference of frontage in Cambridge-street. His brother, in his reply, pointed out that he had had great difficulty in obtaining bricks, but added that he expected to be well up to time in his contract.

Mr. Upington: Why didn't your brother in that letter complain about the site not being given up?

Witness said that the facts were well known to both sides. The architect made deliberate misstatements in his letter in September, when he said that he had repeatedly had to complain of the rate of progress. On the 23rd October they applied for a sum of £500.

on account of work they had done. In reply, the architect wrote stating that the rate of work was unsatisfactory, and that, unless an improvement took place, it would be necessary to take the job out of their hands. On the 13th January they received an extension of time until the 27th February to complete the brewery buildings; on the 14th January they received a letter stating that no extension of time for the hotel buildings could be given. Witness admitted that his brother did not reply by letter, but said that a conversation took place between his brother and the architect. He admitted that a letter was afterwards received from Mr. Walker stating that, inasmuch as he had had no answer to his previous letter, he took it that plaintiff acquiesced in the proposed extension of time. In February plaintiff intimated that if he were to understand that the contract had been cancelled, he was prepared to go to arbitration. Subsequently he refused to go to arbitration unless defendants admitted that, as defendants had turned them off, they had acted illegally and broken the contract. Replying to further questions, witness said that the defendants had not shown any details as to how they arrived at their estimate of the work done, in response to plaintiff's claim.

Mr. Upington: Are you prepared to have that claim referred to some competent person to go into the details?

Witness: I am perfectly prepared to say that any man will uphold it.

Mr. Upington: It will be necessary to go into the various items which make it up.

Witness: All the prices are according to contract.

Mr. Upington: Personally, it seems to me to be a thing that certainly ought to be referred to some accountant to deal with.

[Hopley, J.: But how are you to do that in the middle of a jury trial.]

Mr. Upington: That particular issue of amount could, by consent, be withdrawn from the jury.

[Hopley, J.: The trial is by jury, and as far as I can see we shall have to go through with the whole thing.]

Sir H. Juta said that if defendants had only done what plaintiff asked them to do the whole matter could have been whittled down. He did not see by what process they could withdraw this issue from the jury, and bring it back again.

Mr. Upington quoted section 21 of the Arbitration Act (No. 29), 1898.

[Hopley, J., said he thought they had better proceed with the case.]

Witness was cross-examined at some length on the various items of the claim. He admitted that the item of £34 4s. due to the Municipality for water should go out of the claim if it had been paid by defendants. Plaintiff charged £24 5s. for hoardings. The

hoardings consisted of barrels filled with earth and planks on top.

Mr. Upington: But surely £24 5s. is an excessive figure for such a hoarding?

Witness: It is the price in the contract, and the hoarding satisfied the Municipality. A portion of the wall at the beginning had, he said, to be pulled down again, because the architect insisted only on whole bricks being used. When they left the job, they left uncondemned bricks on the ground. They had charged for these bricks in the claim. He did not see how they could have charged the second contractors for these bricks, because the Breweries took over everything that was on the ground.

Mr. Upington: As a matter of fact, you took this contract too low?

I most decidedly say not. This return shows there was a good profit on it.

In spite of all the delay, you have made a profit?

Witness: We have made a good profit on what has been done. Answering further questions, witness said he had seen the bills of quantities of another builder for the second contract, but he declined to say who he was, because he might be accused of animus by the architect. The quantities were lent to him by the builder, and he copied them. He declined to disclose the builder's name, except on paper to his lordship.

Mr. Upington pressed his right to have the question answered.

Sir H. Juta said rather than that anything said by witness should recoil on this unfortunate builder, he would withdraw the papers in question from the record.

Mr. Upington said he did not know whether there was any process whereby that could be done.

[Hopley, J.: I rule that it may be withdrawn.]

Witness, further cross-examined, said that they had actually done £7,000 worth of work, and the total amount of their tender was £18,000.

Mr. Upington intimated that, although he did not question the witness at present in regard to the measurements, it was not to be assumed that he did not intend to impeach witness's figures.

Re-examined, witness said that when they were ejected from the contract they left about 39,000 bricks on the ground. The cost at that time was from 70s. per 1,000 downwards. They left all their plant and materials on the ground when the defendants took possession.

Herbert Batchelor (the plaintiff) said that he had had six or seven contracts running at the time of the breweries contract, representing about £40,000. All the contracts had been completed except the one in dispute. Witness spoke to the architect several times about giving up full possession of the

site. He also spoke to Mr. Walker about pegging out the site. They were delayed by the failure to give up the site and to peg it out. Witness had also had to ask for the stanchions for the brewery depot. Witness tried to meet the architect in regard to getting suitable bricks from the 15th to 29th September. The reason why he only mentioned the bricks in his letter to the architect of October 2 was because Mr. Walker said he wanted a letter to show to the Breweries Company. Witness detailed a conversation that he had with the architect on the 26th January. The architect said he would suggest to the Breweries Company that the time for the hotel contract should be extended two months, and that he would let witness know.

Cross-examined: At the interview he had with the architect he neither accepted nor refused the extra 47 days for the brewery depot. It was unreasonable to expect that he would be able to complete that part of the contract in 47 days.

Frederick Elliott, builder's foreman, formerly in the employ of the plaintiff on the breweries' contract, said that he had spoken to Mr. Letellier, defendant's manager, about being given possession of the whole site. Witness also gave evidence as to the pegging out of the site, and the discrepancies between the original plan and the survey. Witness did not receive an amended plan until afterwards. As a consequence the work was delayed.

Cross-examined: There was what he called a "store" on the site when they went there containing empty and full barrels, bottles, etc. The store had neither roof nor windows. Witness spoke to Mr. Walker about the pegging out about a week after they had been on the site.

By Hopley, J.: The liquor barrels would be exposed to the rain and sun. What sort of liquor would be kept there?

Witness said he did not know what kind of liquor would be kept there.

George Ernest Kay, a foreman now in plaintiff's employ, said he had examined from time to time the work done by the second contractors, Rochelle and Smith. He corroborated the statistics put in with three exceptions.

Sir H. Juta closed his case.

Leonard K. Walker, of the firm of Cordeaux and Walker, architects, East London, was called. He said that his firm prepared plans and specifications, and drew out bills of quantities of the Grand Hotel and brewery depot. Plaintiff's tender, which was the lowest, was accepted. Work was begun on the 28th June, 1903. When the contract was signed the lower portion of walls of an old building still remained, a considerable quantity of brickwork being still on the site. There was no diffi-

culty in ascertaining what the site was, which had to be cleared of the wall. At the outset a start was made to clear the hotel site, but nothing at all was done in regard to the brewery depot site. When the contract was entered into, Mr. Ellis, the licensee, was occupying the temporary bar. The clearing of the site of the old building was performed in a very dilatory manner; it had not been cleared when the survey was completed on the 13th August. A portion of the old hotel walls had not been removed. On the 13th July witness was asked by Mr. Herbert Batchelor for the pins for the brewery depot. Witness told the plaintiff that there was a pin in, but on going down they were unable to find it. Witness then wrote to the surveyor; the survey did not take place until the 13th August, the reason of the delay being that there was some question of the deeds of the adjoining block. Witness saw the site on the 12th August; it was not then sufficiently clear for the contract to be gone on with. No complaint had been made by plaintiff, his brother, or foreman that they were being delayed through the site not having been pegged out. Witness had before the 13th August spoken to plaintiff about getting blue bricks and other material. He gave to plaintiff verbal instructions after the difference between the original plan and the survey had been found. This was on the 14th August. There was no reason why the excavations should not have been gone on with. The reason why the plan of the 4th September was given was because the girders had been ordered from Home, and if they extended the building 13 inches it would require piers to carry the ends of the girders. The plan was given to show the distances between the piers and their actual position. Witness found it necessary to order some red bricks to be taken out and blue bricks substituted. On the 15th September witness wrote to plaintiff complaining of the rate of progress of the work, and on the 28th September he gave notice to the plaintiff that unless an improvement took place within three days the contract would be taken out of his hands. The plaintiff had a conversation with witness about the letter. They discussed the rate of progress of the work, but no mention was made by the plaintiff that he had been delayed in any way, excepting that he said he had had great difficulty in getting blue bricks. Plaintiff admitted that the work was not going on as it should do. The only excuse he made was that it was impossible to obtain the right class of bricks in sufficient quantities. Witness gave evidence as to further communications that he had with plaintiff, and said that the work dragged along sometimes, while sometimes it went quickly. The management was unsatisfactory. Witness had only previously known two

persons in connection with the contract—the plaintiff and his foreman Elliott. He had not known John Batchelor as a responsible person in connection with the contract until this case had come on. The only complaint made by plaintiff as to the site was that he had not access to an old stable. That matter was put right on the following day. Under the contract certain iron and steel work was to be supplied by defendants; that material was not available until early in January. Batchelor was delayed on the brewery depot through the late arrival of steel and iron work. On the 31st October plaintiff had reached the level at which he wanted the girders, but he did other work after that. Witness admitted that Batchelor was delayed to a certain extent through the non-arrival of the stanchions. The delay on the brewery depot began on the 31st October. On the 13th January, witness wrote to plaintiff granting an extension of time, for the brewery depot contract for 47 days; he reckoned from the 31st October to the end of the contract time, and also took the period up to the arrival of the girders. On the 14th January, witness informed the plaintiff that no extension would be allowed on the hotel contract, because the work was not ready for the girders. Even after the girders had arrived, nothing was done for about a week either on the hotel or depot. On the 26th January, the plaintiff called on witness at his request. Witness then read over certain of the letters he had sent to plaintiff. Plaintiff waved his hand, and said that was "ancient history"—using a political term going about East London at the time. Witness asked plaintiff what he had to say, and for the first time the latter then said he had been delayed by the survey. Witness admitted that he had been delayed through the girders. Plaintiff said he considered that 47 days was too short an extension, and mentioned three months' extension on the hotel. Witness told him that no had not been delayed on that at all. He was willing to give plaintiff additional time rather than have a rupture, but plaintiff got up and said he could not do any thing more, and that the contract had been broken, and he (plaintiff) could do as he liked. After the notice of ejection, the plaintiff continued on the contract until the 10th February. Witness also gave evidence in reference to certain of the materials left on the ground by plaintiff, which defendants refused to take over—the drain pipes, arches, etc.

Cross-examined by Mr. Upington: Plaintiff says that he estimated his profit on the work done at £842 odd. What do you say as to that?

Witness: I hope he has; but I doubt it very much.

Can you give some reasons?—The work was not carried on in a payable way at

all; it was dragged along. From the time of starting to the time they left, they were on the job six months, and the actual amount of work done by them was about £5,000. During further evidence, witness said he thought that 17 per cent. profit on ground work, as estimated by plaintiff, was a very large figure. He had taken out bills of quantities for the second contract by taking from the original contract the work actually done by the plaintiff. Messrs. Rochelle and Smith's tender was accepted for the second contract, the amount being £14,167. He thought that was a reasonable figure. The contract price had been paid, but the extras, amounting to about £500, had still to be paid.

Witness gave evidence in regard to a report presented by the plaintiff on the work done by the second contractors in its relation to the original bills of quantities. The alterations in the work thus made represented £546. The extras for which Rochelle and Smith had sent in an amount were £563 5s. 5d. Deductions had been made in consequence of considerable alterations under clause 7 of the general conditions of contract. Witness was then examined in regard to the disputed items of the plaintiff's claim. He declared that the plaintiff never provided hoardings to his satisfaction. He considered that £12 10s. was quite sufficient for the hoardings and lights; the plaintiff had charged £24 17s. 3d. Witness was further examined in some detail in regard to various items.

Sir H. Juta suggested that these details should be submitted to an architect, and that, after hearing Mr. Batchelor and Mr. Walker, he should give evidence to the Court.

Mr. Upington consented.

The suggestion was also approved by Hopley, J., and the jury.

It was agreed that the following questions be submitted to a quantity surveyor, to be dealt with in the course of the afternoon, and that he should hear Mr. John Batchelor and Mr. Walker: (1) General conditions of contract; (2) work done on hotel; (3) work done on brewery depot; (4) work generally; (5) working material on site; (6) scaffolding and plant. Counsel intimated that they would mutually decide upon a quantity surveyor, whose evidence should be regarded as final.

Mr. Leonard Walker stated that he produced the certificates of Batchelor's contract and also of Rochelle and Smith's contract. He stated that the first entry of shingle in plaintiff's materials book was on the 8th September; shingle was to be a constituent of the concrete used on the job. Concrete would be used for the foundations; that would be the first thing done after the trenches had been got out.

Cross-examined by Sir H. Juta: Witness usually put in writing his complaints as to works under his supervision. He did not address any letters of complaint to the plaintiff in November or December, 1903; he made complaints verbally to the plaintiff that the work was not being pushed on sufficiently. He desired to give the plaintiff as much latitude as possible during November and December.

Sir H. Juta: By why this sudden generosity of latitude after you had been giving the plaintiff notice? Had it anything to do with the girders not arriving?—Witness: No.

In answer to further questions, witness said that he was not being pushed so much during November and December by the breweries. That, he thought, was one reason why he did not address letters of complaint to the plaintiff.

Sir H. Juta: Can you suggest any reason why the employer suddenly dropped his great urgency in November and December, and woke up again in January?—I think he came in in December and made complaints. The plaintiff did very good work from October to the 20th November.

You granted them an extension of time on the 13th January, and then on the 14th January you launched this thunderbolt, threatening that if they did not go more quickly, you would take the work out of their hands?—I did not consider it a thunderbolt.

Didn't you consider it a farce to give an extension of time till the 27th February, and then the day after to send that notice threatening to take the work out of his hands?—I did not send a notice; I sent a letter telling him that he must push on, or he would not get through with it.

Now you knew perfectly well that after the contract time had expired, you could not give an extension?—No, I did not know that.

Didn't you know, what every other architect knows, that you cannot give an extension of time when the contract time has expired?—I did not know. That is a legal point, and I am not a lawyer.

In further cross-examination, witness said that he declined to give the plaintiff more money in January, because he was not satisfied that he was entitled to more upon the work done. He had not measured the work exactly.

Sir H. Juta: How dare you withhold from these men money that is due to them?

Witness: If I had paid more than the work justified, what would have been my position with my client? Replying to further questions, he said that he regarded it as possible on the 21st January that he would have to take the work out of plaintiff's hands, but he was going to wait. He thought that

plaintiff wanted to get rid of the contract.

Sir H. Juta: Yes, and you were going to help him?—Witness: I did not want him to get rid of the contract.

Cross-examination continued: On the 26th January, he made a further offer to the plaintiff. He offered to give plaintiff an additional month's extension on the brewery depot, and two months' extension on the hotel contract. He was desirous that the contract should be proceeded with.

Sir H. Juta: Notwithstanding that these contractors were such a dilatory bad lot, you were prepared to give them extensions rather than let the contractors go?—Witness: We offered the extensions.

Eliminate the period, 15th September to 2nd October, when there was a dispute between you as to bricks, and show me one single serious complaint of delay in the work on the brewery.—There was no written complaint.

No. Now what becomes of this big case of accumulated complaint of delaying the work?—It is very plainly shown by the amount of work he did.

Is that all you can answer on that?—Yes. A number of the condemned centres were used by Rochello and Smith on the building, after the centres had been reboarded. Witness had allowed the plaintiff £20 for them.

Arthur Thomas Babbe, quantity surveyor, Cape Town, gave evidence in reference to the questions submitted to him, by consent of parties, for determination. Under the general conditions of contract, plaintiff claimed £156 9s., and witness found for £91 10s. As to works executed on the hotel portion, plaintiff claimed £3,079 10s. 11d., and witness found that he was entitled to £3,036 17s. 10d. As to works executed on the brewery depot, plaintiff claimed £1,150 5s. 10d., and witness found that he was entitled to payment in full. As to works generally, plaintiff claimed £317 12s. 8d. and witness found that he was entitled to £214 1s. 2d. As to contractor's working material on site, plaintiff claimed £195 13s. 2d., and witness allowed £173 16s. 10d. As to contractor's plant, plaintiff claimed £160 14s. 4d., and witness allowed £135.

By the Jury: He could not express an opinion as to whether the plaintiff would have been able to make a profit of £1,700, if he had carried out the entire contract. The prices in the schedule seemed to him to be fairly well cut. He would not call them "fat prices."

Mr. Uppington said that the tender made by the defendants seemed to be about £160 below the findings of Mr. Babbe.

Geo. Thorneby Atherstone, of Murray and Atherstone, surveyors, East London, gave evidence as to finding debris on the site when he carried out the survey in August, 1903.

Alfred Letellier, formerly defendants' manager at East London, described the condition of affairs on the site in the early period of the contractor's operations. As to the alleged "store," he declared that only empty casks and cases were placed in the space between the old walls. He left defendants' service of his own free will. Witness had no complaint either from the plaintiff or architect about these casks being on the premises. When plaintiff wanted casks removed witness had them removed in half an hour. He was absent from East London between August 19 and September 26, and on his return he was astounded at the small amount of work which had been done on the contract. For the temporary bar, Ellis, the licensee, was paying £40 a month. His lease extended to September, 1907. Ellis was "tied" to the breweries for draught beer. The defendants paid £5 a month for temporary offices. An extra store at £3 a month had to be hired for cases and boxes.

Cross-examined by Sir H. Juta: Witness was at present out of employment, but he was expecting when this lawsuit was over to go to the Central Hotel, King William's Town. He was not to be backed by the South African Breweries. He had not yet settled up with the Breweries. He had sold his hotel through the Breweries, and he was expecting a balance of about £230. He did not know whether any question had arisen between the Breweries and the auditor at East London. He admitted that he had been asked to give an explanation in regard to various items on vouchers. He was told about the matter at the end of last month. He wrote a letter to the head office, saying that the plaintiff had admitted having broken the contract. He did not know who informed him of that. He could not be expected to remember every incident ten months afterwards.

Henry John Ellis, East London, said that he was the lessee of the Grand Hotel, and paid a rent of £150 a month. For the temporary bar during the building operations, he paid £40 a month. His manager occupied a sleeping apartment on the site. His last month's account with the Breweries Company was £142; during the rebuilding, his account for the temporary bar was £30 to £40 a month.

[Hopley, J.: I suppose you don't know how much profit they make out of it?]

Witness: I suppose about 50 per cent. No doubt the profit would be considerable, or they would not be able to pay such good dividends.

Charles Maple Polmear, manager for Rochelle and Smith's, said his firm had practically completed the contract. There was a balance owing of £563 over and above the contract price. Assuming that that was allowed, their profit

on the work would, he calculated, be about £700.

Cross-examined: There was some difference of working between contractors. His firm had properly-kept books.

Sir H. Juta: Then I should be glad if you would arrange for your books to be sent here from East London, ready for Monday's hearing.

Witness said he did not see how their books would help matters much.

Sir H. Juta: Yes, but I do.

Hopley, J., requested witness to telegraph to his firm for the books dealing with this contract.

Witness, in answer to Sir H. Juta, said that he believed their original tender for the contract was £18,000, or a little over.

John Rochelle, of Rochelle and Smith, said that their original tender was £19,000, or a little over. The firm's books would show the amount of profit made on the second contract. He had not estimated the profit.

Cross-examined: They took the second contract at a cheaper rate than they adopted in their original tender. He could not, however, say that of his own knowledge.

Mr. Upington intimated that, as desired by the other side, wires had been sent to Rochelle and Smith, at East London, asking them to send their books dealing with the second contract. The books had been sent by Saturday night's train, which was due in town this (Tuesday) morning.

Sir H. Juta asked for copies of the telegrams sent to Rochelle and Smith to be produced. There were, he understood, three wires despatched, and he desired the Court to authorise the telegraph office to give to his attorney copies of telegrams to Rochelle and Smith, other than that sent by Mr. Souter.

The necessary authority was given by the Court.

Mr. Upington then called further evidence.

Charles Thomas Mouat, accountant, Cape Town, said that he had examined certain books in the hands of the Registrar, these being a copy of the wages books of the plaintiff, and memoranda of materials and plant delivered to the Grand Hotel Works, contained in three books. The books were very inaccurate, so far as additions were concerned. There were many errors, making, he calculated, a difference of about £170.

By the Court: The difference meant that the profit of the plaintiff would be smaller than appeared from the materials books, inasmuch as the materials had cost more than the additions showed.

Witness detailed several cases of shortage in the additions. He found shortages amounting to £174 11s. 9d., and excesses amounting to £5 15s. 7d., thus showing a shortage of £168

16s. 2d. The correct addition of the materials books was £2,420 5s. 4d., and of the wages books £1,663 18s. He did not think it possible to compile a profit and loss account from the books produced. He should want the man's journal, cash books, and so forth. There was no cost of supervision shown in the books produced, which were really informal memoranda. A certain amount should also be allowed for depreciation of plant.

Cross-examined by Sir H. Juta: Plaintiff's payments for the hotel and brewery contract were: For wages, £1,663 18s.; material and part plant, £2,420 5s. 4d.; imported goods, £711 16s.; carting, £69 1s.; water, £26 1s. 10d.; use and depreciation of scaffolding plant, £25; and management expenses, £85. He did not think that £85 would represent a fair charge for management on such a large contract for eight months. There would be clerical and office expenses to add, and charges for stationery. The total of the items he had mentioned was £5,000 2s. 2d., from which £160 was to be deducted for bricks sold on the site, leaving a sum of £4,840 2s. 2d. Witness considered that 15 per cent. should be added for management expenses, that was to say, £726.

Mr. Upington said that Mr. Walker (the architect), who was to be re-called, to give evidence on a certain point, was unable to attend the Court. Counsel put in a medical certificate, showing that Mr. Walker was suffering from dysentery and would not be able to attend before Wednesday. He added that he could not, of course, ensure the health of his witnesses.

Sir H. Juta, in answer to his lordship, said he would rather go on with the case than have another adjournment, the absence of the books of Rochelle and Smith, and certain evidence he wanted from Mr. Walker notwithstanding. He hoped that the telegrams sent to Rochelle and Smith would soon be in court. Counsel then proceeded to address the jury in support of the plaintiff's case. The whole crux of the case was, he urged, whether the architect was justified in giving plaintiff notice, and taking possession of the works. That question involved two points—one of law and the other of fact. As regarded the legal aspect, his first point was that the contract time for the brewery depot having expired on the 17th December, 1903, the architect could not in January extend the time. He quoted Hudson on Building Contracts (Vol. I. page 447), and cited the cases of *Walker* (Law Reports I., Common Pleas Division, p. 518), *Roberts v. Bury Improvement Commissioners* (5 Common Pleas Division, p. 310), *Wells v. Army and Navy Co-operative Society* (Law Times Reports, vol. 86, p. 764). In point of fact, Mr. Walker was quite wrong in

extending the time on the 13th January. It was very significant that Mr. Walker should have been anxious to have an acknowledgment from the plaintiff that they acquiesced in the extension. The only power the architect had under the contract was that if the work were not proceeded with, he should be able to apply penalties of £5 a day. The contract said nothing as to the rate of progress being within the arbitrament of the architect. The notice given to the contractor had nothing to do with past delays. He submitted that in the month of January, when the notice was given, the rate of progress was better than it had been before. Wages paid in January were 100 per cent. more than in the previous period. Counsel went on to review the principal features of the evidence, and submitted that the amount of profit claimed by the plaintiffs was not excessive.

Mr. Upington said that this was really the first opportunity he had had of putting the defendant's case before the Court. The position of the architect under the contract, he submitted, was that of a judge between the contractor and employer. That there was cause of complaint against the contractor from the outset, there could be no doubt. He contended that the evidence of the surveyor as to the debris on the site on the 12th August was entitled to the utmost consideration. He dealt with the causes of delay alleged by the plaintiff, and submitted that it had been shown to be highly improbable that the plaintiff was ever delayed either as regarded anything kept on the site by the defendants or the course to be adopted in regard to the additional land in Cambridge-street found upon the survey. These so-called causes of delay were an after-thought in the mind of Mr. Batchelor. As to the non-arrival of the steel-work, the defendants admitted this, and for the sake of argument, he would admit that they were to some extent liable, but he contended that the whole of the period when the plaintiff might have been delayed had been allowed in the extension of time granted by the architect. As to the question of the architect's right to extend time of contract, counsel submitted that the correspondence showed that, in the absence of an explicit reply by the plaintiff or his brother, the plaintiff was taken to have acquiesced in the architect's proposal granting an extension on the brewery depot, and declining to give an extension on the hotel. If that statement was unchallenged, Mr. Batchelor could not now be heard to say that he did not accept the extension offered on the brewery depot. If the plaintiff did accept that extension, as counsel submitted he did, then the question of Walker's authority to give the extension went out of the case altogether.

Then the question arose whether Batchelor did or did not after that continue the work at a reasonable rate of progress. Of that question, the first judge was the architect. Plaintiff's own memorandum book showed that in January the wages paid on the contract did not during any week show a fluctuation of a £10 note. On his own figures, there was nothing to show that plaintiff made any improvement while the six days' notice given in January was running. He might be asked what were the reasons why plaintiff had got into these difficulties? He did not wish to go into these matters, but it did not seem improbable that their contract was not so profitable as they wished to make out, that, as a matter of fact, theirs was the lowest tender, and that they cut things a little too fine. If defendants had not acted illegally, counsel contended that they were entitled to damages, and especially in relation to the difference of rental that they received through being kept out of the Grand Hotel until November. He submitted that the evidence given by plaintiff in support of his claim that they would have made 10 per cent. profit on the entire contract was unsatisfactory. Counsel quoted from *Hudson on Building Contracts* (Vol. II., p. 132).

Hopley, J., said they must all feel that this was a case which it would have been much better to have referred to some practical, common-sense man at East London, who could have gone on the spot and entered into every detail. Such a man he was sure would in two days have been able to deal with the case in a more satisfactory way than a judge and jury sitting five days in Cape Town could do. Touching on the question of the architect's right to extend the contract time on the brewery depot, his lordship said it seemed to him that the view contended for by Sir H. Juta was the correct one. It seemed to him from the case quoted that if the employer wanted to forfeit a contract it must be done during the period of the contract. His lordship dealt with various other aspects of the case, and indicated the legal bearing of the issues to be tried by the jury. The measure of damages, if the jury found that the defendants had committed a breach of contract, would be the profit that plaintiff was likely to have made on the contract, and that alone. Then there was also a sum of £2,835 that it was admitted would have to be awarded to the plaintiff provided certain materials were included that the architect had rejected. After all the architect was the sole arbiter in the matter of the materials. As to the bricks, it seemed that if there were £90 worth of bricks left on the site by plaintiff, and if these bricks were used by the second contractors, whether improperly or not, then the plaintiff should be allowed that sum.

His lordship afterwards gave directions to the jury as to the question of damages to defendants should it be found that plaintiff had been rightfully ejected from the works.

The jury intimated that they had found for the plaintiff for £2,783 7s. 4d. on the account, and £750 as and for damages.

Sir H. Juta formally moved for judgment for £3,533 7s. 4d., with costs. He also mentioned the question of the costs of previous applications.

After hearing counsel further,

Hopley, J., said that judgment would be entered for the plaintiff for £3,533 7s. 4d., with costs, to include costs of previous applications, and plaintiff's expenses as a necessary witness. The question of John Batchelor's expenses as a witness would be dealt with by the Taxing Master.

[Plaintiffs' Attorneys: Silberbauer, Wahl and Fuller: Defendants' Attorneys: Van Zyl and Buissinné.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ADMISSIONS.

{ 1905.
{ Jan. 12th.

Mr. Searle, K.C., moved for the admission of Gerald Molyneux Swift, as an advocate.

Application granted, and oath administered.

Law Society—Attorney—Admission.

Where the Law Society raises difficulties in respect of the admission of an attorney: it should directly oppose and produce definite facts in support of its opposition.

Mr. Close moved for the admission of Herbert Stanley Jones as an attorney-at-law. Mr. M. Bisset appeared for the Law Society, who, although they did not object, desired to put in certain correspondence, from which it would appear that the secretary of the Law

Society, London, wrote to the effect that while there was no record against the applicant there had been one or two complaints against him, but they could not be made out. His name was still on the rolls. From Natal there was correspondence to the effect that he was confidential clerk to Robert Greening, an attorney, who was at present under suspension, and that when Greening absconded from Natal in 1900, the applicant saw him off.

The applicant admitted having been clerk to Greening, and in support of the application correspondence was put in showing how he had been employed in this country.

Mr. Close pointed out that the correspondence should have been put on affidavit. Mr. Jones was in court, and was perfectly willing to answer any questions.

Mr. Bisset said he was not instructed to oppose the application. He would leave the matter in his lordship's hands.

De Villiers, C.J., in granting the application, said that of course it was competent for counsel to object to the correspondence going in, but once it was put in the Court was bound to give full effect to it. It was a matter for regret that the Law Society had not taken any definite stand in the matter. If the Law Society after ascertaining the previous career of this petitioner, had come to the conclusion that the society ought to oppose his admission, then there would have been something for the Court to consider. He thought the Law Society ought to take some responsibility on itself. Upon the whole, as there was no opposition, and there was nothing tangible against the applicant, the only course open to the Court was to grant the petition.

The oath was administered.

Mr. Sutton moved for the admission of Herbert Alexander Payn, as an attorney-at-law and notary public.

Application granted, subject to the birth certificate being filed.

Mr. Sutton moved for the admission of Frank Robert Baker, as an attorney-at-law.

Application granted, and oath administered.

Mr. Close moved for the admission of Alfred Allan Baxter Pocock, as an attorney-at-law and a notary public.

Application granted, the oath to be taken before the R.M. of Oudtshoorn.

Mr. J. E. R. de Villiers moved for the admission of Francis Hamp Adams as an attorney-at-law.

Application granted, oath to be taken before the R.M. of Komgha.

Mr. W. P. Buchanan moved for the admission of Claude Bernhard Schultz, as an attorney and notary public.

Application granted, the oath to be taken before the R.M. of Colesberg.

Mr. W. P. Buchanan moved for the admission of Howard Murray Layton, as an attorney-at-law and notary public. Application granted and oath administered.

Mr. P. Jones moved for the admission of Walter Reid as an attorney-at-law and notary public. Application granted and oath administered.

Mr. W. P. Buchanan moved for the admission of William Knox Baxter, as a conveyancer.

Application granted and oath administered.

PROVISIONAL ROLL.

VAN DER SPUY V. KAISER. { 1905.
{ Jan. 12th.

Mr. Sutton moved for provisional sentence on a mortgage bond for £5,500, with interest at 6 per cent. from 1st July, 1904, less £161 9s. 1d. paid on account, and that the property specially hypothecated be declared executable. Granted.

MCAUGHTON V. SMELLEKAMP.

Mr. Sutton moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment of the Supreme Court for £19 12s. 3d., being the amount of taxed costs.

The defendant appeared in person, and said that the case was due to the irregular and vexatious conduct of the plaintiff, who had obtained judgment fourteen days after full settlement had been made, when he was well aware that the matter of costs was in dispute. He was not prepared to pay this amount; his intention was to bring an action for damages against the plaintiff, and contest the claim. The sheriff's officer at Kimberley was informed that there was sufficient movable property at Durbanville, which he could attach. Before witness was barred, the plaintiff was fully paid.

De Villiers, C.J., said that if the plaintiff knew or had any means of knowing, that the defendant had a property which might without any difficulty be attached, the plaintiff should not proceed to such an extreme measure for the payment of such a paltry sum. Application refused.

COWLEY AND CO. V. VASSIS.

Mr. Close moved for provisional sentence for £96 la., with interest and costs. The claim was one by edictal citation, and there had been considerable service. Granted.

LOTZ V. BOULTON.

Mr. De Waal moved for provisional sentence on a promissory note for £350. Granted.

BRADY V. ALLIE AND OTHERS.

Mr. W. P. Buchanan moved for the final order of sequestration of the joint and separate estates of the defendants. Granted.

NEWMARK V. HURWITZ.

Mr. Russell moved for provisional sentence on a mortgage bond for £1,300, with interest at 6 per cent. from 1st July, and that property specially hypothecated be declared executable. Granted.

BERNSTEIN V. ESTATE RADEMEYER.

Dr. Rainsford moved for provisional sentence on two mortgage bonds for £800 and £1,200, with interest at 7 and 10 per cent. respectively, from the 1st January, 1903, and that the property specially hypothecated be declared executable. Granted.

MICHAU AND DE VILLIERS V. VAN REENEN.

Mr. De Waal moved for provisional sentence for £12 17s. 4d., taxed costs. Granted.

COTTON AND CO. V. BAUMGARTEN.

Mr. Sutton moved for provisional sentence on two promissory notes for £25 and £29 19s. 5d., with interest and costs. Granted.

BEID AND CO. V. GARVIE AND CO.

Mr. Sutton moved for the final adjudication of the defendants' estate as insolvent. Granted.

HARRIS AND CO. V. MARTIN.

Dr. Greer moved for provisional sentence on an unsatisfied judgment of the Magistrate's Court for £14 17s. and costs, and that property mentioned in the summons be declared executable. Granted.

MCINTYRE V. MARTIN.

Dr. Greer said this was a similar application to the last. Granted.

STEYTLER V. NAUDE.

Mr. W. P. Buchanan moved for provisional sentence on a promissory note for £19 14s. 6d., with interest and costs.
Granted.

ZACKON V. GORDON.

Mr. W. P. Buchanan moved for provisional sentence on a promissory note for 370 roubles, with interest and costs.
Granted.

NEW EXPORT CO, LTD. V. HAUPT.

Mr. Sutton moved for provisional sentence on a bill of exchange and promissory note for £31 10s. 1d. and £121 13s. 3d., with interest and costs.
Granted.

DU TOIT V. NICHOLSON.

Dr. Greer moved for provisional sentence on a mortgage bond for £1,175, less £500 paid on account, with interest and costs, and that the property specially hypothecated be declared executable.
Granted.

SMITH AND CO. V. ALLIE AND ANOTHER.

Mr. Gutsche moved to have the defendants' estates compulsorily sequestrated.
Granted.

ESTATE CROSBIE V. ZONDAGH.

Mr. Cloos moved for provisional sentence for £00, with interest on a mortgage bond, and that the property specially hypothecated be declared executable.
Granted.

ESTATE HERTZOG V. PITT.

Dr. Rainsford moved for provisional sentence on a mortgage bond for £700, with interest, and that the property hypothecated be declared executable.
Granted.

VAN OUDTSHOORN V. LOBO.

Mr. De Waal moved for provisional sentence on a mortgage bond for £550, with interest and costs, and that the property specially hypothecated be declared executable.
Granted.

HOFFMANN AND CO. V. MARTIN.

Dr. Greer moved for provisional sentence on an unsatisfied judgment of the Magistrate's Court for £35 13s., together

with taxed costs, and to have the property mentioned in the summons declared executable.
Granted.

SASSIN V. SCHLECHTER.

Mr. Gutsche moved for provisional sentence on a promissory note for £98 15s.
Granted.

GREATHEAD V. FREDRIKS.

Mr. Russell moved for provisional sentence on an unsatisfied judgment of the Magistrate's Court at Swellendam for £14 6s. 2d., and £8 2s. 10d., taxed costs, and that the property mentioned in the summons be declared executable.
Granted.

SCHOLTZ V. VENTER.

Mr. Gutsche moved for provisional sentence on a promissory note for £257 18s. 6d.
Granted.

WILSON V. BOYCE.

Mr. W. P. Buchanan moved to have a provisional order of sequestration superseded in view of a settlement.
Granted.

ESTATE CLEAR V. LONSDALE.

Mr. Struben moved for a decree of civil imprisonment against the respondent on an unsatisfied judgment for £45, for rent due.

The defendant appeared in person, and said that he was totally without means, and was barely able to keep his wife on a precarious occupation. Last month he earned £4 10s.

The application was refused.

PHILIPS BROS. AND OTHERS V. JARVIS.

Mr. M. Bisset moved for a provisional order of sequestration to be made final.
Granted.

GRIFFITHS V. COURT.

Mr. M. Bisset moved for provisional sentence for £50 on a promissory note, with interest and costs.
Granted.

LIRACK AND CO. V. CARTWRIGHT.

Dr. Rainsford moved for a decree of civil imprisonment on an unsatisfied judgment of this Court for £27 7s. 9d., with interest and costs,

The defendant appeared in person, and said that at present she was unable to pay. She had no occupation now, and had three children to keep.
Application refused.

ELLIS V. KEMP.

Mr. W. P. Buchanan moved for the final adjudication of the defendant's estate as insolvent.
Granted.

VAN RYN WINE AND SPIRIT CO. V. CLARK.

Mr. Lewis moved for provisional sentence for £62 12s. 2d., balance of interest on a mortgage bond, with costs.
Granted.

HARTVODT V. I. AND J. HERMANN.

Mr. W. P. Buchanan moved for the compulsory sequestration of the defendants' estates as insolvent, and for the appointment of a provisional trustee.
Granted.

OHLESON V. HARRIS.

Mr. Gutsche moved for provisional sentence on a mortgage bond for the sum of £26,000, together with interest at 6 per cent. per annum, less £260 paid on account, the bond having become due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.
Order granted.

LENG V. HEYER.

Mr. P. Jones moved for the final adjudication of the defendant's estate as insolvent.
Granted.

RIPLEY V. MYBURGH.

Mr. J. E. R. de Villiers moved for provisional sentence on a promissory note for £866 10s., less £197 14s. paid on account, with interest and costs.
Granted.

BEATTY V. FERNANDES.

Mr. W. P. Buchanan moved for provisional sentence on a mortgage bond for £9,000, with interest and costs, and that the property specially hypothecated be declared executable.
Granted.

BAGNALL AND CO. V. SCHAPER.

Mr. W. P. Buchanan moved for provisional sentence on three promissory notes, for a total amount of £78 15s. 11d., less £20 paid on account.
Granted.

FOSTER V. DENYS EN.

Mr. Gutsche moved for provisional sentence on a mortgage bond for £300, together with interest and costs, and that the property specially hypothecated be declared executable.
Granted.

HAWORTH V. SOULE.

Mr. P. Jones moved for provisional sentence on a mortgage bond for £450, with interest and costs, and that the property specially hypothecated be declared executable.
Granted.

MELLISH V. LATEGAN.

Mr. W. P. Buchanan moved for provisional sentence on a promissory note for £102.
Granted.

HAMILTON V. ALBERT.

Mr. W. P. Buchanan was for the plaintiff, and Dr. Greer was for the defendant.

Mr. Buchanan moved for a decree of civil imprisonment on an unsatisfied judgment of £68 13s. 2d.

Dr. Greer said that defendant was prepared to pay £5 next Monday, and £3 a month thereafter.

Mr. Buchanan said, under the circumstances the plaintiff would accept the proposal.

Decree granted, to be suspended upon payment as offered.

ROBINSON V. BOULTON.

Mr. De Waal moved for provisional sentence on a promissory note for £302 17s. 6d.
Granted.

PATE V. BLUMBERG AND SLIES.

Mr. Russell moved for provisional sentence on a mortgage bond for £1,100, with interest and costs, £10 premium of insurance, and that the property specially hypothecated be declared executable.
Granted.

ILLIQUID ROLL.

ROBERTSON V. SWAIN AND KELLY. 1905.
Jan. 12th.

Mr. W. P. Buchanan moved for judgment under Rule 329d, for £300, money lent to the defendants, with interest and costs. There had been service only on Kely. Swain's whereabouts were unknown.

Order granted against Kelly.

ANKELL AND DOUGLAS V. HOFFMANN.

Mr. Lewis moved for judgment, under Rule 329d, for £362 8s. 11d., due on a bill of exchange, and £15 9s. 8d. exchange on the bill, with interest and costs.

Granted.

BERMAN V. CUNLIFFEHISTER.

Mr. J. E. R. de Villiers moved for judgment, under Rule 319, the plaintiff having been barred from pleading, for £135 10s., with interest and costs.

Granted.

ISAACS V. AREND.

Mr. Russell moved, under Rule 329d, for the transfer of certain piece of land.

Granted.

HAYWARD V. BROWNE.

Mr. Lewis moved for judgment, under Rule 329d., for £65 5s. 8d., for board and lodging of the respondent's minor son.

Granted.

HOLLIDAY V. CHRISTENSEN.

Mr. Russell moved for judgment, under Rule 329d, for £90 13s. 4d., balance due on certain shares, £3 3s. commission, and £16 interest.

Granted.

MANCHESTER ASSURANCE CO. V. ROBERTSON.

Dr. Rainsford moved for judgment, under Rule 329d, for £22 9s. 3d., balance of money paid by the plaintiff on behalf of the defendant.

Granted.

PAYNE V. NORTON.

Mr. De Waal moved for judgment, under Rule 329d, for £8 2s., due on certain account for medical service.

Granted.

GRAUPNER V. MARTIN.

Dr. Rainsford moved for judgment, under Rule 329d, for £23 18s. 6d., goods sold and delivered, with interest and costs.

Granted.

ANDREWS V. VYNER.

Mr. Roux moved for judgment, under Rule 329d, for £150, balance due on a disbursement for professional services.

Granted.

JACOBSON V. PORTER AND BARSDORF.

Mr. J. E. R. de Villiers moved for judgment, under Rule 319, the defendants having been duly barred from pleading.

Granted.

BELVLIET PARK ESTATE SYNDICATE V. FOSTER.

Mr. Gutsche moved for judgment, under Rule 329d, for £35, rent due, and £1 5s., stamps paid on a document.

Granted.

PATERSON, BOYES AND CO. V. HAMILTON.

Mr. P. Jones moved for judgment, under Rule 329d, for costs of a suit.

Granted.

CAPE TIMES, LTD. V. COHEN.

Dr. Rainsford moved for judgment, under Rule 329d, for £125, rent due, with interest and costs.

Granted.

PRINCE V. MARX.

Mr. W. P. Buchanan moved for judgment, under Rule 329d, for £312 17s. 1d., balance of salary, and for £25, the amount of the plaintiff's passage money from England.

The defendant appeared in person, and said that he only owed the difference between the first and second-class fare.

The matter was ordered to stand over for further inquiries as to the second portion of the claim.

Mr. Buchanan, later in the day, said that he had consulted his attorney, and was prepared to take judgment on the understanding that the second part of the claim for £25 was reduced to the difference between first and second-class fare.

Judgment was given on the first part of the claim as prayed, and for £4 17s. 8d. on the second part of the claim, with costs.

CAPOEN V. PEAKE.

Mr. M. Bisset moved for judgment, under Rule 329d, for £40, rent due, with interest and costs.
Granted.

MARAIS V. SWART.

Mr. J. E. R. de Villiers moved, under Rule 329d, to obtain transfer of a third share in a certain farm, with costs.
Granted.

CARTWRIGHT AND CO. V. GRIFFITHS.

Mr. Gutsche moved for judgment under Rule 329d, for £149, rent due, and £7 16s. for electric light supplied.
Granted.

CAPE COLD STORAGE CO. V. FLEMING.

Mr. Russell moved for judgment, under Rule 329d, for £152 5s. 9½d., balance for goods sold and delivered, with interest and costs.
Granted.

SYFRET, GODLONTON AND LOW V. GARVIE.

Mr. W. P. Buchanan moved for judgment, under Rule 329d, for £32 15s. 11d., less £20 paid on account, for services rendered, with interest and costs.
Granted.

COATON V. REYNOLDS.

Mr. M. Bisset moved for judgment, under Rule 329d, for £100, the purchase price of certain shares.
Granted.

COLONIAL GOVERNMENT V. MCKENZIE AND CO., LTD.

Mr. Howel Jones moved for judgment for £157 14s., being under-charges of certain consignments of goods conveyed to the defendant's store at Maitland.
Order granted.

COLONIAL GOVERNMENT V. MCKENZIE AND CO., LTD.

Mr. Howel Jones moved for judgment for £49 10s. 8d., being telephone rates.
Order granted.

COLONIAL GOVERNMENT V. TALANDA.

Mr. Howel Jones moved for judgment for £30, being telephone rates.
Order granted.

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COLONIAL GOVERNMENT V. SACKS AND CHAT.

Mr. Howel Jones moved for judgment for £40 11s. 10d., under-charges of certain two consignments of potatoes, conveyed on behalf of the defendants.
Order granted.

ROCHESTER BRICK CO. V. G. AND J. HARDMAN.

Mr. Pittman moved for judgment, under Rule 329d, for £36 10s., together with interest *a tempore moras* and costs.
Order granted.

HARRIES V. BEHN AND ROUS.

Mr. Roux moved for judgment, under Rule 319, for £45, purchase price of mules sold and delivered.
Order granted.

CAPE TIMES, LTD. V. HOFFMAN.

Mr. W. P. Buchanan moved for judgment, under Rule 329d, for £27 8s. 6d., work and labour done and materials supplied by plaintiffs to defendant between November, 1903, and June, 1904, together with interest and costs.
Order granted.

SHARENOWITZ V. BASSON.

Mr. W. P. Buchanan moved for judgment for costs only, the capital sum having been paid.
Order granted.

BARNETT V. LEVENSON.

Mr. Du Toit moved for judgment, under Rule 329d, for £15 17s., goods sold and delivered, less £4 19s. 6d., paid on account, with interest and costs of suit.
Order granted.

GENERAL MOTIONS.

DAMONS V. DAMONS. } 1905.
 { Jan. 12th.

Dr. Rainsford moved for a decree of divorce, failing compliance with a rule calling upon defendant to return to or receive plaintiff.
Rule made absolute.

Ex parte ADKINS.

Mr. J. E. R. de Villiers moved for a rule *nisi* under the Derelict Lands Act to be made absolute.
Rule made absolute.

WEINTROUB AND ANOTHER V. STEER.

Interdict—Servitude—Possession
— *Aquaeductus* — Sewerage
and drainage.

The applicants, as owners of land, having a right of sewerage and drainage over neighbouring land, laid a pipe thereon for conveying water to their property. After the pipes had been so laid for a year, the respondent bought and received transfer of the neighbouring land, and thereafter cut the pipe on the land so transferred to him.

Held, that the servitude of sewerage and drainage does not embrace the right of laying pipes for leading water on to the applicants' land.

Held further, that the acquiescence of the former owner of the respondent's land for less than the period of presumption does not prejudice the respondent as the bona fide purchaser of the land.

Held further, that although the fact of the pipe having been used for leading water over the respondent's land for a year might afford prima facie proof of the applicants' right so to lead the water, it does not entitle them, in the face of the facts actually proved, to the Praetorian edict de aqua quotidiana.

Mr. M. de Villiers moved for an order directing the restoration of a certain water-pipe upon ground adjoining Beach-road, Three Anchor Bay. Mr. Struben appeared for the respondent, Frederick Beecher Steer.

From the affidavits, it appeared that the land of the applicants was originally bought at auction from the respondent, and that the water leading had been carried under the houses of the respondent's predecessor-in-title. The respondent had now objected, and he had the pipes taken out. He offered, it appeared from correspondence that was read, to allow as an act of grace the applicants to lay a water-pipe to flush their sewers along the side of his houses, but they declined to avail themselves of this tender.

Mr. De Villiers: See regulation 124 of the Town Council Regulations. In

the first place a servitude of drainage comprises the right of water leading. (2) The respondent is bound by the acquiescence of his predecessors in title. (3) The respondent should have proceeded by action, and not have taken the law into his own hands.

As to my first point. Drains must be flushed and that cannot be done without water. Moreover, it would have been unreasonable to expect the adjoining proprietors to take their pipes round by the main road.

As to the second point. Kennedy, Steer's predecessor in title, acquiesced in these pipes being laid. They had been *in situ* more than a year, and in such a case no private person has any right to interfere on his own authority; see *Poet* (45-20 and 8-5-8). As to the regulations; when these pipes were laid there were no houses in the vicinity. We do not insist on any right to lay pipes under the respondent's house, but we ask for costs and for an order directing the respondent to reconnect the pipes. We are *spoliati* and therefore *ante omnia restituenti*.

Mr. Struben (for respondent): A servitude must be registered. We admit the right of sewage, but we deny the right of leading water, and say that these servitudes are distinct. Then again there is no necessity for leading water under our house. They can get water without coming on our property. They must be held bound by their grant, and cannot vary it by parol evidence. As to acquiescence; we are not bound by our predecessor in title.

[De Villiers, C. J.: Will you allow them to lead water along your wall?]

We have offered that concession as an act of grace, but they would not accept it on our terms. We were prepared even to grant a licence in perpetuity as an act of grace. Even if they can establish their right to a servitude to lead water across our ground it is for us to point out the way by which it must be led. *Van der Byl v. Myburgh*. (2 Juta 77.)

Mr. de Villiers (in reply): Counsel has avoided the question of spoliation. We claim restitution of our connection.

[De Villiers, C. J.: Then if a man has gone over my property for a year, I cannot interfere with him?]

Not forcibly; and then that would be an *interim* servitude; ours is continuous.

[De Villiers, C. J.: There is no evidence of forcible interference. You are willing to accept their offer, and the whole matter appears to be merely a question of costs.]

That is so; but we had to make this application.

[De Villiers, C. J.: I do not see any necessity for coming to the Court. Why not have accepted their offer?]

The offer was only conditional.

De Villiers, C. J.: In this application, which was heard on the 12th

inst., and was decided in favour of the respondent, the question of costs was reserved, because of the point raised by counsel for the applicant that on the authority of Voet, the applicant had a right to a water pipe over the respondent's land, because he had enjoyed such a privilege uninterruptedly for more than a year. The passage quoted from Voet might be so construed, but he was referring to the Roman law, and he does not say that the Dutch practice followed that of the Roman law. On the contrary in another passage dealing with interdicts in general (43.1.9) he clearly intimates that the Dutch "mandament" had taken the place of the Roman interdict, but was much more limited in its operation. In none of the books dealing with the Dutch practice do I find anything to support the contention that the Praetorian interdict *de aqua quotidiana* was obtainable in Holland. The fact that water had been led over a person's land for a year might afford *prima facie* proof that a right existed so to lead it, but it would not prove the existence of such a right in the face of evidence such as that given on behalf of the respondent in the present case.

The servitude of sewerage and drainage which the applicants certainly had over the respondent's land does not embrace the right of laying pipes over that land for leading water on to the applicants' land, nor can the period of prescription prejudice the applicants as the *bona fide* purchasers of that land.

The application must therefore be refused with costs.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

PROVISIONAL CASE.

ESTATE SERRURIER V. { 1904.
ABRAHAMS. { Jan. 18th.

Mr. Russell mentioned this matter, which was ordered to stand over from the previous day for notice to the defendant. Counsel now moved for provisional sentence for £36, amount of interest on a bond, and £2 premium insurance, with costs.

Granted.

GENERAL MOTIONS.

Ex parte REDELINGHUYE.

Mr. Roux moved for an order on the Registrar of Deeds to have certain property purchased privately, from the estate of the petitioner's late father, registered.

De Villiers, C.J., said he would grant a rule, giving the opportunity to anyone to object, calling on all persons concerned to show cause why transfer should not be passed, the rule to be published once in English and Dutch in the "Oudts-hoorn Courant."

Ex parte WALKER.

Mr. M. Bisset moved, on behalf of the petitioner, to have a certain interdict set aside. The interdict was granted at the instance of Mrs. Martin, restraining her husband, against whom she intended proceeding for judicial separation, from passing transfer of certain property at Mossel Bay. Six months had now elapsed, and no such action had been instituted.

[De Villiers, C.J.: A better course would be to order transfer, and let the purchase price be paid to the Registrar.]

Mr. Bisset: That would be perfectly satisfactory to Mr. Walker. Walker, however, has arranged to pay some of Martin's creditors, and hand over the balance to Martin.

De Villiers, C.J.: I think the only solution is that an order should be granted as prayed, on condition that the petitioner pay the purchase price into the hands of the Registrar of the Court, pending a further order.

Ex parte NEL.

Mr. Close moved to have a certain rule *nisi* for the cancellation of certain old bonds made absolute.

Rule made absolute.

Ex parte SMITH.

Mr. W. P. Buchanan moved for leave to the petitioner to execute a certain bond on the property of her late husband.

Granted.

MOLINE PLOW CO. V. SACKS AND OTHERS.

Mr. Searle, K.C., moved to make absolute a rule *nisi* restraining the respondents from using the words "Flying Dutchman" in regard to ploughs, or from exhibiting agricultural or horticultural instruments with the

words "Flying Dutchman." The respondents' attorneys had written to the effect that the "Flying Dutchman" was sent to their clients direct, who were entirely ignorant of the fact that the title was registered. As soon as the rule was served they gave instructions to erase the name from the stands, catalogues, etc. The agent of the respondent firm now undertook to discontinue the use of the words, and tendered costs to date, reserving the right to his principals to reclaim the costs if there was no previous infringement.

De Villiers, C.J.: If the respondents had given any indication of their desire of contesting the right to this trade-mark I should certainly have reserved the right, because the rule was granted upon an *ex parte* statement, and there is always a possibility that the respondents may prove that the applicants had not the full right which upon the *ex parte* statement they would appear to have. I think, however, you are entitled to the rule being made absolute, with costs.

Ex parte BREDENKAMP.

Mr. P. Jones moved, on behalf of the petitioner, who is executrix dative in the estate of her late husband for an order authorising her to pass a first mortgage bond for £1,250 on the estate.

De Villiers, C.J., said he would like to have further information as to the condition of the estates concerned, and whether or not there were any minors.

BREARLEY V. FAURE, VAN (1905.
EYK AND MOORE. { Jan. 13th.

Incola—Security for costs—Plaintiff proceeding by motion.

A person, not resident in the Colony, who makes a claim in the Supreme Court is not entitled to be relieved from the necessity of giving security for costs, on the ground that he is proceeding by way of motion and not by action.

Mr. Close was for the applicant and Mr. Bisset was for the respondents.

Mr. Bisset said at the outset he would take the objection that the applicant was not entitled to take any proceedings unless he gave security for costs beforehand, as he was not domiciled in this country, neither had he any immovable property here.

His Lordship: Is he not entitled to have his costs taxed?

Mr. Bisset: Oh, yes, provided he paid the necessary disbursements.

Counsel having been heard in argument,

De Villiers, C.J., said it was not denied on behalf of the applicant that he had left the Colony, that he was at present absent from the Colony, and that he stated before leaving the Colony that he did not intend to return to the Colony. It was clear therefore if the applicant instead of proceeding by motion had proceeded by action, he would have been bound to give security for costs. In his opinion it made no difference whether it was by action or motion, otherwise a person might always in these cases in which, by the practice of the Court, either motions or actions might be brought, chose the form of procedure by motion, and evade his liability for costs. In the present case he found on the 15th December the respondents gave notice to the applicant that if he proceeded with his motion there would be a demand for security for costs of the motion and the notice of motion was given on the 7th January, three weeks after the applicant knew that the security for costs would be demanded. Of course in the case of a motion the costs were not generally so heavy as in the case of an action, and that would be reason for not demanding heavy security, but certainly no reason for dispensing with the security. In the present case he considered heavy security need not be required, but that some security should be given. The Court therefore held that the applicant was not entitled to proceed with this motion unless he gave security to the satisfaction of the Registrar of the Court for the sum of £25. As to the question of costs of this motion, he thought it should stand over.

Ex parte ROOS.

Mr. W. P. Buchanan moved, on behalf of the petitioner, in his capacity as secretary to the Board of Executors, for an order confirming the sale of certain property, which had been purchased by the trustee in an estate after it had been put up for auction.

De Villiers, C.J., in granting the order, under special circumstances disclosed, characterised the practice of trustees purchasing in their own estates without disclosing full particulars to all concerned as pernicious.

GREEFF V. COLONIAL GOVERNMENT.

This was an application to have a certain award of arbitrators made a rule of Court.

Mr. Searle, K.C., for the applicants, said that the Government, he thought,

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ADMISSION. { 1905.
Jan. 16th.

Mr. W. P. Buchanan moved for the admission of Rufus George Robert Macleod as an attorney-at-law.

Application granted, and oaths administered.

ESTATE DAVIDSON V. AURET. { 1905.
Jan. 16th.
" 24th.

Partnership—Dormant partner—
Insolvency—Sharing of profits—Proof by solvent partner.

By agreement between A. and D., the former advanced £300 to the latter, to be utilized for the purpose of a tailoring business, which was to be managed by D. at a fixed salary in addition to a half share of the profits. D. was to keep the books which A. was to be allowed to inspect. In consideration of the advance, D. was to pay to A. one half share of the annual profits in lieu of interest, and D. was to have the option of repaying the £300 in two years, and on such repayment A.'s share in the profits was to cease, but until such repayment A. was to receive his half share.

Held, that the agreement furnished prima facie proof of the existence of a partnership between A. and D.

This was an application by the trustee in the insolvent estate of Wm. Davidson for an order as to the ranking of certain claims.

From the affidavit of the applicant it appeared that the petitioner, Nathan Lionel Goldsmid, was sole trustee in the insolvent estate of William Davidson, of Queen's Town. In February, 1903, Davidson purchased a certain business from one Ryan for £450, obtained a loan from Auret of £300, and an agreement was entered into that at the expiration of each

did not oppose, but both parties wished an expression of opinion from the Court, whether upon the award being made a rule of Court, the £750 awarded for certain ground expropriated at Oudtshoorn should not be paid by the Government to the applicant. There would be a delay of some months in getting transfer, and as the Government had taken possession of the farm for some time, the applicant contended he was entitled to his money before transfer was passed.

Mr. H. Jones (or the Crown) pointed out that if the Government paid for the land now there might be a great amount of trouble and expense to get transfer in case of insolvency.

De Villiers, C.J., said that he thought the Government would be entitled to say that they would pay the purchase price, but they should only do so simultaneously with the transfer. He did not wish to suggest that the applicant might become insolvent; in fact, for all he knew the applicant might be a very wealthy man, but the principle must be upheld, and there would be an order that the purchase price should be paid upon transfer being given by the applicant. The Court would make the award a Rule of Court on condition that the transfer took place simultaneously with the payment of the purchase price, each party to pay half the costs of this application.

Mr. Searle mentioned the question of interest.

Mr. Jones said it was not the fault of the Government. They were willing to pay, but they could not get transfer.

De Villiers, C.J., said as it was a forced sale he thought the Government should pay costs from the date of the award being made a Rule of Court. If the Government ascertained that there was no chance of insolvency with Greeff, he did not see why they should not pay the money and get out of the interest.

Ex parte LE ROUX.

Mr. Close moved for an order releasing the applicant from a certain executorship by reason of the petitioner entering into a second marriage.

Granted.

Ex parte WILL.

Mr. W. P. Buchanan moved for the appointment of the petitioner as provisional trustee in the insolvent estate of James Wright, an hotelkeeper, of Colesberg. The petitioner, who represented a majority of the creditors, had been managing the business for his late father, who had formerly been trustee.

Granted.

year the profits were to be divided. At the end of the first year, Davidson submitted a statement showing profits at £283 11s. 6d. Davidson could not pay one-half, and judgment was taken out against him. In July, Davidson filed a petition, claims amounting to £705 were filed, and at the third meeting Auret's claim was presented, and petitioner objected to the claim on the ground that Auret was an anonymous partner of Davidson. The R.M. accepted the claim without any reservation. The creditors instructed petitioner to take action to obtain an order that the respondent's claim was not entitled to rank concurrently with the other claims. In the course of the agreement it was stipulated that Davidson should receive a salary of £20 a month, the amount to be deducted out of the profits. Davidson, instead of paying interest, was to pay one half of the net profits. Auret at all times was to have access to the books, and Davidson was to have the option of paying the £300 in 1906.

The answering affidavit of the respondent denied that he was an anonymous partner. The £300 was advanced as an ordinary loan. Davidson could not give any security, and the agreement was drawn up.

The replying affidavit of Davidson asserted that the respondent and himself agreed to become partners in the business. The reason the respondent's name was not disclosed was because he was in the Postal Telegraph Department.

In a further affidavit, the respondent denied that his occupation prevented him giving his name.

Mr. Giddy, K.C., was for the applicant, and Mr. Searle, K.C., was for the respondent.

Mr. Giddy pointed out that to all intents and purposes Auret's name did not appear before the creditors. Auret had free access to the books, and he had, so to speak, a veto on Davidson's transactions; and it would be seen that he participated in the losses as well as the profits. If the interest was taken on £300, it would be a small sum in comparison with what half the property amounted to. Counsel submitted that so long as the agreement existed there was a partnership between the parties.

Mr. Searle said the point had never yet crisply come up before the Court. He submitted the Court had really to look at the agreement itself to gather from the terms of the agreement what was intended. The creditors knew nothing of Auret, and counsel urged that there was strong evidence in the terms of the agreement that it was merely a loan and not a partnership. There were the terms, "Davidson as owner," "the money to be utilised by him." Davidson was more like the agent of Auret than his partner, although counsel would not even admit that. According to the de-

cision in the case of *Watermeyer and Kindell's Trustees* (3 Mens. 424) the Magistrate was clearly right in holding that there was no partnership.

Cur. Adt. Vult.

Postea (January 24).

De Villiers, C.J.: This is an application by the trustee of the insolvent estate of W. M. Davison for an order expunging a claim for £439, which Auret, the respondent, has proved against the estate or otherwise, postponing the payment of such claim, until all other claims against the same estate shall have been satisfied, on the ground that the respondent was a partner of the insolvent. No contract, purporting to be a contract of partnership, was entered into, but the applicant relies upon a written agreement made on the 7th of February, 1903, as virtually establishing such a partnership. The material portions of the agreement are the following: "The said Auret has advanced the sum of £300 to the said Davison, who, as owner of the tailoring business heretofore carried on in Queen's Town by John Ryan, acknowledged to have received the amount which is to be utilised by him for the purposes of the said business. The said Davison shall manage and carry on the said business, and keep proper books of account. In consideration of the said sum so advanced by the said Auret, the said Davison shall pay for, and, instead of interest, one-half of the net profits of the said business, such a division of the profits to be made every year, reckoned as from the 1st February, 1903. The said Auret, or his lawful nominee, shall at all reasonable times have free access to the books of the said business. As soon as the said Davison shall assume personal supervision of the said business, and for that purpose leave his present situation, then and from such date, he shall be entitled to £20 a month, which sum shall be deducted from the gross profits of the business before a division is made. The said Davison shall have the option of repaying the said sum of £300 on the 31st January, 1906, and on such payment the share in half of the profits of the said Auret shall cease, it being conditioned that the said Auret shall be entitled to such half-share of the profits until the amount be paid him." The respondent's counsel contends that this agreement amounts to no more than a loan by Auret to Davison, but it is remarkable that no time is fixed for the repayment of the £300 advanced by Auret. The money was advanced with the distinct object of being utilised for the purposes of a business to be carried on by Davison for the joint profit of himself and Auret, and the option is left to Davison of repaying the money on the 31st of January, 1906. Whether Davison paid the money on that date, or postponed the payment until a later date, Auret was to be entitled to his half share of the profits until the date of

actual payment. The duties were imposed on Davison of managing and carrying on the business, and keeping proper books of account, in consideration of which he was to receive an allowance of £20 a month, to be deducted from the gross profits, and the right was reserved to Auret or his nominee to have free access to the books of the said business. Upon the evidence before the Court, the contract thus entered into would appear to be one of partnership, and not of loan. If a loan had been intended, there surely would have been some provision enabling the lender to recover back the amount of his loan. Supposing that Auret became dissatisfied with the manner in which the business was carried on, would he be bound to wait until Davison chose to repay the loan before he could lay claim to the capital sum advanced by him? Unless he were a partner with the ordinary right to claim a dissolution after due notice, he would in such a case seem to have no remedy under the agreement. Supposing, further, that without any fault on the part of Davison, heavy losses had been sustained in the business, with the result that the whole of the capital advanced by Auret had been lost, would Auret have been entitled to claim repayment of the capital? The agreement confers no such right on him in express terms, and no such right can be fairly inferred from the terms of the agreement. The decision of this Court in the case of *Watermeyer v. Kerdell's Trustees* (3, Menz., 424), has been relied upon by the respondent's counsel as negating the existence of a partnership in the present case, but no definite rule was there laid down by the majority of the Court which can assist in the determination of the present case. The complicated terms of that agreement differed very materially from the simple terms of the agreement now under consideration, which may be construed by the aid of the elementary principles of the law of partnership. What, then, is meant by a partnership. According to Voet (17, 2, 1), it is *contractus super re honesta de lucris et damnis communione*. Literally translated, this means that it is a "contract concerning an honest transaction for the sharing of profit and loss," but freely translated, the author's meaning seems to be that it is "an agreement between two or more persons for the purpose of carrying on a lawful undertaking, and dividing its profits and losses between them." The definition given by Pothier (Partnership), and followed by Van der Linden (Institutes, B 4, ch. 1, 11), is that "partnership is a contract by which two or more persons put or engage to put something in common in order to make therefrom in common an honest profit with the mutual obligation of accounting to each other." The difference between the two definitions is that Voet says nothing about putting anything into a common stock, or about the

parties having to account to each other, and that Pothier says nothing about sharing of losses, but when they proceed to enlarge upon their respective definitions there is no substantial difference between them. They are agreed that either labour or effects or both may be contributed by the partners, that he who carries on the business must render an account of his administration, and that generally each of the partners must bear the same proportion of the losses of the partnership as he ought to have of its profits, if it is prosperous. Voet (17, 2, 8) admits that this last rule may be evaded by a special stipulation to the contrary, and that it may be legally agreed that one of the partners shall have a share of the profit, and not bear any part of the loss, and he adds that such an agreement would not transgress his requirement of community of loss, because there can be no profit until the loss has been deducted. Whether this explanation be perfectly satisfactory or not, it is clear that he did not intend, under his definition of partnership, to exclude cases where community of loss is not expressly agreed upon. The main test in every case is whether there is an agreement to share profits, unaccompanied by circumstances showing that partnership was intended to be excluded. In the present case, the word loan is not used at all in the written agreement, but even if it had been so used, the Court, as stated in *Treasurer-General v. Lippert* (1 Juta, 302; 2 Juta, 175), would look to the real transaction between the parties, and not to what they have called it. The tendency at the present day would be to designate an advance for the purposes of a partnership business as a loan, in the same way as under the strict laws against usury, the tendency formerly was to disguise a loan at usurious interest as a partnership. I do not say that the disguise was fraudulently adopted—for the statement in Davison's affidavit may be correct that the reason for Auret's name not being disclosed was because of his being in the Civil Service—but I do say that the agreement includes the essential requisites of a partnership, and that, unless the actual dealings between the parties rebut the presumption arising out of the terms of the agreement, the Court will have to hold that a partnership did exist at the date of sequestration. An opportunity will, however, be given to both parties to produce further evidence on this point before the Resident Magistrate. I have made no reference to the English law, because the case must, of course, be decided under our law; but it is satisfactory to find that there is no substantial difference in the tests to be applied in order to ascertain whether a partnership exists or not. In the case of *Mollivo v. Court of Wards* (4 L.R.P.C., 419), it was held by the Privy Council that, although the right

to participate in the profits of a trade is a strong test of partnership, and there may be cases where, from such perception alone, it may as a presumption, not of law, but of fact, be enforced; yet, whether that relation does or does not exist, must depend on the real intention and contract of the parties. In that case, a lengthy agreement in writing was relied upon to establish the partnership, but the Judicial Committee, looking at the whole scope of the agreement, came to the conclusion that the primary object was to give security to the alleged partner, an Indian Rajah, as a creditor of the persons, Watsons by name, who carried on the trade, and not to make him a partner. The agreement differed in several particulars from the present one, the most important being that all available proceeds had to be handed to the Rajah as received by the Watsons for the purpose of extinguishing the debt due to him. The Rajah did not advance a fixed sum, as was done by Auret, and as is usual in ordinary partnerships, but he stipulated that for such advances indefinite in amount as he had already made, and should from time to time make, he should have certain securities, the chief security being the right to recoup himself out of the proceeds, as they were handed to him. The option was certainly not left to the Watsons, as it was to Auret, of paying the advances when it suited them to put an end to the agreement for sharing the profits of the business. "The Watsons," said their lordships, "evidently wished the Rajah to continue his advances, and for that purpose were willing to give him the largest security they could offer; but a partnership was not contemplated, and the agreement is really founded on the assumption not of community of benefit, but of opposition of interests." In the subsequent case of *Pooley v. Drier* (L.R. 5, Ch. Div. 458), Jessel, M.R., held that in the absence of something in the contract to show a contrary intention, the right to share profits, as profits, constitutes, according to English law, a partnership. The agreement in that case contained a number of ingenious provisions to enable the dormant partner to get a share of the profits, without contributing to the losses, but the general tenour of the Master of the Rolls' instructive judgment satisfies me that he would have held that an agreement like the one in question creates a partnership, unless some other relation could be shown from the surrounding circumstances. Both these English cases were referred to in the judgments of the judges in the Transvaal case of *Anderson v. Royce* (2, Off. Reports, 256), where it was held that the mere fact that the lender stipulates for a share in the profits acquired with the money lent, instead of interest, does not make him a partner of the borrower. It was there held that a judgment which had

been obtained against the borrower and his known partner declared executable as against the lender, on the ground that he was a partner; but at the most he would have been an anonymous partner against whom the creditors could not have proceeded in respect of debts incurred in the name of someone else. The Court there held that a partnership did not exist, but there was no written agreement, as there is in the present case, containing provisions which support the presumption of partnership arising out of a participation in profits. At the date of the sequestration of Davison's estate, the agreement was still running and in force. The claim of £439 consists mainly of the capital sum of £300 advanced, and the half share of profits, which, according to a statement submitted by Davison to the respondent in March, 1904, had up to that date been earned. In May, 1904, the respondent issued a summons against Davison for the amount of such capital and profits, and judgment was accordingly given in default of appearance on the part of Davison. In July, 1904, Davison's estate was sequestrated on his petition, which stated that his liabilities were £1,105 and his assets £822; but the applicant, as trustee, is doubtful whether the assets will realise one-fourth of the amount set forth in the schedules. The Court has no information before it as to whether the account rendered by Davison in March, 1904, which showed a profit of £283, was a correct statement, or whether, at the date of the sequestration, the tailoring business had resulted in a profit or in a loss. Nor does it appear from the affidavits whether Davison advanced any capital in addition to contributing his time and labour to the management and supervision of the business. If, after allowing for liabilities lawfully incurred by Davison on behalf of the business there had, at the date of sequestration, been an actual loss, absorbing the capital advanced by Auret, and the profits alleged to have been made up to March, there is no express provision in the agreement entitling Auret to claim more than the amount of business assets left in Davison's hands after deduction of the remaining business liabilities. It is clear that Auret can have no greater claim against the insolvent estate than he would have had against Davison if, in the absence of insolvency, Auret had in July sought to enforce his judgment debt. From the amount of that debt would have been deducted any lawful debt capable of being pleaded in compensation (Voet, 16, 2, 2). It will be necessary, therefore, before finally deciding the case, to remit the same to the Resident Magistrate, for further proof in terms of the last proviso to the 27th section of the Insolvent ordinance. Before stating the terms of the reference, however, I have to make a few general observations upon some of the arguments

used on behalf of the respondent. His counsel contended that if there was a partnership it was either a partnership en commandite, or an anonymous partnership, and that, in either case, the respondent should not be postponed to the creditors of the partnership. The partnership, if any, was not en commandite, because there was no express limitation, as between themselves, of the respondent's liability, but it was an anonymous partnership, because it had been agreed that the business should be carried on by the insolvent in his own name alone. The expression anonymous partnership is used by Van der Linden (Inst., 4, 1, 12), who appears to have taken it over from Pothier, but I do not find it used in any earlier books on Dutch law. Neither of these writers, however, supports the contention that an anonymous partner is entitled to claim payment of the debts due to him by the partnership concurrently with other creditors of his partner. He is not, it is true, liable for the debts of the partnership to the creditors, with whom the principal, or known partner, has contracted, but he is liable for them to the principal or known partner, who has lawfully contracted them. This doctrine, as pointed out by Pothier (sec. 102), is a result of certain well established principles of the Roman law, which were adopted by the Dutch as well as the French law. One of those principles was that whatever power one partner might have to bind the others by a debt which he has contracted, it was necessary that it should be contracted in the name of the partnership, and this principle was adopted to its full extent by this Court, in the case of *Guardian Insurance Company v. Lovemore's Executors* (5, Juta, 211). A necessary result of the principle is that, as stated by Voet (17, 2, 15), where one of two or more partners have incurred a debt not in the name of the partnership, but in his own name, he does not bind the remaining parties either severally or jointly with himself. It is, however, in the nature of an anonymous partnership that the administering partner manages the business, and contracts debts in his own name, and not that of the partnership, and, consequently, the anonymous partner cannot be sued by the creditors of the partnership for the debts incurred by the managing partner. He remains liable, however, to the managing partner, who has contracted the debts in his own name but for the benefit of the partnership. If the managing partner becomes insolvent by reason of losses sustained in the business, the very difficult question arises as to the manner in which the insolvency assets should be distributed. The question was considered by Menzies, J., in the case of *Watermeyer v. Kerdell's Trustee* (3 Menz., 436), and, although the other judges differed from him as to the existence of a partnership in that case, it

does not appear that they differed from him on the point now under consideration. His remarks are as follows: "As to the limitation of the obligations of anonymous partners to creditors is an exception from the general rule, it is not to be extended further than there is express authority for so doing. And no authority has been produced to show that the creditors of an anonymous partnership are not entitled to have their debts discharged out of the assets of the partnership, no matter by which of the partners they may have been advanced, before the anonymous partner is entitled to claim out of those assets repayment of the capital advanced by him, or payment of debts due to him individually, either by the partnership or by his co-partner." The difficulty lies in the practical application of this principle, for, *ex hypothesi*, there is only one estate under sequestration, and, as all the creditors gave credit to Davison individually, it may be impossible to draw a distinction between the creditors of the business and the creditors of the individual. They are all creditors of the insolvent estate of Davison, and may have to rank concurrently in the distribution of the assets of that estate, which, I presume, consists of assets employed in the business as well as assets not so employed. Upon these points the Court will be in a better position to pronounce a final judgment after it has obtained the fuller information which will be asked for. It is to be hoped that the Court may be able to decide this case without the aid of the thirty-fourth section of the Insolvent Ordinance, because that section seems to me hopelessly obscure. The first part of the section is confined to cases in which an ordinary partnership estate and the estate of one or more of the partners have been placed under sequestration, and neither that section nor the ninth section appears to contemplate the sequestration of the estate of a partnership consisting of two persons, one of whom is an anonymous partner. In the case of *Sellar Brothers v. Clarke* (10 Juta, 171), I am reported have said that the ordinance makes no distinction between known and dormant partners, and confers on the creditors of an insolvent partnership estate the full right of obtaining satisfaction from any partner. The *dictum* was not necessary for the decision of that case, and if the latter part of it was correctly reported I must take this opportunity of withdrawing it, and leaving the matter fully open for future decision. Although the ordinance makes no distinction between known and anonymous partners, it is, after further consideration, by no means clear to me that the ordinance was intended to subject anonymous partners to liabilities from which they would have been free if the ordinance had not been passed. The first proviso to the thirty-fourth section might possibly be

made applicable to a case like the present, but that could only be done by treating the words "if insolvent" as a misprint for "if solvent." The proviso would then read thus: "Provided, however, that no partner, if solvent, and no trustee of the insolvent estate of any partner shall under any circumstances rank for the amount of any such claim for contribution upon the insolvent estate of any other partner in competition or concurrence with any of the creditors of the company claiming upon any such last-mentioned estate, which creditors are hereby declared to be entitled to be paid in preference and priority to any such partner or trustee." This is probably what the Legislature intended to enact, and I find that in the fair copy of the Ordinance filed in the Registrar's office the first syllable in the word "insolvent" has been struck through in ink, but there are no initials or anything else to show that the amendment was made by authority of the legislature. The respondent is solvent, and would not be affected by the proviso as it appears in the Statute Book, and the adoption of the amendment suggested by me would not materially affect the decision of the present case. As to the last proviso to the 34th section it only adds to the obscurity of the section and offers no assistance in the elucidation of the law or in the decision of the present case.

The Court will remit the case to the Resident Magistrate with directions to obtain: (1) Production of all correspondence that may have passed between Auret and Davison relative to the tailoring business carried on by the latter; (2) any relevant oral evidence that may be tendered on either side upon the questions at issue with liberty to the opposing party to cross-examine the witnesses; (3) production of the statement submitted by Davison in March, 1904, and showing an alleged profit of £283 11s. 6d.; (4) an account prepared by some competent person, and sworn to by him showing (a) the capital, if any, paid into the business by Davison; (b) the actual amount and dates of advances made by Auret; (c) the sums, if any, obtained from the business by Auret, and the sums drawn by Davison as salary, as his share of the profits and for his private purposes; (d) the profits and losses made and incurred between the date of the agreement and the date of sequestration; (e) the value of the assets of the business and the value of assets not belonging to the business at the date of sequestration; (f) the amount of the liabilities of the business, and the amount of the other liabilities of Davison at the date of sequestration; and (g) generally the balance of either profit or loss of the business at the date of sequestration. The information thus obtained will be transmitted to the Registrar of this

Court, and the costs of this application will stand over.

[Applicant's Attorneys: Silberbauer, Wahl and Fuller; Respondents' Attorneys: Walker and Jacobsohn.]

DUTCH REFORMED CHURCH, CAPE TOWN V. CAPE TOWN COUNCIL.

Mr. M. de Villiers was for the applicants, and Mr. Close for the respondents.

Mr. M. de Villiers moved to have a certain award in the expropriation of certain property at the instance of the respondents made a rule of Court, with costs. Mr. Close appeared to consent.

Award made a Rule of Court, with costs.

Ex parte NEL.

Mr. Du Toit moved for the appointment of two commissioners, one at Robertson and one at Cape Town, to take the evidence of witnesses in the insolvent estate of Woolf Cohen, of Robertson. Counsel suggested the Resident Magistrate of Robertson as one.

Application granted, the Resident Magistrate to take evidence at Robertson, and Mr. P. Jones to act at Cape Town.

SONDOM V. SONDOM.

Mr. J. E. R. de Villiers moved for leave to sue the respondent, petitioner's wife, by edictal citation, for divorce *in forma pauperis*. The parties were married in Johannesburg, in November, 1895, in community of property. In 1896, the respondent deserted the petitioner, took up her abode with another man, and in 1902 gave birth to a child, of which the applicant was not the father.

De Villiers, C.J., said he would first grant a rule calling on the respondent to show cause why the plaintiff should not be allowed to sue *in forma pauperis*, returnable February 1, personal service to be effected.

Ex parte OOSTHUIZEN.

Mr. P. Jones moved for an order authorising the transfer of certain property. The matter had been before the Master, and his report was favourable. In the joint will of petitioner's parents, a farm, 2,363 morgen, at Aliwal North, was bequeathed specially to the respondent, provided he paid into the estate £1,000 within one year of the death of his father.

Granted

Ex parte VAN WYK AND OTHERS.

Mr. W. P. Buchanan applied for leave on behalf of the petitioner's to sell certain property vested in the Dutch Reformed Church, at Adelaide. The Church owned the square on which the church was built. At a Congregational meeting of the Church, held on June 18, the consistory was instructed to sell a number of erven on the Church-square and utilise the funds for the church. The Registrar wanted an order of Court, because the ground in question was marked on the diagram as a square.

De Villiers, C.J., said he would grant a rule calling on all concerned to show cause on the 1st February why an order should not be made as prayed, the rule to be published twice in a Dutch newspaper circulating in the district, and twice in an English paper circulating in the district.

Ex parte IMPEY AND ANOTHER.

Mr. Pyemont moved for an order directing the winding up of the Amoy Brick Syndicate, a company which was unable to pay its debts, and which was indebted to the estate of Emile van Heerden in a mortgage bond for £1,000, and to petitioner, who was chairman, in his private capacity, in £314. The Divisional Council valuation of the farm held by the syndicate was £1,800, and the liabilities amounted to £1,979. It was impossible to get a quorum of shareholders together. It was to the best interests of the company that official liquidators should be appointed, and the names of Harry Gibson and E. Syfret had been suggested, with Fairbridge, Arderne and Lawton as attorneys.

Judgment as prayed, the gentlemen mentioned being appointed to act.

NEEDHAM V. NEEDHAM.

Mr. Sutton moved on behalf of the petitioner, Mary Ann Needham, of Observatory-road, for alimony. The parties were married in community of property in 1893, and there were four children of the marriage. Petitioner's attorneys, acting on instructions, wrote to the respondent suggesting that a private separation *a mensa et thoro* be arrived at, as it was absolutely impossible to live with the respondent.

De Villiers, C.J., granted an order for the payment of £25 to the applicant's attorneys, to enable the applicant to proceed with the action, the sum of £8 to be paid to the applicant per month towards the maintenance of her children, pending an action, costs to stand over.

Ex parte ROBERTSON AND ANOTHER.

Mr. Close moved for an order sanctioning a certain compromise with certain creditors of a company to whom the petitioners were official liquidators. Granted.

WILSON AND CATHCART V. YOUNG.

Mr. P. Jones moved for an order calling on the defendant to show cause why an order should not be granted for the attachment of the person of respondent for contempt of Court. On the 15th December the respondent was ordered to deliver up certain household premises at Observatory, but he had failed to do so. The respondent forcibly took possession of the premises, and the Court ordered him to restore possession.

The respondent appeared in person, and pointed out that he had trouble in getting rid of his tenant. The applicant, Wilson had refused to give him specifications to be examined by a qualified man. The plumbing work had to be redone. The job was not finished until it had been passed by an architect and the engineer at Mowbray.

The respondent was ordered to give up possession in terms of the order of Court of the 15th December, on or before 28th February, and in the meantime the applicants to proceed with all despatch with their action to recover the amount claimed, costs of the application to abide the result of the action.

DRUMMOND V JONES.

This was an application for leave to appeal to the Supreme Court against a judgment of Justice Lange, in the High Court of Griqualand West. Judgment was reserved, and by the time it was delivered applicant was away on business, and the time for appeal had elapsed. Applicant (who appeared in person) proceeded to relate several criminal charges that had been brought against him, each of which had been withdrawn, and the action on behalf of the police accounted for the delay in bringing the appeal. He based his application on the Act for the Better Administration of Justice. Applicant then proceeded to read a petition which he was about to forward to His Majesty the King, for protection against the unremitting persecution of the Cape Police. In two of the best years of his life he had been worried by the police, and he prayed of His Majesty for protection, so that he could go through the Colony as a loyal British subject without fear.

[De Villiers, C.J.: Have you paid the amount of the judgment?]

Applicant: I have not been asked for it.

[De Villiers, C.J.: Could you find security?]

I think I could manage that.

De Villiers, C.J., said the applicant would have leave to appeal to the Supreme Court if within three weeks from this date he gave security to the Registrar for the payment of the amount of the judgment of the High Court, and the costs awarded by that judgment.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

ADMISSIONS. { 1905.
Feb. 1st.

Mr. P. Jones moved for the admission of Frederick Glanville Stapleton as an advocate.

Application granted, and oath administered.

Mr. J. E. R. de Villiers moved for the admission of Arthur Edward Carlisle as an advocate.

Application granted, and oath administered.

Mr. Gardiner moved for the admission of Arthur Hallam Davidson as an attorney-at-law. Mr. Uppington appeared to oppose on behalf of the Law Society.

Mr. Gardiner said the matter had previously been before the Court, when it was pointed out by the Law Society that the applicant had only been admitted in Scotland as a law agent in the Sheriff's Court, and certain allegations were made against him by the Law Society that he held himself out to be an attorney of the Supreme Court before he was admitted. There was now a certificate from Scotland that he was still on the roll of law agents. The application would now be for admission to the Circuit Court.

Mr. Uppington read from the report of Mr. Justice Hopley's judgment, from which it would appear that the applicant could apply for admission to the Circuit Court, but there were still allegations of unprofessional conduct against him, and there would be a chance given him of refuting the charges. Counsel then proceeded to read an affidavit made by Alexander John MacCallum, secretary to the Law Society, to the effect that the society received certain information that the applicant was either practising himself or lending his to an unqualified man at Lady Outside the office, a sign-

board was put up with the inscription, "A. H. Davidson, attorney and notary public," and his name had appeared under a notice in the "Gazette."

Mr. Gardiner said his name had never been struck off the rolls, nor had he ever been suspended in Scotland or the Transvaal.

Counsel having been heard in argument,

His Lordship, in granting the application, said it had been clearly laid down that a person in the position of the applicant was entitled to be admitted as an attorney of the Circuit Court. In September the applicant filed an application to be admitted as an attorney of the Supreme Court, and in the same month, under an arrangement with Mr. Dell, he went to Lady Grey for the purpose of taking an office. The applicant stated that the signboard was put up without his knowledge, consent, or instructions, and it was taken down at once when it came to his notice. He considered, on the whole, that there was nothing to show that the applicant had committed any act which should debar him from being admitted. There would be no order as to costs.

Mr. Alexander moved for the admission of Mauritz Pasques George Elliott as an attorney-at-law and notary public.

Application granted, and oaths administered.

Mr. Pyemont moved for the admission of Charles Herman Maasdorp as a conveyancer.

Application granted, and oaths administered.

PROVISIONAL ROLL.

SMITH V. LEVIN. { 1905.
Feb. 1st.

Dr. Rainsford moved for provisional sentence on a mortgage bond for £1,500, with interest and costs, and that the property hypothecated be declared executable.

Granted.

JUNKER V. JONES.

Mr. Lewis moved for provisional sentence on a mortgage bond for £1,000, with interest at 6 per cent. from July, 1904, and that the property be declared executable, with costs.

Granted.

MOORBEE'S V. HOFFMAN.

Mr. Lewis moved for the final adjudication of the defendant's estate as insolvent.

Granted.

MARAIS V. GELDENHUIS.

Mr. Sutton moved for provisional sentence on two mortgage bonds, and that the property be declared executable.

Granted.

GRAAFF V. KALWERISKY AND OTHERS.

Mr. Van Zyl moved for provisional sentence on a mortgage bond for £2,500, with interest at 6 per cent. from 1st July, 1904, and that the property be declared executable.

Granted.

GRAAFF V. GOW AND OTHERS.

Mr. Van Zyl moved for provisional sentence for £3,300, less £750, paid, due on a mortgage bond, with 6 per cent. interest from 1st July, 1904, and that the property be declared executable.

Granted against the defendants in their capacity as trustees.

WOODHEAD, PLANT AND CO. V. VAN REENEN.

Mr. P. Jones moved for judgment on a promissory note for £62 4s. 3d., with interest and costs.

Granted.

COLONIAL GOVERNMENT V. VAN RENSBURG.

Mr. P. Jones moved for provisional sentence for interest on a bond for £135 3s. 4d. and £14 8s., with costs.

Granted.

MENNE V. VAN DER LINDE.

Mr. Gutsche moved for provisional sentence on a promissory note for £415 14s. 8d., with interest and costs.

His Lordship said a consent to judgment had been put in.

Judgment was given in terms of the consent.

BLACK V. HURWITZ.

Mr. Pyemont moved for provisional sentence on a promissory note for £30, with interest and costs.

The defendant appeared in court, and said he never received value for the amount.

His Lordship instructed him to put his defence on affidavit, and the case to come on to-morrow morning.

Postea (February 16th).

Defendant appeared in person.

An affidavit had been filed by the defendant stating that he engaged the plaintiff to prepare plans of certain building, and it was agreed that the

plaintiff should get the plans passed and approved by the Town Council. The Council only passed the plans provisionally. He verily believed the plans had not been finally passed by the Council. He said that plaintiff had since agreed to accept a lump sum of £80. He gave plaintiff £50, and a promissory note for £30. Until the plans were finally passed, he could not proceed with the building, and he was not prepared to pay the promissory note.

An answering affidavit by the plaintiff, Wm. Black, said that there was no special stipulation in their terms that the plans should be approved by the City Council. The defendant knew that the plans were passed provisionally, and agreed to the conditions specified by the Council as to the frontage in Sir Lowry-road, and Dorset-street. The plans had been returned to deponent duly approved, subject to the defendant carrying out his undertaking with the Council. Defendant subsequently said that he had found a difficulty in the financing of the scheme, and that he did not propose to go on with the building. Deponent believed that defendant wished to escape his liability for the preparation of the plans. Further affidavits by Owen C. Ludolph, employed by the plaintiff to prepare the plans, and Cecil E. Bradfield, of plaintiff's attorneys, were read by counsel.

An answering affidavit by the defendant was read.

Buchanan, J.: In this case the plaintiff asks for provisional sentence on a promissory note. The defendant says that this promissory note was given in part payment for preparing certain plans, the plaintiff being an architect, and that these plans were to be submitted to the Town Council, and approved by them. There is a great deal of force in the defendant's contention that an architect is not to be paid for plans which are futile and useless, but they must be such plans as would be adopted, and some benefit would accrue to the person, who has the plans made. It is common cause that these plans were prepared and submitted to the Town Council, and, according to Mr. Black's and his assistant's affidavits, they were approved by the Town Council, and the only question in dispute was the question of blocking the building on the land. The plaintiff has done his work. He has prepared plans, they are plans which have been approved, and the only remaining question is whether the defendant's plans are in the possession of the defendant or the plaintiff. The document produced by plaintiff supports his statement that he handed the plans to defendant, and the defendant has nothing to support his statement that he handed back the plans to plaintiff. Provisional sentence will be granted as prayed. Mr. Hurwitz, if he likes, may go into the principal case,

words "Flying Dutchman." The respondents' attorneys had written to the effect that the "Flying Dutchman" was sent to their clients direct, who were entirely ignorant of the fact that the title was registered. As soon as the rule was served they gave instructions to erase the name from the stands, catalogues, etc. The agent of the respondent firm now undertook to discontinue the use of the words, and tendered costs to date, reserving the right to his principals to reclaim the costs if there was no previous infringement.

De Villiers, C.J.: If the respondents had given any indication of their desire of contesting the right to this trade-mark I should certainly have reserved the right, because the rule was granted upon an *ex parte* statement, and there is always a possibility that the respondents may prove that the applicants had not the full right which upon the *ex parte* statement they would appear to have. I think, however, you are entitled to the rule being made absolute, with costs.

Ex parte BREDEKAMP.

Mr. P. Jones moved, on behalf of the petitioner, who is executrix dative in the estate of her late husband for an order authorising her to pass a first mortgage bond for £1,250 on the estate.

De Villiers, C.J., said he would like to have further information as to the condition of the estates concerned, and whether or not there were any minors.

BREARLEY V. FAURE, VAN (1905.
EYK AND MOORE. { Jan. 13th.

Incola—Security for costs—Plaintiff proceeding by motion.

A person, not resident in the Colony, who makes a claim in the Supreme Court is not entitled to be relieved from the necessity of giving security for costs, on the ground that he is proceeding by way of motion and not by action.

Mr. Close was for the applicant and Mr. Bisset was for the respondents.

Mr. Bisset said at the outset he would take the objection that the applicant was not entitled to take any proceedings unless he gave security for costs beforehand, as he was not domiciled in this country, neither had he any immovable property here.

His Lordship: Is he not entitled to have his costs taxed?

Mr. Bisset: Oh, yes, provided he paid the necessary disbursements.

Counsel having been heard in argument,

De Villiers, C.J., said it was not denied on behalf of the applicant that he had left the Colony, that he was at present absent from the Colony, and that he stated before leaving the Colony that he did not intend to return to the Colony. It was clear therefore if the applicant instead of proceeding by motion had proceeded by action, he would have been bound to give security for costs. In his opinion it made no difference whether it was by action or motion, otherwise a person might always in these cases in which, by the practice of the Court, either motions or actions might be brought, chose the form of procedure by motion, and evade his liability for costs. In the present case he found on the 15th December the respondents gave notice to the applicant that if he proceeded with his motion there would be a demand for security for costs of the motion, and the notice of motion was given on the 7th January, three weeks after the applicant knew that the security for costs would be demanded. Of course in the case of a motion the costs were not generally so heavy as in the case of an action, and that would be reason for not demanding heavy security, but certainly no reason for dispensing with the security. In the present case he considered heavy security need not be required, but that some security should be given. The Court therefore held that the applicant was not entitled to proceed with this motion unless he gave security to the satisfaction of the Registrar of the Court for the sum of £25. As to the question of costs of this motion, he thought it should stand over.

Ex parte ROOS.

Mr. W. P. Buchanan moved, on behalf of the petitioner, in his capacity as secretary to the Board of Executors, for an order confirming the sale of certain property, which had been purchased by the trustee in an estate after it had been put up for auction.

De Villiers, C.J., in granting the order, under special circumstances disclosed, characterised the practice of trustees purchasing in their own estates without disclosing full particulars to all concerned as pernicious.

GREEFF V. COLONIAL GOVERNMENT.

This was an application to have a certain award of arbitrators made a rule of Court.

Mr. Searle, K.C., for the applicants, said that the Government, he thought,

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ADMISSION. { 1905.
Jan. 16th.

Mr. W. P. Buchanan moved for the admission of Rufus George Robert Macleod as an attorney-at-law.

Application granted, and oaths administered.

ESTATE DAVIDSON V. { 1905.
AURET. Jan. 16th.
" 24th.

Partnership—Dormant partner—
Insolvency—Sharing of profits—Proof by solvent partner.

By agreement between A. and D., the former advanced £300 to the latter, to be utilized for the purpose of a tailoring business, which was to be managed by D. at a fixed salary in addition to a half share of the profits. D. was to keep the books which A. was to be allowed to inspect. In consideration of the advance, D. was to pay to A. one half share of the annual profits in lieu of interest, and D. was to have the option of repaying the £300 in two years, and on such repayment A.'s share in the profits was to cease, but until such repayment A. was to receive his half share.

Held, that the agreement furnished prima facie proof of the existence of a partnership between A. and D.

This was an application by the trustees in the insolvent estate of Wm. Davidson for an order as to the ranking of certain claims.

From the affidavit of the applicant it appeared that the petitioner, Nathan Lionel Goldsmid, was sole trustee in the insolvent estate of William Davidson, of Queen's Town. In February, 1903, Davidson purchased a certain business from one Ryan for £450, obtained a loan from Auret of £300, and an agreement was entered into that at the expiration of each

did not oppose, but both parties wished an expression of opinion from the Court, whether upon the award being made a rule of Court, the £750 awarded for certain ground expropriated at Oudtshoorn should not be paid by the Government to the applicant. There would be a delay of some months in getting transfer, and as the Government had taken possession of the farm for some time, the applicant contended he was entitled to his money before transfer was passed.

Mr. H. Jones (or the Crown) pointed out that if the Government paid for the land now there might be a great amount of trouble and expense to get transfer in case of insolvency.

De Villiers, C.J., said that he thought the Government would be entitled to say that they would pay the purchase price, but they should only do so simultaneously with the transfer. He did not wish to suggest that the applicant might become insolvent; in fact, for all he knew the applicant might be a very wealthy man, but the principle must be upheld, and there would be an order that the purchase price should be paid upon transfer being given by the applicant. The Court would make the award a Rule of Court on condition that the transfer took place simultaneously with the payment of the purchase price, each party to pay half the costs of this application.

Mr. Searle mentioned the question of interest.

Mr. Jones said it was not the fault of the Government. They were willing to pay, but they could not get transfer.

De Villiers, C.J., said as it was a forced sale he thought the Government should pay costs from the date of the award being made a Rule of Court. If the Government ascertained that there was no chance of insolvency with Greeff, he did not see why they should not pay the money and get out of the interest.

Ex parte LE ROUX.

Mr. Close moved for an order releasing the applicant from a certain executorship by reason of the petitioner entering into a second marriage.

Granted.

Ex parte WILL

Mr. W. P. Buchanan moved for the appointment of the petitioner as provisional trustee in the insolvent estate of James Wright, an hotelkeeper, of Colesberg. The petitioner, who represented a majority of the creditors, had been managing the business for his late father, who had formerly been trustee.

Granted.

year the profits were to be divided. At the end of the first year, Davidson submitted a statement showing profits at £283 11s. 6d. Davidson could not pay one-half, and judgment was taken out against him. In July, Davidson filed a petition, claims amounting to £705 were filed, and at the third meeting Auret's claim was presented, and petitioner objected to the claim on the ground that Auret was an anonymous partner of Davidson. The R.M. accepted the claim without any reservation. The creditors instructed petitioner to take action to obtain an order that the respondent's claim was not entitled to rank concurrently with the other claims. In the course of the agreement it was stipulated that Davidson should receive a salary of £20 a month, the amount to be deducted out of the profits. Davidson, instead of paying interest, was to pay one half of the net profits. Auret at all times was to have access to the books, and Davidson was to have the option of paying the £300 in 1906.

The answering affidavit of the respondent denied that he was an anonymous partner. The £300 was advanced as an ordinary loan. Davidson could not give any security, and the agreement was drawn up.

The replying affidavit of Davidson asserted that the respondent and himself agreed to become partners in the business. The reason the respondent's name was not disclosed was because he was in the Postal Telegraph Department.

In a further affidavit, the respondent denied that his occupation prevented him giving his name.

Mr. Giddy, K.C., was for the applicant, and Mr. Searle, K.C., was for the respondent.

Mr. Giddy pointed out that to all intents and purposes Auret's name did not appear before the creditors. Auret had free access to the books, and he had, so to speak, a veto on Davidson's transactions; and it would be seen that he participated in the losses as well as the profits. If the interest was taken on £300, it would be a small sum in comparison with what half the property amounted to. Counsel submitted that so long as the agreement existed there was a partnership between the parties.

Mr. Searle said the point had never yet crisply come up before the Court. He submitted the Court had really to look at the agreement itself to gather from the terms of the agreement what was intended. The creditors knew nothing of Auret, and counsel urged that there was strong evidence in the terms of the agreement that it was merely a loan and not a partnership. There were the terms, "Davidson as owner," "the money to be utilised by him." Davidson was more like the agent of Auret than his partner, although counsel would not even admit that. According to the de-

cision in the case of *Watermeyer and Kindell's Trustees* (3 Mens. 424) the Magistrate was clearly right in holding that there was no partnership.

Cur. Adv. Vult.

Postea (January 24).

De Villiers, C.J.: This is an application by the trustee of the insolvent estate of W. M. Davison for an order expunging a claim for £439, which Auret, the respondent, has proved against the estate or otherwise, postponing the payment of such claim, until all other claims against the same estate shall have been satisfied, on the ground that the respondent was a partner of the insolvent. No contract, purporting to be a contract of partnership, was entered into, but the applicant relies upon a written agreement made on the 7th of February, 1903, as virtually establishing such a partnership. The material portions of the agreement are the following: "The said Auret has advanced the sum of £300 to the said Davison, who, as owner of the tailoring business heretofore carried on in Queen's Town by John Ryan, acknowledged to have received the amount which is to be utilised by him for the purposes of the said business. The said Davison shall manage and carry on the said business, and keep proper books of account. In consideration of the said sum so advanced by the said Auret, the said Davison shall pay for, and, instead of interest, one-half of the net profits of the said business, such a division of the profits to be made every year, reckoned as from the 1st February, 1903. The said Auret, or his lawful nominee, shall at all reasonable times have free access to the books of the said business. As soon as the said Davison shall assume personal supervision of the said business, and for that purpose leave his present situation, then and from such date, he shall be entitled to £20 a month, which sum shall be deducted from the gross profits of the business before a division is made. The said Davison shall have the option of repaying the said sum of £300 on the 31st January, 1906, and on such payment the share in half of the profits of the said Auret shall cease, it being conditioned that the said Auret shall be entitled to such half-share of the profits until the amount be paid him." The respondent's counsel contends that this agreement amounts to no more than a loan by Auret to Davison, but it is remarkable that no time is fixed for the repayment of the £300 advanced by Auret. The money was advanced with the distinct object of being utilised for the purposes of a business to be carried on by Davison for the joint profit of himself and Auret, and the option is left to Davison of repaying the money on the 31st of January, 1906. Whether Davison paid the money on that date, or postponed the payment until a later date, Auret was to be entitled to his half share of the profits until the date of

actual payment. The duties were imposed on Davison of managing and carrying on the business, and keeping proper books of account, in consideration of which he was to receive an allowance of £20 a month, to be deducted from the gross profits, and the right was reserved to Auret or his nominee to have free access to the books of the said business. Upon the evidence before the Court, the contract thus entered into would appear to be one of partnership, and not of loan. If a loan had been intended, there surely would have been some provision enabling the lender to recover back the amount of his loan. Supposing that Auret became dissatisfied with the manner in which the business was carried on, would he be bound to wait until Davison chose to repay the loan before he could lay claim to the capital sum advanced by him? Unless he were a partner with the ordinary right to claim a dissolution after due notice, he would in such a case seem to have no remedy under the agreement. Supposing, further, that without any fault on the part of Davison, heavy losses had been sustained in the business, with the result that the whole of the capital advanced by Auret had been lost, would Auret have been entitled to claim repayment of the capital? The agreement confers no such right on him in express terms, and no such right can be fairly inferred from the terms of the agreement. The decision of this Court in the case of *Watermeyer v. Kerdell's Trustees* (3, Menz., 424), has been relied upon by the respondent's counsel as negating the existence of a partnership in the present case, but no definite rule was there laid down by the majority of the Court which can assist in the determination of the present case. The complicated terms of that agreement differed very materially from the simple terms of the agreement now under consideration, which may be construed by the aid of the elementary principles of the law of partnership. What, then, is meant by a partnership. According to Voet (17, 2, 1), it is *contractus super re honesta de lucri et damni communione*. Literally translated, this means that it is a "contract concerning an honest transaction for the sharing of profit and loss," but freely translated, the author's meaning seems to be that it is "an agreement between two or more persons for the purpose of carrying on a lawful undertaking, and dividing its profits and losses between them." The definition given by Pothier (Partnership), and followed by Van der Linden (Institutes, B 4, ch. 1, 11), is that "partnership is a contract by which two or more persons put or engage to put something in common in order to make therefrom in common an honest profit with the mutual obligation of accounting to each other." The difference between the two definitions is that Voet says nothing about putting anything into a common stock, or about the

parties having to account to each other, and that Pothier says nothing about sharing of losses, but when they proceed to enlarge upon their respective definitions there is no substantial difference between them. They are agreed that either labour or effects or both may be contributed by the partners, that he who carries on the business must render an account of his administration, and that generally each of the partners must bear the same proportion of the losses of the partnership as he ought to have of its profits, if it is prosperous. Voet (17, 2, 8) admits that this last rule may be evaded by a special stipulation to the contrary, and that it may be legally agreed that one of the partners shall have a share of the profit, and not bear any part of the loss, and he adds that such an agreement would not transgress his requirement of community of loss, because there can be no profit until the loss has been deducted. Whether this explanation be perfectly satisfactory or not, it is clear that he did not intend, under his definition of partnership, to exclude cases where community of loss is not expressly agreed upon. The main test in every case is whether there is an agreement to share profits, unaccompanied by circumstances showing that partnership was intended to be excluded. In the present case, the word loan is not used at all in the written agreement, but even if it had been so used, the Court, as stated in *Treasurer-General v. Lippert* (1 Juta, 302; 2 Juta, 173), would look to the real transaction between the parties, and not to what they have called it. The tendency at the present day would be to designate an advance for the purposes of a partnership business as a loan, in the same way as under the strict laws against usury, the tendency formerly was to disguise a loan at usurious interest as a partnership. I do not say that the disguise was fraudulently adopted—for the statement in Davison's affidavit may be correct that the reason for Auret's name not being disclosed was because of his being in the Civil Service—but I do say that the agreement includes the essential requisites of a partnership, and that, unless the actual dealings between the parties rebut the presumption arising out of the terms of the agreement, the Court will have to hold that a partnership did exist at the date of sequestration. An opportunity will, however, be given to both parties to produce further evidence on this point before the Resident Magistrate. I have made no reference to the English law, because the case must, of course, be decided under our law; but it is satisfactory to find that there is no substantial difference in the tests to be applied in order to ascertain whether a partnership exists or not. In the case of *Mollivo v. Court of Wards* (4 L.R.P.C., 419), it was held by the Privy Council that, although the right

to participate in the profits of a trade is a strong test of partnership, and there may be cases where, from such perception alone, it may as a presumption, not of law, but of fact, be enforced; yet, whether that relation does or does not exist, must depend on the real intention and contract of the parties. In that case, a lengthy agreement in writing was relied upon to establish the partnership, but the Judicial Committee, looking at the whole scope of the agreement, came to the conclusion that the primary object was to give security to the alleged partner, an Indian Rajah, as a creditor of the persons, Watsons by name, who carried on the trade, and not to make him a partner. The agreement differed in several particulars from the present one, the most important being that all available proceeds had to be handed to the Rajah as received by the Watsons for the purpose of extinguishing the debt due to him. The Rajah did not advance a fixed sum, as was done by Auret, and as is usual in ordinary partnerships, but he stipulated that for such advances indefinite in amount as he had already made, and should from time to time make, he should have certain securities, the chief security being the right to recoup himself out of the proceeds, as they were handed to him. The option was certainly not left to the Watsons, as it was to Auret, of paying the advances when it suited them to put an end to the agreement for sharing the profits of the business. "The Watsons," said their lordships, "evidently wished the Rajah to continue his advances, and for that purpose were willing to give him the largest security they could offer; but a partnership was not contemplated, and the agreement is really founded on the assumption not of community of benefit, but of opposition of interests." In the subsequent case of *Pooley v. Driver* (L.R. 5, Ch. Div. 458), Jessel, M.R., held that in the absence of something in the contract to show a contrary intention, the right to share profits, as profits, constitutes, according to English law, a partnership. The agreement in that case contained a number of ingenious provisions to enable the dormant partner to get a share of the profits, without contributing to the losses, but the general tenour of the Master of the Rolls' instructive judgment satisfies me that he would have held that an agreement like the one in question creates a partnership, unless some other relation could be shown from the surrounding circumstances. Both these English cases were referred to in the judgments of the judges in the Transvaal case of *Anderson v. Royce* (2, Off. Reports, 266), where it was held that the mere fact that the lender stipulates for a share in the profits acquired with the money lent, instead of interest, does not make him a partner of the borrower. It was there sought to have a judgment which had

been obtained against the borrower and his known partner declared executable as against the lender, on the ground that he was a partner; but at the most he would have been an anonymous partner against whom the creditors could not have proceeded in respect of debts incurred in the name of someone else. The Court there held that a partnership did not exist, but there was no written agreement, as there is in the present case, containing provisions which support the presumption of partnership arising out of a participation in profits. At the date of the sequestration of Davison's estate, the agreement was still running and in force. The claim of £439 consists mainly of the capital sum of £300 advanced, and the half share of profits, which, according to a statement submitted by Davison to the respondent in March, 1904, had up to that date been earned. In May, 1904, the respondent issued a summons against Davison for the amount of such capital and profits, and judgment was accordingly given in default of appearance on the part of Davison. In July, 1904, Davison's estate was sequestrated on his petition, which stated that his liabilities were £1,105 and his assets £822; but the applicant, as trustee, is doubtful whether the assets will realise one-fourth of the amount set forth in the schedules. The Court has no information before it as to whether the account rendered by Davison in March, 1904, which showed a profit of £283, was a correct statement, or whether, at the date of the sequestration, the tailoring business had resulted in a profit or in a loss. Nor does it appear from the affidavits whether Davison advanced any capital in addition to contributing his time and labour to the management and supervision of the business. If, after allowing for liabilities lawfully incurred by Davison on behalf of the business there had, at the date of sequestration, been an actual loss, absorbing the capital advanced by Auret, and the profits alleged to have been made up to March, there is no express provision in the agreement entitling Auret to claim more than the amount of business assets left in Davison's hands after deduction of the remaining business liabilities. It is clear that Auret can have no greater claim against the insolvent estate than he would have had against Davison if, in the absence of insolvency, Auret had in July sought to enforce his judgment debt. From the amount of that debt would have been deducted any lawful debt capable of being pleaded in compensation (*Voet*, 16, 2, 2). It will be necessary, therefore, before finally deciding the case, to remit the same to the Resident Magistrate, for further proof in terms of the last proviso to the 27th section of the Insolvent ordinance. Before stating the terms of the reference, however, I have to make a few general observations upon some of the arguments

Ex parte VAN WYK AND OTHERS.

Mr. W. P. Buchanan applied for leave on behalf of the petitioner's to sell certain property vested in the Dutch Reformed Church, at Adelaide. The Church owned the square on which the church was built. At a Congregational meeting of the Church, held on June 18, the consistory was instructed to sell a number of erven on the Church-square and utilise the funds for the church. The Registrar wanted an order of Court, because the ground in question was marked on the diagram as a square.

De Villiers, C.J., said he would grant a rule calling on all concerned to show cause on the 1st February why an order should not be made as prayed, the rule to be published twice in a Dutch newspaper circulating in the district, and twice in an English paper circulating in the district.

Ex parte IMPEY AND ANOTHER.

Mr. Pyemont moved for an order directing the winding up of the Amoy Brick Syndicate, a company which was unable to pay its debts, and which was indebted to the estate of Emile van Heerden in a mortgage bond for £1,000, and to petitioner, who was chairman, in his private capacity, in £314. The Divisional Council valuation of the farm held by the syndicate was £1,800, and the liabilities amounted to £1,979. It was impossible to get a quorum of shareholders together. It was to the best interests of the company that official liquidators should be appointed, and the names of Harry Gibson and E. Syfret had been suggested, with Fairbridge, Arderne and Lawton as attorneys.

Judgment as prayed, the gentlemen mentioned being appointed to act.

NEEDHAM V. NEEDHAM.

Mr. Sutton moved on behalf of the petitioner, Mary Ann Needham, of Observatory-road, for alimony. The parties were married in community of property in 1893, and there were four children of the marriage. Petitioner's attorneys, acting on instructions, wrote to the respondent suggesting that a private separation *a mensa et thoro* be arrived at, as it was absolutely impossible to live with the respondent.

De Villiers, C.J., granted an order for the payment of £25 to the applicant's attorneys, to enable the applicant to proceed with the action, the sum of £8 to be paid to the applicant per month towards the maintenance of her children, pending an action, costs to stand over.

Ex parte ROBERTSON AND ANOTHER.

Mr. Close moved for an order sanctioning a certain compromise with certain creditors of a company to whom the petitioners were official liquidators. Granted.

WILSON AND CATHCART V. YOUNG.

Mr. P. Jones moved for an order calling on the defendant to show cause why an order should not be granted for the attachment of the person of respondent for contempt of Court. On the 15th December the respondent was ordered to deliver up certain household premises at Observatory, but he had failed to do so. The respondent forcibly took possession of the premises, and the Court ordered him to restore possession.

The respondent appeared in person, and pointed out that he had trouble in getting rid of his tenant. The applicant, Wilson had refused to give him specifications to be examined by a qualified man. The plumbing work had to be redone. The job was not finished until it had been passed by an architect and the engineer at Mowbray.

The respondent was ordered to give up possession in terms of the order of Court of the 15th December, on or before 28th February, and in the meantime the applicants to proceed with all despatch with their action to recover the amount claimed, costs of the application to abide the result of the action.

DRUMMOND V JONES.

This was an application for leave to appeal to the Supreme Court against a judgment of Justice Lange, in the High Court of Griqualand West. Judgment was reserved, and by the time it was delivered applicant was away on business, and the time for appeal had elapsed. Applicant (who appeared in person) proceeded to relate several criminal charges that had been brought against him, each of which had been withdrawn, and the action on behalf of the police accounted for the delay in bringing the appeal. He based his application on the Act for the Better Administration of Justice. Applicant then proceeded to read a petition which he was about to forward to His Majesty the King, for protection against the unremitting persecution of the Cape Police. In two of the best years of his life he had been worried by the police, and he prayed of His Majesty for protection, so that he could go through the Colony as a loyal British subject without fear.

[De Villiers, C.J.: Have you paid the amount of the judgment?]

Applicant: I have not been asked for it.

made applicable to a case like the present, but that could only be done by treating the words "if insolvent" as a misprint for "if solvent." The proviso would then read thus: "Provided, however, that no partner, if solvent, and no trustee of the insolvent estate of any partner shall under any circumstances rank for the amount of any such claim for contribution upon the insolvent estate of any other partner in competition or concurrence with any of the creditors of the company claiming upon any such last-mentioned estate, which creditors are hereby declared to be entitled to be paid in preference and priority to any such partner or trustee." This is probably what the Legislature intended to enact, and I find that in the fair copy of the Ordinance filed in the Registrar's office the first syllable in the word "insolvent" has been struck through in ink, but there are no initials or anything else to show that the amendment was made by authority of the legislature. The respondent is solvent, and would not be affected by the proviso as it appears in the Statute Book, and the adoption of the amendment suggested by me would not materially affect the decision of the present case. As to the last proviso to the 34th section it only adds to the obscurity of the section and offers no assistance in the elucidation of the law or in the decision of the present case.

The Court will remit the case to the Resident Magistrate with directions to obtain: (1) Production of all correspondence that may have passed between Auret and Davison relative to the tailoring business carried on by the latter; (2) any relevant oral evidence that may be tendered on either side upon the questions at issue with liberty to the opposing party to cross-examine the witnesses; (3) production of the statement submitted by Davison in March, 1904, and showing an alleged profit of £283 11s. 6d.; (4) an account prepared by some competent person, and sworn to by him showing (a) the capital, if any, paid into the business by Davison; (b) the actual amount and dates of advances made by Auret; (c) the sums, if any, obtained from the business by Auret, and the sums drawn by Davison as salary, as his share of the profits and for his private purposes; (d) the profits and losses made and incurred between the date of the agreement and the date of sequestration; (e) the value of the assets of the business and the value of assets not belonging to the business at the date of sequestration; (f) the amount of the liabilities of the business, and the amount of the other liabilities of Davison at the date of sequestration; and (g) generally the balance of either profit or loss of the business at the date of sequestration. The information thus obtained will be transmitted to the Registrar of this

Court, and the costs of this application will stand over.

[Applicant's Attorneys: Silberbauer, Wahl and Fuller; Respondents' Attorneys: Walker and Jacobsohn.]

DUTCH REFORMED CHURCH, CAPE TOWN V. CAPE TOWN COUNCIL.

Mr. M. de Villiers was for the applicants, and Mr. Close for the respondents.

Mr. M. de Villiers moved to have a certain award in the expropriation of certain property at the instance of the respondents made a rule of Court, with costs. Mr. Close appeared to consent.

Award made a Rule of Court, with costs.

Ex parte NEL.

Mr. Du Toit moved for the appointment of two commissioners, one at Robertson and one at Cape Town, to take the evidence of witnesses in the insolvent estate of Woolf Cohen, of Robertson. Counsel suggested the Resident Magistrate of Robertson as one.

Application granted, the Resident Magistrate to take evidence at Robertson, and Mr. P. Jones to act at Cape Town.

SONDOM V. SONDOM.

Mr. J. E. R. de Villiers moved for leave to sue the respondent, petitioner's wife, by edictal citation, for divorce *in forma pauperis*. The parties were married in Johannesburg, in November, 1895, in community of property. In 1896, the respondent deserted the petitioner, took up her abode with another man, and in 1902 gave birth to a child, of which the applicant was not the father.

De Villiers, C.J., said he would first grant a rule calling on the respondent to show cause why the plaintiff should not be allowed to sue *in forma pauperis*, returnable February 1, personal service to be effected.

Ex parte OOSTHUIZEN.

Mr. P. Jones moved for an order authorising the transfer of certain property. The matter had been before the Master, and his report was favourable. In the joint will of petitioner's parents, a farm, 2,363 morgen, at Aliwal North, was bequeathed specially to the respondent, provided he paid into the estate £1,000 within one year of the death of his father.

Granted

MARAIN V. GELDENHUYTS.

Mr. Sutton moved for provisional sentence on two mortgage bonds, and that the property be declared executable.

Granted.

GRAAFF V. KALWERISKY AND OTHERS.

Mr. Van Zyl moved for provisional sentence on a mortgage bond for £2,500, with interest at 6 per cent. from 1st July, 1904, and that the property be declared executable.

Granted.

GRAAFF V. GOW AND OTHERS.

Mr. Van Zyl moved for provisional sentence for £3,300, less £750, paid, due on a mortgage bond, with 6 per cent. interest from 1st July, 1904, and that the property be declared executable.

Granted against the defendants in their capacity as trustees.

WOODHEAD, PLANT AND CO. V. VAN REENEN.

Mr. P. Jones moved for judgment on a promissory note for £62 4s. 3d., with interest and costs.

Granted.

COLONIAL GOVERNMENT V. VAN RENSBURG.

Mr. P. Jones moved for provisional sentence for interest on a bond for £135 3s. 4d. and £14 8s., with costs.

Granted.

MENNE V. VAN DER LINDE.

Mr. Gutsche moved for provisional sentence on a promissory note for £415 14s. 8d., with interest and costs.

His Lordship said a consent to judgment had been put in.

Judgment was given in terms of the consent.

BLACK V. HURWITZ.

Mr. Pyemont moved for provisional sentence on a promissory note for £30, with interest and costs.

The defendant appeared in court, and said he never received value for the amount.

His Lordship instructed him to put his defence on affidavit, and the case to come on to-morrow morning.

Postea (February 16th).

Defendant appeared in person.

An affidavit had been filed by the defendant stating that he engaged the plaintiff to prepare plans of certain building, and it was agreed that the

plaintiff should get the plans passed and approved by the Town Council. The Council only passed the plans provisionally. He verily believed the plans had not been finally passed by the Council. He said that plaintiff had since agreed to accept a lump sum of £80. He gave plaintiff £50, and a promissory note for £30. Until the plans were finally passed, he could not proceed with the building, and he was not prepared to pay the promissory note.

An answering affidavit by the plaintiff, Wm. Black, said that there was no special stipulation in their terms that the plans should be approved by the City Council. The defendant knew that the plans were passed provisionally, and agreed to the conditions specified by the Council as to the frontage in Sir Lowry-road, and Dorset-street. The plans had been returned to deponent duly approved, subject to the defendant carrying out his undertaking with the Council. Defendant subsequently said that he had found a difficulty in the financing of the scheme, and that he did not propose to go on with the building. Deponent believed that defendant wished to escape his liability for the preparation of the plans. Further affidavits by Owen C. Ludolph, employed by the plaintiff to prepare the plans, and Cecil E. Bradfield, of plaintiff's attorneys, were read by counsel.

An answering affidavit by the defendant was read.

Buchanan, J.: In this case the plaintiff asks for provisional sentence on a promissory note. The defendant says that this promissory note was given in part payment for preparing certain plans, the plaintiff being an architect, and that these plans were to be submitted to the Town Council, and approved by them. There is a great deal of force in the defendant's contention that an architect is not to be paid for plans which are futile and useless, but they must be such plans as would be adopted, and some benefit would accrue to the person, who has the plans made. It is common cause that these plans were prepared and submitted to the Town Council, and, according to Mr. Black's and his assistant's affidavits, they were approved by the Town Council, and the only question in dispute was the question of blocking the building on the land. The plaintiff has done his work. He has prepared plans, they are plans which have been approved, and the only remaining question is whether the defendant's plans are in the possession of the defendant or the plaintiff. The document produced by plaintiff supports his statement that he handed the plans to defendant, and the defendant has nothing to support his statement that he handed back the plans to plaintiff. Provisional sentence will be granted as prayed. Mr. Hurwitz, if he likes, may go into the principal case,

[Le Valliers, C.J.: Could you find security?]

I think I could manage that.

De Villiers, C.J., said the applicant would have leave to appeal to the Supreme Court if within three weeks from this date he gave security to the Registrar for the payment of the amount of the judgment of the High Court, and the costs awarded by that judgment.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

ADMISSIONS. { 1905.
Feb. 1st.

Mr. P. Jones moved for the admission of Frederick Glanville Stapleton as an advocate.

Application granted, and oath administered.

Mr. J. E. R. de Villiers moved for the admission of Arthur Edward Carlisle as an advocate.

Application granted, and oath administered.

Mr. Gardiner moved for the admission of Arthur Hallam Davidson as an attorney-at-law. Mr. Upington appeared to oppose on behalf of the Law Society.

Mr. Gardiner said the matter had previously been before the Court, when it was pointed out by the Law Society that the applicant had only been admitted in Scotland as a law agent in the Sheriff's Court, and certain allegations were made against him by the Law Society that he held himself out to be an attorney of the Supreme Court before he was admitted. There was now a certificate from Scotland that he was still on the roll of law agents. The application would now be for admission to the Circuit Court.

Mr. Uppington read from the report of Mr. Justice Hopley's judgment, from which it would appear that the applicant could apply for admission to the Circuit Court, but there were still allegations of unprofessional conduct against him, and there would be a chance given him of refuting the charges. Counsel then proceeded to read an affidavit made by Alexander John MacCallum, secretary to the Law Society, to the effect that the society received certain information that the applicant was either practising himself or lending his name to an unqualified man at Lady Grey. Outside the office, a sign-

PROVISIONAL ROLL.

SMITH V. LEVIN.) 1905.
) Feb. 1st.

Dr. Rainsford moved for provisional sentence on a mortgage bond for £1,500, with interest and costs, and that the property hypothecated be declared executable.

JUNKER V. JONES.

Mr. Lewis moved for provisional sentence on a mortgage bond for £1,000 with interest at 6 per cent. from July, 1904, and that the property be declared executable, with costs.

Granted.

MOORBES V. HOFFMAN.

Mr. Lewis moved for the final adjudication of the defendant's estate as insolvent.
Granted.

MARAIS V. GELDENHUYS.

Mr. Sutton moved for provisional sentence on two mortgage bonds, and that the property be declared executable.

Granted.

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been effected upon two of the defendants.

Mr. Jones said he was instructed that the third defendant was dead.
Order granted.

EILENBERG V. ABRAHAMAS.

Mr. Gutsche moved for a decree of civil imprisonment against the defendant upon an unsatisfied judgment for £135.

Defendant said that he owed the money on an accommodation bill for a third person. He could only pay £2 or £3 a month. He was a cattle dealer. He made a larger offer in December last, but received no reply from Eilenberg; he was now unable to repeat the offer. Witness lived in Lawson-street, Kimberley. He was not living at the Central Hotel. He had lost his money on the share market. He had been interested in the turf, but he had not done anything in connection with it for eleven months. He had come down from Kimberley in consequence of the summons; he had travelled second class at excursion rates.

Decree granted, execution to be suspended on payment of £5 a month, until the capital amount has been discharged, the first payment to be made on the 1st March.

MCLEOD V. WERTH.

Mr. Gardiner moved for provisional sentence on a mortgage bond for £500, with interest, the bond having become due by reason of the non-payment of interest; counsel also asked for the property hypothecated to be declared executable.

Order granted.

MURRAY AND CO. V. NIEBURG.

Mr. De Waal moved for provisional sentence on two promissory notes.

Order granted.

CELLIERS V. CUMMINGS.

Mr. Roux moved for provisional sentence on a mortgage bond for £100, with interest, the bond having become due by reason of notice given.

Order granted, subject to production of copy of notice calling up the bond.

KEER V. KAISER.

Mr. Gutsche moved for provisional sentence upon a mortgage bond for £360, with interest, the bond having become due by reason of the non-payment of interest; counsel also asked for the property hypothecated to be declared executable.

Order granted.

DISTRIBUTING SYNDICATE FOR COLD STORAGE V. ROSE.

Mr. Gutsche moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

ILLIQUID ROLL.

SOUTH AFRICAN NEWSPAPER (1905.

CO. V. STEYN. (Feb. 1st.

Mr. Du Toit moved for judgment, under Rule 319, for £10,000, with interest at 6 per cent.; also that the defendant be ordered to pay transfer, expenses, and costs, the amount having become due in terms of the declaration. Defendant had been barred from pleading.

Order granted, subject to proof of service of bar.

BARNETT V. FOTHERINGHAM.

Mr. De Waal moved for judgment, under Rule 329d, for £28 1s. 3d.

Order granted.

MARQUARD AND CO. V. GIBSON.

Mr. De Waal moved for judgment, under Rule 329d, for £207 13s. 4d., goods sold and delivered.

Order granted.

HORN V. BOULTON.

Dr. Rainsford moved for judgment, in default of plea, for £284 5s. 6d., with interest thereon from the 31st October, 1903, and for costs of suit, and asked that the claim for damages be allowed to stand over.

Order granted as prayed.

LOOKWOOD V. HEROLD BROS.

Mr. Lewis moved for judgment, under Rule 329d, for £25, rent due upon certain shops in Lockwood Buildings, Observatory.

Order granted.

ESTATE HUDSON V. SALTZMAN.

Mr. Pyemont moved for judgment, under Rule 329d, for £63, rent due, with interest *a tempore morae* and costs of suit, and for an interim interdict to be set aside.

Order granted as prayed.

THE VALUE SUPPLY CO. V. WILSON.

Mr. P. S. T. Jones moved for judgment, under Rule 329d, for £8 11s.,

work and labour done and materials supplied.

Order granted.

STEER V. WERNER.

Mr. Russell moved for judgment, under Rule 329d, for £33 17s. 7d., professional services rendered and disbursements made.

Order granted.

PEREIRA V VICTOR.

Mr. Sutton moved for judgment, under Rule 329d, for £120, money lent and advanced.

Order granted.

MALZON AND CO. V. BURFOOT.

Dr. Rainsford moved for judgment, under Rule 329d, for £100 10s., goods sold and delivered, and for return of certain trolleys or payment of their value (£80), with interest *a tempore morae* and costs.

Order granted.

SUTCLIFFE V. HIRSCHFELD.

Dr. Rainsford moved for judgment, under Rule 329d, for £33 18s., for jewellery sold and delivered, with interest *a tempore morae* and costs.

Order granted.

MYBURGH V. PORTER.

Mr. P. S. T. Jones moved for judgment, under Rule 329d, (1) for a true and correct account of all survey fees, etc., in connection with the sale of the Heatherley Estate, Claremont; (2) debate of such account; (3) payment of such sums as may be found due; and (4) costs of suit.

Buchanan, J., said that he would grant judgment for an account, to be filed within one month. The parties could then debate such account, and the Court could be moved further for such sum as might be found to be due upon debate.

SMIT AND VAN NIEKERK V. DUCKWORTH AND SMITH.

Mr. J. E. R. de Villiers moved for judgment, under Rule 329d, for £465 10s. 7d., balance due for certain goods sold, and cash lent and advanced, with interest and costs.

Order granted.

OLUIGMAN AND BERNSTEIN V. KAHN.

Mr. Roux moved for judgment, under Rule 329d, for costs, the capital sum sued for having been paid.

Order granted accordingly.

DEMPERS AND VAN RYNEVELD V. BULL.

Mr. De Waal moved for judgment, under Rule 329d, for £11 17s. 2d., less £1 paid on account since issue of summons, for professional services rendered.

Order granted.

ESTATE HITGE V. BOTHA AND OTHERS.

Mr. Alexander moved for judgment in terms of consent paper.

Mr. M. de Villiers (for the defendants) assented.

Order granted in terms of consent paper.

REHABILITATIONS.

{ 1905.
Feb. 1st.

Mr. D. Buchanan moved for the rehabilitation of Jan Hendrik Nicolaas Botha. The Master had given a certificate.

Granted.

Mr. Close moved for the rehabilitation of Stephen Green. The order was made final in January, 1895, and there was nothing unfavourable in the trustee's report.

Granted.

GENERAL MOTIONS.

BOISSON V. BOISSON.

Mr. Struben asked leave to mention this case as a matter of urgency. Leave was granted to serve the interdict by edictal citation, and the return day was fixed for the 15th February. The order was that personal service should be effected, failing which, publication in the "Government Gazette" not later than 15th January, and once in the "Daily Telegraph." Personal service could not be effected, and ten days were wasted in endeavouring to find the defendant. Publication was made in the "Daily Telegraph," and counsel would ask the Court, under the circumstances, whether it would insist on the publication in the "Government Gazette" a month before the return day.

Buchanan, J., said that under the circumstances he thought that a publication at once in the "Gazette" would be sufficient.

**TABLE BAY HARBOUR BOARD V.
MACKENZIE AND CO., LTD.**

Mr. Schreiner, K.C. (with him Mr. P. Jones), appeared for the plaintiffs, to apply for judgment in terms of the arbitrator's report. The arbitrator found that the defendants were indebted to the plaintiffs in the sum of £1,236 7s. 2d., with interest *a tempore mora*. The defendants, up to the present, had failed to give any evidence in support of their claim in reconvention.

Judgment was given in convention for £1,236 7s. 2d., with interest and costs, including the costs of hearing and the reference, with absolution from the instance with costs, in the claim in reconvention.

Ex parte **WHITE, RYAN AND CO.**

Mr. De Waal moved for the appointment of a provisional trustee in an insolvent estate, in which the goods were perishable, and in which the petitioners were large creditors. The secretary of the South African Association had been suggested as provisional trustee. Granted.

LLOYD V. LLOYD.

Mr. P. Jones moved to make absolute a rule calling on the defendant to return to the plaintiff, or show cause why a decree of divorce should not be granted. Rule made absolute.

Ex parte **STANTON.**

Mr. Russell moved to have a rule *nisi* granted under the Derelict Lands Act made absolute.

Rule made absolute.

Ex parte **GODDARD.**

Mr. Sutton moved to make absolute a rule *nisi* granted under the Derelict Lands Act.

Rule made absolute.

Ex parte **THE RIVERSDALE MUNICIPAL COUNCIL.**

Mr. Sutton moved to make absolute a rule *nisi* granted under the Derelict Lands Act.

Rule made absolute.

Ex parte **EDDIE.**

Mr. Gutsche moved to make absolute a rule *nisi* granted under the Derelict Lands Act.

Rule made absolute.

Ex parte **STANDER.**

Mr. D. Buchanan moved to make absolute a rule granted under the Derelict Lands Act.

Rule made absolute.

Ex parte **CERES MUNICIPAL COUNCIL.**

Mr. P. Jones moved to make absolute a rule granted under the Derelict Lands Act with regard to certain portions of property marked "d," "e," and "g," and to make absolute with regard to the portions "a," "b," "c," and "f," subject to certain costs being paid.

Rule made absolute generally, execution stayed for two months with regard to the latter portions.

Ex parte **VAN RENSBURG.**

Mr. D. Buchanan moved for leave to the petitioner to dispose of certain property in the division of Cradock. Petitioner was the executrix in the estate of her late husband, and she applied for leave to dispose of a certain farm, and place the proceeds out on first mortgage on immovable property in order to properly maintain the children. She did not propose to sell it at less than £2 a morgen. The Master, in his report, thought if the property could be disposed of at not less than £2 a morgen it would be to the benefit of the children.

Order granted in terms of the Master's report.

Ex parte **BOWKER.**

Mr. Close moved for an order authorising the petitioner to sign on behalf of his minor brother, to whom he acted as guardian, in the partition of certain property. The Master's report was favourable.

Order granted in terms of the Master's report.

Ex parte **DU PLESSIS AND OTHERS.**

Mr. P. Jones moved for leave to sell certain property by public auction in the interest of certain minors. The Master's report was favourable.

Order granted on condition that the minors' shares be paid into the Guardian Fund.

BYRNE V. BYRNE.

Mr. Pyemont moved for an order calling on the respondent to show cause why a decree of divorce should not be granted. It was not found possible to effect personal service, and the notice had been published once in the "Government Gazette," and twice in a Dub-

lin newspaper. The defendant was not heard of since 1900, when he deserted his wife in the west of Ireland.

A decree of restitution granted, the defendant to return to or receive the plaintiff on or before 1st May, failing which a rule nisi to be granted, returnable 13th May, calling on him to show cause why a decree of divorce should not be granted, and why the plaintiff should not have custody of the children. The same publication as before.

Ex parte NGAMBULA.

Mr. P. Jones moved for an order authorising the Registrar at King William's Town to pass transfer of certain property which the petitioner as sole executrix had purchased from the estate of her late husband at a public auction.

Granted.

Ex parte JACOBS.

Mr. Struben moved for leave to pass transfer of certain property in the estate of his late wife, of which he was executor dative. Petitioner had purchased the property, which was in the division of Cradock, at public auction for about £1,600.

Buchanan, J., directed that further evidence be produced as to the value of the property. The matter would have to stand over for further evidence of the value. He thought the auctioneer's affidavit was very inadequate.

Ex parte PALMER.

Mr. Gardiner moved for an order directing the election accounts of Mr. Du Preez, agent of the Hon. W. P. Schreiner, K.C., in connection with the Caledon election, should be re-opened to enable petitioner to file an account for £7, charges for advertising in the "South African Review." The petitioner stated that he had inadvertently failed to file the account within the period stipulated by the Act. A further affidavit was read from the election agent, assenting to the application, and acknowledging indebtedness to the petitioner as alleged.

Mr. Searle, K.C., on behalf of Mr. Schreiner, said the latter wished to say that he had been unaware of this account. It was out of his power now to pay the account without an order of Court. Mr. Schreiner was quite willing to pay the account.

Order granted, authorising the accounts to be re-opened, and giving leave for the payment in question to be made.

Ex parte VAN STRAATEN.

Dr. Rainsford moved for an order confirming the sale of certain property,

in the district of Barkly East. Petitioner was desirous of liquidating the estate of his deceased parents, and had purchased the property for £650 at public auction.

Order granted as prayed.

KEATING AND CO. V. FILLIS.

Mr. Struben moved for the rule nisi to be made absolute, requiring the respondent to show cause why permission should not be given to sue by edictal citation, and to attach certain goods to found jurisdiction. Counsel said that service was originally effected on respondent's mother-in-law, but subsequent to that date the respondent's wife had come to the applicants' attorneys, and had written a letter acknowledging the debt. She had paid £50 and promised that the balance would be handed in as soon as possible. Mrs. Fillis was managing the defendant's business in this country, and counsel asked for leave to applicants to effect service upon her. The respondent appeared to be touring with a certain show in America, after having been at the St. Louis Exhibition. Counsel understood that it was Mrs. Fillis's intention to shortly leave this country.

Buchanan, J., asked where the respondent's residence was?

Mr. Struben said he did not think the respondent had a domicile. He seemed to be peripatetic.

Buchanan, J., said that the rule would be made absolute, pending an action to be brought by petitioners. If petitioner found any difficulty in serving process, they could again move the Court.

FLETCHER'S WHOLESALE V. VIVIERS.

Mr. Struben moved for the rule nisi to be made absolute, calling on the respondent to show cause why petitioners should not be allowed to sell his inheritance under his father's will, subject to certain life interest.

Rule made absolute.

Ex parte BUIGWA.

Mr. Roux moved for an order authorising petitioner to mortgage certain property in which minors were interested for the sum of £300.

Order granted in terms of Master's report.

GACULI V. DICKESON.

Mr. J. E. R. de Villiers moved for the discharge of certain notice of appeal given in July last from a judgment of the Magistrate of Tabankulu, by reason

of the respondent's failure to prosecute the appeal within a reasonable time.

Ordered to stand over for production of proof of service on the respondent.

SHAW V. O'SULLIVAN.

Mr. J. E. R. de Villiers moved for a certain rule *nisi* to be made absolute.

Mr. Gardiner consented to the application, but said that he wished the matter of costs to stand over for the decision of Court upon the action being heard.

Rule made absolute, question of costs to stand pending action to be brought by the respondent.

Ex parte REDELINGHUYLS.

Mr. Roux moved for a rule to be made absolute authorising the registration of certain property.

Order granted.

Ex parte CLOSE.

Dr. Rainsford moved for an order authorising the issue of certain copy of deed of transfer. Petitioner moved in his capacity of trustee in the Estate Wood.

Order granted.

TURNBULL V. TURNBULL.

Dr. Greer moved on behalf of Magdalena Jacoba Turnbull for leave to sue by edictal citation. The petitioner desired to sue her husband for restitution of conjugal rights, failing which, divorce. The respondent deserted petitioner in 1884, and his present whereabouts were unknown.

Leave granted, rule to be returnable on the 12th March, personal service to be effected, failing which, publication once in "Government Gazette" and once in the "Diamond-fields Advertiser" (Kimberley).

HARRIS LEE AND CO. V. TORQUE ELECTRIC LIGHTING CO.

Dr. Greer moved for an order restraining the Torque Electric Lighting Co., the Trades, Markets and Exhibition Co., or any others, from in any way dealing with certain parts of an accumulator lying at the Exhibition, Green Point, pending an action to be brought by the petitioners' principals against the said Torque Electric Lighting Co. A lengthy affidavit was read by counsel, in which it was stated that the respondents, the Torque Co., had undertaken to fix the accumulator for electric lighting purposes; that they

only had a portion of the accumulator removed to the Exhibition; that the remainder was lying in cases at the King's Warehouse; that the Torque Co. was in financial difficulties; and that they could not be traced.

Buchanan, J., said that he did not see how he could make the order against the Trades, Markets, and Exhibition Co. An order would be granted as prayed against the Torque Co.

Ex parte ARONSTEIN.

Mr. Gardiner moved for the appointment of a certain trustee in the estate of Benno Maisel, which had been surrendered at Port Elizabeth. The Magistrate at the meeting of Maisel's creditors refused to allow the petitioner's representative to vote, as he had not a legal power of attorney. The proceedings were now at a standstill in the insolvency.

Order granted authorising the Master to call another meeting of creditors for the appointment of a trustee. His Lordship added that if the insolvent was still being detained in gaol, it was time steps were taken to obtain his release. He understood that Maisel had already made an application for his release, but he was without means, and nobody appeared for him.

Mr. Gardiner said that he would have the remark conveyed to his client, upon whose instance the insolvent had been detained.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

PROVISIONAL ROLL.

PRICE V. FUTTER AND { 1905.
OTHERS. { Feb. 2nd.

Mr. Roux moved for the provisional order for the sequestration of the defendants' estate to be made final.

Order granted.

PEACOCK BROS. V. CANTOR.

Mr. Roux moved for the provisional order for the sequestration of the defendant's estate to be made final.

Order granted.

PICCARD AND FREE V. MULLER.

Mr. P. S. T. Jones moved for the provisional order of sequestration to be made final.

Order granted.

JENNER V. SCOTT.

Mr. Pyemont moved for provisional sentence on a mortgage bond for £900, with interest, the bond having become due by reason of the non-payment of interest; counsel also asked for the property specially hypothecated to be declared executable.

Order granted.

JACOBSON V. BOTHA.

Mr. J. E. R. de Villiers moved for the provisional order for the sequestration of the defendant's estate to be made final.

Order granted.

LIQUIDATORS OF SEDGWICK AND CO. V. NOORDEN.

Mr. Struben applied for the provisional order of sequestration to be discharged.

Provisional order discharged.

ILLIQUID ROLL.

ROSS V. COCHRANE AND { 1905.
FITT. { Feb. 2nd.

Mr. McGregor moved for judgment under Rule 319, in default of plea, for £700, and for interest on a sum of £2,000.

Ordered to stand over till later in the day.

Later in the day, Mr. McGregor said he found that the necessary notices were in order, and he repeated the application. He now moved for judgment in terms of the declaration for payment by the defendants jointly and severally of £700, together with interest on the sum of £2,000 from the 10th August, 1903, plaintiff tendering transfer in due and customary form, at the defendants' expense, of the ground on payment of the said amount and deposit of first mortgage bond for the unpaid balance.

Order granted.

FEDERAL SUPPLY AND COLD STORAGE
V. FLEMING.

Mr. Russell moved for judgment, under Rule 329d, for £124 ls., goods sold and delivered, with interest and costs.

Order granted.

GENERAL MOTIONS.

CHRIST V. CHRIST. { 1905.
{ Feb. 2nd.

Dr. Greer moved for the rule nisi to be made absolute, requiring the defendant to contribute alimony, and to deposit a certain sum to enable petitioner to institute action for divorce.

Mr. Burton read an affidavit by the respondent, in which he referred the Court to the affidavits filed in a similar application brought by the petitioner in 1901. He said that the cause was identical, viz., the excessive use by the applicant of intoxicants. He then paid the money, but the applicant did not proceed with the action. He denied that he had threatened his wife or turned his daughter out of the house. He also repudiated the charges of undue familiarity with another woman. His house was always open to his wife and daughter. He believed that no action would be brought now even if he deposited the money, and said that the application was simply brought for the purpose of vexation.

Dr. Greer said the plaintiff's statement was that she agreed on the former occasion to return to the respondent at his request, and to condone his cruel treatment of her in the past. There was also corroborative evidence of the undue familiarity of respondent with another woman.

Buchanan, J., said that, looking at the previous application, he did not think this was a case in which alimony should be ordered to be paid. There would be no order on that part of the case. On the other part of the application, the respondent would be ordered to pay £10 upon issue of summons, and a further sum of £15 if the case were set down for trial, costs to be costs in the case.

FOURIE V. FOURIE.

Mr. Burton moved for petitioner for leave to sue by edictal citation for a decree of divorce from his wife on the ground of her adultery with one Jordaan (late of the Orange River Colony), who had been sheltered at his farm during sickness. The parties were married at Knysna, and petitioner was now farming in the district of Uniondale. Respondent's whereabouts could not be traced.

Leave to sue granted, rule to be returnable on the 10th April, personal service to be effected if possible, failing which publication once in the "Government Gazette," the "Graaff-Reinet Advertiser," and the "Friend" (Bloemfontein), copies of rule to be served on the parents of the respondent.

DIEPRAEM V. CLOETE.

Removal of trial—*Peregrinus*—
Security for costs.

The Court refused the application of a defendant, a peregrinus, to remove a trial, as he had not given security for costs.

Mr. Gardiner moved, on behalf of the defendant in the suit (*Diepraem*), for leave to remove the cause now pending in the Supreme Court to the next Circuit Court, at Aliwal North. The applicant, who was now at Ficksburg, Orange River Colony, said that he could not possibly bring his witnesses and come to Cape Town by the 10th inst. He believed all the witnesses resided in or near Aliwal North, where the cause of action arose. The expense of coming to Cape Town for the case was really too great for him to bear.

Mr. McGregor read an affidavit by the respondent, stating that the respondent had given no security for the costs of this action, and that applicant's attorney had been apprised of the fact that a preliminary objection on the ground that there was no security for costs would be taken by the respondent at the hearing of the application. He was satisfied that any further delay in hearing the case would imperil the plaintiff's chances of obtaining his money if the applicant was a *peregrinus*. Counsel read a considerable body of correspondence which had passed between the parties. He submitted that the applicant could not be heard until he had given security for costs, and cited the case of *Brearley v. Faure, Van Eyk and Co.* (15 C.T.R., 20).

Mr. Gardiner (replying to his lordship) said that he had had no instructions as to giving security for costs. He pointed out, however, that the applicant was the defendant in the suit.

Buchanan, J., said that he would hear the application.

Mr. Gardiner contended that the balance of convenience would be wholly in favour of hearing the case on circuit.

Without calling on Mr. McGregor,

Buchanan, J.: Last month, for the first time, the defendant's attorney suggested that the case should be returned to Aliwal North. If defendant had still been a resident in that district, there might have been a good deal to say in favour of the application, but he has removed from the Colony altogether, and in his absence from the Colony, and the refusal to give security, I cannot, on the information before me, give an order. The application will be refused with costs.

Ex parte ELSBY.

This was an application to have the respondent, John Joseph Elshy, declared of unsound mind, and to have a curator appointed of his person and property. Mr. Struben was for the petitioner; Mr. Lewis appeared on behalf of the *curator ad litem*.

Harriet Elshy, wife of the respondent, said that her husband had been removed to the Asylum last year on account of his unsound mind. Witness desired to be appointed curator of her husband.

Mr. Lewis said that he had visited the respondent, who was quite unfit to manage his own affairs. He did not oppose the application.

Dr. Cox also gave evidence as to the condition of the respondent, who was admitted to the Old Somerset Hospital, under the name of Elsburg. Respondent was certified as insane on the 29th December; he was helpless both mentally and physically, and would have to be detained in a hospital.

Order granted, declaring the respondent to be insane and incapable of managing his affairs, and appointing Mrs. Harriet Elshy curator of his property, and Dr. Cox curator of his person, costs to come out of the joint estate.

Ex parte LIGHTFOOT.

Mr. Searle, K.C., moved for the appointment of a curator of the property of Eleanor Gertrud Lightfoot.

Usual order granted, summons to be returnable on the 9th inst., and Mr. P. S. T. Jones to be *curator ad litem*.

Ex parte MACKINNON.

Mr. Gutsche moved for an order authorising the amendment of certain deeds deposited in the debt registry. The petitioner's name was erroneously inscribed on the deeds as John Mackinnon, and he desired to make an alteration, to comply with the requirements of the Registrar.

Buchanan, J., said that the Court must have the consent of the bondholders before any alteration of the deeds could be sanctioned. No order would be granted at the present stage.

CHORITZ V. SHOOLMAN.

Mr. Alexander moved for an order as to the service of certain process. Defendant had been prosecuted on a criminal charge, and committed to the Criminal Sessions, but he had disappeared before the trial, and his bail had been estreated. Petitioner asked for an order for substituted service upon the defendant.

Leave to sue by substituted service granted, service to be effected at the last

place of abode and business of the defendant; and rule to be published once in the "Government Gazette," and once in the "Cape Times."

Ex parte THE CONSISTORY OF THE ADELAIDE DUTCH REFORMED CHURCH.

Mr. Gardiner moved for a rule *nisi* to be made absolute, authorising the sale of certain church property in the Square, Adelaide.

Rule *nisi* made absolute.

Ex parte DRURY.

Mr. P. S. T. Jones moved for leave to execute a certain mortgage bond, for the purpose of discharging liabilities on a business in the estate. It was stated that the heirs were maintained by the profits on the business, which was said to be a flourishing one. Two of the heirs, now majors, consented. The Master reported that no account had been filed in the estate, and he had no information.

The matter was referred to the Master to report as to whether the bond would be in the interests of the minors.

THE MASTER V. PALMER.

Mr. Howel Jones applied for the attachment of the respondent for contempt of Court. The respondent was trustee in the insolvent estate of Edward Edwin Alexander, and had not complied with an order of Court to file certain accounts with the Master.

There was no appearance for the respondent, and the order was granted.

Ex parte WESSELS.

Mr. P. S. T. Jones moved for leave to pass transfer of certain property. The circumstances were that a certain piece of property in the estate was mis-described in the will. The executors wished to transfer the property as directed by the will, but the Registrar of Deeds declined to allow transfer without an order of Court.

Buchanan, J., said he could not understand why the Registrar of Deeds should refuse to pass transfer.

A rule *nisi* was granted, calling on the Registrar of Deeds at King William's Town, and all other persons interested, to show cause why the prayer of the petition should not be granted.

Ex parte THE DIRECTORS OF THE GOUDINI SCHOOL.

Mr. Van Zyl applied for an order authorising the transfer of certain property

from the directors of the school to the churchwardens.

Buchanan, J., remarked that the transfer would mean to completely change the trust. This property was given by a gentleman who stipulated that it should be controlled by directors elected by voters. To transfer the property as now asked would be doing away with the rights of the voters.

Mr. Van Zyl suggested that if a rule *nisi* were granted it would enable the people who were entitled to vote to express an opinion. This was considered to be in the interests of the school.

No order was made.

Ex parte COOTE AND ANOTHER.

Mr. Upington moved for an order authorising the registration of a certain contract. The petition set forth that Mr. Coote came here some time ago, and went for a holiday to Scotland in July last. There he married the second-named petitioner, and they were advised that the marriage would be according to the laws of Scotland, regulating the separate rights of married persons. On arriving here, they were unable to register a contract embodying the ante-nuptial agreement, and they now applied for an order of Court, authorising the registration of a contract embodying the agreement before marriage, viz., to exclude community of property.

An order was granted, authorising the registration of a post-nuptial notarial contract, embodying the ante-nuptial agreement, excluding community of property.

Ex parte MOSSOP AND ANOTHER.

Mr. Gutsche moved for an order authorising the cancellation of a certain sale. The Master's report was favourable.

Buchanan, J., said the Court would grant an order, as far as the minors were concerned, authorising the applicants to cancel the sale.

Ex parte THE CAPE DISTRICT MUTUAL BUILDING SOCIETY.

Mr. Russell moved for leave to sell certain property. The High Sheriff had refused to sanction the sale of the property at the price offered.

The matter was ordered to stand over for report by the High Sheriff.

Ex parte DU PLESSIS.

Mr. Roux moved for an order authorising the retention of certain property. The will, of which petitioner was executrix, directed that the property should

be disposed of within twelve months, but petitioner represented that, in the present state of the property market, a good price could not be obtained. The Master's report was favourable.

An order was granted authorising petitioner to retain the property for a period of twelve months.

Ex parte CLEGHORN.

Mr. Gutsche moved for the amendment of a certain order of Court, fixing the price at which certain property might be sold. The price could not be obtained.

Granted.

BUTTER V. MARTIN.

Mr. Russell moved for an order attaching certain property, *ad fundandum jurisdictionem*, and for leave to sue by edictal citation.

Granted.

Ex parte HELLAWELL.

Mr. Close moved for an order, authorising the petitioner's release from sequestration. The estate was surrendered in June, 1904, but at the first and final meeting, no claims were filed, and no creditors appeared.

Order granted.

Ex parte SUTTON.

Mr. Close moved for leave to petitioner in his capacity as *curator bonis* to the lunatic Brooke, to sell certain property.

The matter was referred to the Master for report.

ALI WAL NORTH MUNICIPAL COUNCIL
V. WHITHAM.

Mr. Russell moved for leave to attach certain property to found jurisdiction, and to sue by edictal citation. Respondent was now domiciled in England.

Granted, personal service of the citation to be effected.

Ex parte BALL.

Mr. P. S. T. Jones moved on behalf of petitioner, as secretary, for an order authorising the winding up of the Lansdown House Estate Company. Petitioner suggested that William Arthur Currie and himself should be appointed official liquidators. The property of the company was bought for £7,000, about 3,500 £1 shares were taken up, and the debts amounted to about £500. Owing to the depression in the property market,

the company could not meet its liabilities.

Order granted for the winding up of the company, Messrs. Ball and Currie being appointed liquidators, with powers under section 149 of the Act, the liquidators to find security in a total sum of £2,000.

Ex parte BOUWER.

Mr. P. S. T. Jones moved for leave to raise money on mortgage. Minors were interested in the property. The Master reported favourably.

Order granted in terms of Master's report.

BASSON V. BECK.

Mr. Gardiner moved, on behalf of the defendant, for leave to defend *in forma pauperis*.

Referred for report, Mr. Gardiner accepting the reference.

Ex parte WILKINSON.

Mr. Close moved for an order revoking the appointment of Thomas Wilkinson, as curator of petitioner's estate. Counsel said he believed that the respondent was petitioner's husband.

Order granted as prayed.

BROUGHTON V. BROUGHTON.

Mr. Upington moved on behalf of the petitioner for leave to sue her husband, Stanley Edward Broughton, for divorce, on the ground of desertion. Petitioner did not know the present whereabouts of her husband, who had left her in 1904 with the intention of proceeding to Mafeking.

Leave to sue granted, rule to be returnable on the 31st March, personal service to be effected, if possible; failing which, one publication in the "Government Gazette" and the "Mafeking Mail."

Ex parte BOJE.

Mr. Du Toit moved for an order authorising the amendment of certain transfer, ante-nuptial contract, and mortgage bond, and for alteration of the entries in the debt registry. The petitioner's name was erroneously inscribed on the various documents as Maximilian Boje, and should be Max Christian Boje.

Order granted as prayed.

Ex parte SIMMON.

Mr. Gutsche moved for an order authorising the registration of certain property in the names of petitioner and her

sister, bought by them from the estate of their deceased parents.
Order granted as prayed.

HOULDER BROS. V. COLONIAL GOVERNMENT. 1905.
{ Feb. 2nd.

Amendment of plea—Commission—Postponement of trial—Demurrage.

The defendants having filed a plea in an action for demurrage, and having subsequently made certain discoveries relevant to the issue, now applied for:—(1) Leave to amend their plea by striking out certain admissions; (2) The appointment of a commission to take evidence in London; (3) Postponement of the trial.

The Court granted the first and the third of these applications, but refused the second until the amended plea should have been filed and the plaintiffs have had an opportunity of excepting thereto.

This was an application on behalf of the defendants in the above action for leave to amend their plea for the appointment of a Commissioner to take evidence in London, and for the postponement of the trial. The matter arose out of a claim instituted by the plaintiffs for demurrage against the Government under a certain contract in connection with the supply of coal.

The affidavit of Mr. Reid, of Messrs. Reid and Nephew (applicants' attorneys), stated that the pleadings were closed on the 14th May, 1904, and that since then certain facts had come to the knowledge of the applicants through investigations which had been made into the case by the Agent-General in London, and which had rendered it necessary for the defendants to amend their plea. He would suggest that a Commissioner should be appointed to take such evidence in London as either party might call. The trial has been set down for the 14th. February, but it would be impossible for the defendants to go to trial on that date.

The answering affidavit of Mr. W. G. Fairbridge, of Messrs. Fairbridge, Arderne and Lawton (plaintiffs' attorneys), stated that he believed that the reason why the application was made was simply because, on further consideration, the defendant was of opinion that he might be able to set up a different plea than that set upon the

record, his contention now being that the plaintiffs were entitled only to claim such demurrage as they paid to other persons. Deponent urged that the application should not be allowed.

Mr. Schreiner, K.C. (with him Mr. H. Jones) for applicants. Sir Henry Juta, K.C. (with him Mr. Struben) for respondents.

Mr. Schreiner said the applicants desired to amend paragraph 7 of their plea in certain respects, and to add new clauses after clause 7.

Sir H. Juta submitted that the amendments, if allowed, would raise a new defence, because the defendants now desired to withdraw certain admissions.

Mr. Schreiner said that on the pleadings as they stood a certain basis for the calculation of demurrage was taken from a certain letter, simply on the basis of that letter. It would appear that a certain amount per ton per day for a certain period was to be paid if they failed to discharge at a certain rate. The plaintiffs' claim was based on that, and the defence was that the plaintiffs delayed bringing in their ships. The point was this: the defendants had discovered the contracts under which the plaintiffs had been sending out this coal, and it might be put in this way: Supposing that plaintiffs had not had to pay a single penny of demurrage, were they entitled to claim any demurrage from the Government? Counsel added that he could not supply the names of the witnesses whom the defendants wished to examine in England on commission.

Sir H. Juta said that the Court never granted a Commission unless the names of the witnesses were given or the application was a joint one.

His Lordship: Oh, yes, they do.

Sir H. Juta said that it was not two months since that Court stated that unless the names of the witnesses were given, it would not grant a Commission except in the case of a joint application. His learned friend did not know the names of the witnesses whom they would have examined; he said that they did not know the people. He (Sir H. Juta) took it that that meant that upon certain points evidence would be required, but he submitted that they must have the names of the people, and that they could not go on interminably. As to the case itself, the Government made a contract with the plaintiffs under which the latter agreed to supply coal, and in which the Government agreed to pay certain demurrage. Plaintiffs alleged that it was defendants' duty to receive that coal here at a certain rate. The defendants admitted that, but now they wished to withdraw that admission, a course of action that he objected to entirely. The defendants now wished to set up this case, that although they agreed with the plaintiffs to pay them demurrage at a certain rate, yet, if un-

der their (the plaintiffs') agreements with the persons from whom they got the ships they had to pay those people at a less rate they could not claim from the Government, except what they had to pay those people. Now, that was, he contended, a mere legal question, and he should, in the replication, certainly try to raise it, so that they could get the decision of the Court upon this legal point before they went to the great expense of hearing evidence taken on Commission in England. He asked the Court not to grant the Commission until there had been an opportunity of raising this legal question before the Court, so as to see whether it were necessary to go into the facts.

[Buchanan, J.: You would take exception to the plea.]

Sir H. Juta: Yes, we would take exception to those paragraphs as raising no defence. I object to this admission being withdrawn, because I submit that an admission, once made on the pleadings, cannot be withdrawn for the purpose of setting up something that is inconsistent with it. Continuing, counsel said that there was a third amendment proposed in regard to paragraph 8, that was very important. The facts, as alleged, were these: Plaintiffs sent in a claim for demurrage upon eighteen ships. They alleged that the Government paid the demurrage on ten, but would not pay demurrage on the remaining eight, in respect of which this plea was set up. They admitted that the plaintiffs had rendered to the Government an account declaring their claim for demurrage in respect of certain eight ships, that the Government had voluntarily paid to the plaintiffs certain sums, by way of demurrage in respect of the other ships, and had refused to pay a sum of £10,000 odd, or any part thereof claimed for demurrage. The defendants now wanted to say that they paid a certain sum in respect to demurrage, not in respect of any particular ships, and that that sum was quite large enough to cover everything that the plaintiffs were entitled to.

Buchanan, J.: If parties find that their pleadings are wrong, and wish to have an amendment made, it is a much more convenient practice to have the amendments made before the case comes to trial. It is true that the plaintiffs in this case object to the alteration on the ground that the plea previously filed helped their case more than the proposed one, but the Court has to see that the pleadings meet the actual facts of the case. I do not see any objection to the amendment of the plea, simply because the respondents think that the alterations are not so advantageous to them as the other pleadings were. In this case, looking at the nature of the claim, and the results of investigations made by the applicants, their pleadings certainly do not represent the defence which they intend to the actual facts

to set up. I, therefore, think that the defendants are entitled to amend their plea, but they must pay all expenses caused by such amendment. But then there are two other questions before the Court. One is that the defendants wish to have a commission to examine certain witnesses in England, whose evidence, counsel states, is material to the issues raised, and without which evidence they could not safely go to trial. The respondents object to the commission because they say that the pleadings, as amended, can be excepted to, and, after the legal questions which may be raised by the exception, have been decided, it may be unnecessary to have a commission. I think there is great force in that, and that it would be advisable to have the exception determined before a commission issues. The respondents will be allowed fourteen days, within which, if they are so advised, to except to the amended pleadings. The further hearing of the application for a commission will be postponed until after the decision on the exception has been given. Of course, the trial will have to be postponed. Other costs of this application will be costs in the cause.

[Applicants' Attorneys: Reid and Nephew: Respondents' Attorneys: Fairbridge, Ardenne and Lawton.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D).]

ELIASON V. ELIASON. { 1903.
 { Feb. 3rd.

This was an action for restitution of conjugal rights, brought by Louisa Jacoba Eliason against her husband, Auguste Emanuel Eliason, on the ground of his malicious desertion.

Mr. Roux was for the plaintiff; defendant was in default. The defendant had been sued by official citation.

The evidence of Wm. Thomas Birch, clerk in charge of the Marriage Registers, showed that the marriage took place in Cape Town on the 19th June, 1894.

The plaintiff said that after they had lived about a year and ten months in Cape Town the defendant sent her for

a holiday to her father at Simon's Town. He afterwards wrote and told her not to hurry to come back, as he was going on along all right. When she came back to Cape Town in 1896 she found that the defendant had gone. She was unable to trace his whereabouts, and since his departure had received no contribution from him. There was one child of the marriage.

Decree of restitution granted, with costs, defendant to return to or receive the plaintiff on or before the 30th April, failing which, rule to issue calling on the defendant to show cause on the 14th May why a decree of divorce should not be granted, with costs, the plaintiff to be declared entitled to custody of the child, and order to be served in the same manner as directed in regard to citation.

Postea (May 15): The rule was made absolute.

DE JONGH V. DE JONGH.

This was an action for restitution of conjugal rights, brought by Elizabeth de Jongh against her husband, Wm. John de Jongh, on the ground of his malicious desertion. Mr. Close was for the plaintiff; the defendant was in default.

Wm. Thomas Birch, clerk in charge of the Marriage Register, gave evidence as to the entry of the marriage.

The plaintiff said she was married to the defendant in the Wesleyan Church, Cape Town, in 1902, and had previously gone through a form of marriage with the defendant before the Landdrost of Griqua Town during the Boer occupation. Witness and her husband lived for some time at Observatory-road during 1902. In November of that year he said that he was in some trouble, and was going to Canada. Their life together had not been happy, owing to the defendant's drinking and gambling habits. For six months prior to his departure defendant had not supported her. In February, 1903, witness received three letters from the defendant, couched in affectionate terms, and promising to send her money. She had received no money from him. A week later she received another letter from him, saying that he was sending £20 by the next mail, and that unless she joined him he would have nothing more to do with her. Witness had received no further communication from him. For the purpose of these proceedings she had communicated with the address given in the letters, but had not been able to trace the defendant. There was one child of the marriage.

Decree of restitution granted, with costs, defendant to return to or receive the plaintiff on or before the 30th April, failing which, rule to issue calling on the defendant to show cause on the 14th

May why a decree of divorce should not be granted, with costs, with custody to the plaintiff of the child, and maintenance at the rate of £2 per month until the child attains the age of sixteen years, order to be served in the same manner as directed in regard to citation, in addition to which, copy to be sent by registered letter to the defendant, care of McKenzie, Mann and Co., Toronto, Canada.

Postea (May 15): The rule was made absolute.

POLDEN V. POLDEN.

This was an action brought by Charles Polden, a former sergeant in the York and Lancaster Regiment, against his wife for divorce, on the ground of her adultery with one Richard George, of Salt River.

Mr. J. E. R. de Villiers was for the plaintiff; defendant was in default.

Charles Polden (the plaintiff) said he was formerly a sergeant in the York and Lancaster Regiment. In July, 1892, he was married to the defendant at the Castle, Jamestown, St. Helena, before the Civil Registrar. He left his regiment about a week afterwards, and went to Maritzburg, and stayed until 1894. His wife remained at St. Helena until 1893, when she came to Cape Town to her aunt. In 1894 witness came to Cape Town. When he saw the defendant she was pregnant, and she admitted she was in fault. She then disappeared, and witness could not trace her. In 1896 he went with his regiment to India, and stayed there until 1902, when he returned to England and immediately placed the matter in the hands of his solicitor. After delay, his solicitor obtained from St. Helena a photograph of his wife, with two children (one of his marriage) and a man whom witness did not know. A few days ago witness found his wife living with a Mr. Richard George, in Kipling-street, Salt River. She admitted that there were five children in the house, of four of whom George was the father.

By the Court: He could not take his wife with him from St. Helena to Natal because she was not on the strength of the regiment. The arrangement was that as his regiment were moving downward she should come to Cape Town and wait his arrival. Witness paid her expenses while she was in Cape Town.

De Villiers, C.J., said that a decree of divorce would be granted as prayed, subject to the production of certificate of marriage to the satisfaction of the Registrar.

INGRAM V. INGRAM.

This was an action for restitution of conjugal rights, brought by Hannah Ingram against her husband, Johan Fred-

erick C. Ingram, at present residing at Johannesburg, on the ground of his malicious desertion.

Mr. Rowson was for the plaintiff; defendant in default.

Hannah Ingram (the plaintiff) said she was married to the defendant at Westminster, London, on the 5th May, 1896. They first resided at different places in London; they came out to this colony in 1902 with the intention of settling here. They did not live happily together, because her husband was very untruthful towards her. He did not maintain her properly. There was one child of the marriage still surviving. Witness also asked for maintenance of the child at the rate of £4 a month. Plaintiff was now at Johannesburg, where he was employed as a waiter. Both witness and her husband were Germans.

Decree of restitution granted with costs, defendant to return to or receive the plaintiff on or before the 30th April, failing which, rule to issue calling on defendant to show cause on the 14th May why a decree of divorce should not be granted with costs, with custody of the child to the plaintiff, and the defendant to pay to her £2 per month for the maintenance of the child until she attains the age of seventeen years, order to be served personally on the defendant.

Postea (May 15): The rule was made absolute.

SCHRIENERT V. SCHRIENERT.

This was an action brought by Peter Ernest Schriener, of Cape Town, against his wife for divorce on the ground of her alleged adultery with one Alfred Schmahr, from whom damages in the sum of £1,000 were claimed.

The declaration set out that the first defendant unlawfully and maliciously deserted the plaintiff on or about the 17th October, 1904, and at divers times in 1903 and 1904 had committed adultery with the second defendant (Schmahr), and that from the 17th October last the defendants had been living together in adultery at 8, Dorpstreet, Cape Town. Plaintiff claimed, as against the first defendant, a divorce, forfeiture of the benefits of the marriage and custody of the children, and, as against the second defendant, damages, alternative relief, and costs of suit.

The second defendant, in his plea, said he had tendered to the plaintiff £50, as damages, with taxed costs to date. He repeated this tender. He specially denied that the plaintiff had suffered £1,000 damages, and prayed that, subject to the tender, the claim may be dismissed, with costs.

The plaintiff, in his replication, admitted that the tender was made, but said that it was insufficient.

Mr. Close was for the plaintiff; the first defendant had been barred from pleading; Dr. Rainsford was for the second defendant (Schmahr).

Dr. Rainsford applied for leave to amend the plea by inserting the words, "save that he denies the allegations of adultery prior to the 17th October, 1904."

The amendment was allowed.

Peter Ernest Schriener said he was married in community of property to the first defendant at Altona, Germany, in 1881. They lived together in Germany for 12 years. Witness then came out to South Africa to found a business and a home. About nine months later he sent for his wife and children. They lived happily together until about three or four years ago, when he became acquainted with the second defendant. They exchanged visits, the second defendant then residing with another woman, named Braundt. About three years ago he had reason to complain to Schmahr of his familiarity towards his wife, and said that their friendship must come to an end. The second defendant did not come again. Witness also spoke to his wife, and told her not to have anything more to do with the second defendant. Witness and his wife still lived together, and witness thought his wife was quite faithful. On the 17th October, 1904, his wife came home, and said she had bought something without obtaining his consent. He had told her that he wanted her to speak to him before she bought anything but necessities, owing to the bad times. She became annoyed and insulted him, and said she would leave him, and would go to another man, whom she had known for a long while, and whom she loved better than witness. His wife said, "Why can't you do as other people do; you can take somebody else to live with you." His wife went out about 9 p.m., but said she was coming back. She did not return, and witness went to look for her next morning. From a conversation that he had with Mrs. Leider, he learnt the true state of affairs, and he did not inquire further. Witness was a watchmaker. The second defendant was a brickmaker, and had landed property.

Cross-examined: Witness was not in regular employment, and had not had a regular situation since a year ago last October. He denied that he was addicted to drink; he might get drunk occasionally. He had not treated his wife cruelly.

Dr. Rainsford: You are out of employment, and you thought this would be a good chance of getting a large sum out of Schmahr?

Mr. Close objected to the question.

[De Villiers, C.J. (to Dr. Rainsford): Surely you do not expect witness to say "Yes" to that question?]

Witness did not reply.

Mr. Close asked the witness whether he had drunk to excess, and whether he was in the habit of getting drunk?

[De Villiers, C.J.: It depends what you mean by "drinking to excess." A German student will take thirty glasses of beer, I believe.]

Witness admitted that he might occasionally have taken too much.

Arthur Biedelheim, of Dorp-street, Cape Town, said he knew the parties. He had seen the first and second defendants living together at the opposite house.

Mrs. Hannah Leider said that about two years ago Mrs. Schriener expressed to her a wish to go and live with the second defendant.

Otto Braun, a night watchman, Francis Haggerman, and Frederick Perle, articulated clerk, also gave evidence.

This closed the plaintiff's case.

Alfred Schmahr, the co-defendant, said he first became acquainted with the Schrieners about twelve years ago. He became intimately acquainted with them about six or seven years ago; he was at that time living with Clara Braundt. Mrs. Schriener and Clara Braundt were on intimate terms. He invited the plaintiff to a Christmas Eve gathering, when the former told him that he would not come, as he had noticed that his wife preferred his (Schmahr's) home to her own. In October last, Mrs. Schriener saw him at a restaurant, and said that her husband had told her that he had known for a long time that there was someone else she cared for better. Her husband told her that she could go away.

Witness tried to prevail upon Mrs. Schriener to go home. She would not leave witness; he tried to get her to go home, but she would not. Witness was a painter; he was doing practically no business at present. He had property valued at £671, upon which there was a mortgage for £500. He did not like to say anything as to Schriener's drinking habits.

Cross-examined: He denied that he had tried to induce the first defendant to come away, and live with him two years ago. Witness was a Dane. He did not know that it was a serious thing to be seen arm in arm with another person. Witness was an artist in silver leaves. He had 40,000 bricks, for which he would be glad to get £1 a thousand if he could sell them.

The first defendant, Mrs. Schriener, said that her husband often used to drink to excess, and while they were living together he treated her badly.

Counsel having been heard in argument on the facts,

De Villiers, C.J.: It would appear that the adultery has been committed between the first and second defendants. The plaintiff is entitled to divorce against the first defendant, and also for a declaration that she has forfeited the benefits under the marriage

in community, and that the plaintiff is entitled to the custody of the children. As to the second defendant, against whom damages are claimed, this does not appear to me to be a case in which heavy damages should be awarded. The married life of the plaintiff and the first defendant was not a particularly happy one, nor does it appear that the second defendant has used any special means to draw away the wife from her loyalty to her husband. I am satisfied, from the evidence, that the married life of the plaintiff and the first defendant was an unhappy one, and I am not satisfied that the plaintiff was quite such a sober man as he wished the Court to believe. But occasional acts of inebriety would be no reason for withholding damages altogether from the plaintiff, under our present law. The second defendant now takes the singular and somewhat unusual course of throwing the whole of the blame on the first defendant. Usually one finds in such a case that there is an effort made to shield the woman. I consider that some damages should be awarded, and that, considering the position of the parties—they do not appear to be particularly well off—and considering the previous relations between the plaintiff and the first defendant, a sum of £100 would be quite sufficient to satisfy the justice of the case. Judgment will, therefore, be for a divorce as against the first defendant, plaintiff to have custody of the minor children of the marriage, and forfeiture of the benefits of the marriage, and for £100 against the second defendant, with costs of suit, to be paid by the second defendant.

CAPE TIMES, LTD. V. MCKENZIE AND CO., LTD.

Mr. Sutton moved for judgment, in terms of a consent paper, for £70, with costs. He said that an application was made by way of motion on the 15th December last, calling upon the defendant to render particulars of certain tender that he had made. Mr. Justice Hopley did not make an order, but he said that the costs of that application should abide the result of the trial.

Judgment granted in terms of the consent paper, with costs, including costs of previous motion.

Ex parte SPRING AND CO. V. FRASER AND SONS.

Provisional sequestration—Trustee—Practice.

Where an estate has been provisionally sequestrated, it is not the practice of the Court to appoint a provisional trustee.

tee. In cases of urgency application should be made to the Master for the appointment of a curator bonis.

Mr. Upington moved as a matter of urgency for the appointment of Alfred Newton Foot (the former assignee), as provisional trustee in the estate of F. Peace and Co., carriers, Woodstock, with power to sell the principal assets, consisting of 18 horses, one cow, and one wagon, pending the appointment of a trustee at the second meeting of creditors.

Order granted as prayed.

Subsequently De Villiers, C.J., stated that he had been given to understand that the estate had only been provisionally sequestrated, and the practice had not been, under such circumstances, for the Court to appoint a provisional trustee, but for the parties to apply to the Master to appoint a *curator bonis*. When he made the order appointing a trustee, he understood that it was an insolvent estate in every respect. He now withdrew the order, leaving it to the applicant to apply to the Master to appoint a *curator bonis*.

MATTHEWS V. OOSTHUIZEN. { 1905.
Feb. 3rd.
" 6th.

Deed of repudiation of inheritance
—Deed of donation—Registration—Consideration.

O. and his wife, by their mutual will, bequeathed certain property to their son P., which was to remain under the administration of O. The wife died, and O. adiated under the will. P. became a man of intemperate habits and a spend-thrift, and O., to protect P. against himself, induced P. to execute a deed, repudiating his inheritance and relieving O. from the obligation of paying the same over, but by another instrument executed two days afterwards and termed by the parties a "deed of donation," O. made another settlement on P. in substitution for the inheritance. The so-called deed of donation was not registered.

Held, after the death of O. and of P. that, as there was full consideration for the settlement,

the absence of registration did not deprive the heirs of P. of the right to recover the benefits of the settlement from the estate of O.

This was an action brought by Caroline Merle Matthews to obtain a declaration of her rights in connection with the estate of her former husband, Pieter Marinowitz Oosthuizen, now deceased. The plaintiff was Caroline Merle Matthews (born Marinowitz), married without community of property to and assisted as far as need be by Albert Lourens Matthews, of Oudtshoorn, in the district of Oudtshoorn, and sues individually and as executrix dative in the estate of her late husband, P. M. Oosthuizen.

The defendants were: (1) Charles Willoughby Herold, in his capacity as executor testamentary of the late Jacobus Daniel Johannes Oosthuizen; (2) Frederick Simon Oosthuizen, in his capacity as the executor dative of the late Pieter Marinowitz Oosthuizen; (3) Charles Willoughby Herold, in his capacity as the trustee under certain deed of donation between the said late Jacobus Daniel Johannes Oosthuizen and Pieter Marinowitz Oosthuizen; (4) Henry Burton, barrister-at-law, in his capacity as *curator ad litem* of Catharina Jane Oosthuizen, a minor child of the said late Pieter Marinowitz Oosthuizen; and (5) Frederick Simon Oosthuizen, in his individual capacity.

The declaration, after setting out the parties to the suit, proceeded:

3. On October 4, 1883, the said Jacobus D. J. Oosthuizen, hereinafter called the testator, and his wife Sophia Johanna Oosthuizen, who were married in community of property, executed the mutual will, copy whereof (with a translation) is hereunto annexed marked "A."

4. Under clause 2 of the said will, the testators bequeathed to their son Pieter Marinowitz Oosthuizen the farm Modderdrift, together with the sum of £2,000, payable out of their estate.

5. Under clause 2 of the said will, the testators bequeathed certain farms, sheep, and goats to their son the defendant Frederick S. Oosthuizen, on condition that he paid to their son Pieter M. Oosthuizen the sum of £4,000.

6. Under clause 6 of the said will, the testators bequeathed to their sons previously mentioned in the said will, being Ockert A. Oosthuizen, the said Frederick S. Oosthuizen, John P. Oosthuizen, and the said Pieter M. Oosthuizen, payable after the survivor's death all the moneys in the estate, exclusive of that which was specially disposed of, and all mortgage bonds.

7. On December 3, 1885, the testatrix, Sophia Johanna Oosthuizen, died with-

out the said will having been revoked, the survivor Jacobus D. J. Oosthuizen adiated under the said will, took benefits thereunder, and confirmed it, and took out letters of administration thereunder as executor.

8. Thereafter on April 16, 1886, the said survivor passed a deed of Kinderbewys (a copy whereof marked "B" is annexed hereto) in favour of his son Pieter M. Oosthuizen, then a minor, for the sum of £2,000, and the said deed still remains uncanceled in the Debt Registry: the said Pieter M. Oosthuizen subsequently attained his majority.

9. On April 17, 1886, the said survivor filed the liquidation account in the estate, a copy whereof marked "C" is annexed hereto.

10. On March 10, 1891, before the notary, E. T. Ashley, the said Pieter M. Oosthuizen executed the deed of renunciation, copy whereof is hereunto annexed marked "D," whereunder he purported to renounce all his right, title and interest in and to any inheritance out of the joint estate of his parents, and more especially his right to the farm Modderdrift, and the sum of £6,000 bequeathed to him under the aforementioned will, to and in favour of his said father, the said Jacobus D. J. Oosthuizen, and giving his said father full and absolute power and authority to dispose of his inheritance as he (the said father) may think fit and proper.

11. On March 12, 1891, before the said notary, the said Jacobus D. J. Oosthuizen executed a deed whereunder he purported to grant as a donation to Gysbert Benedictus Reitz in trust to his son, the said Pieter M. Oosthuizen, the farm Middelwater and the said farm Modderdrift, then registered in the name of the said Jacobus D. J. Oosthuizen, and the sum of £1,500, subject to a life interest in favour of him, the said Jacobus D. J. Oosthuizen: a copy of the said deed is hereto annexed, marked "E," and the said Reitz accepted the said gift on behalf of the said Pieter M. Oosthuizen.

12. The said Pieter M. Oosthuizen received no consideration for the renunciation of the bequest of the said farm Middeldrift, and the £2,000 payable out of the testators' estate and the £4,000 payable by the said F. S. Oosthuizen save and except the donation under the deed of gift of March 12, 1891. The defendant, F. S. Oosthuizen, has paid the said sum of £4,000 into the hands of the defendant, C. W. Herold, in his capacity as executor testamentary of the estate of the testator, J. D. J. Oosthuizen.

13. The said farm Middelwater in the said donation mentioned was the property of O. A. Oosthuizen, and was mortgaged to the testator for £2,000, which was cancelled, and on the 4th April, 1891, the said O. A. Oosthuizen transferred the said farm to trustees in

trust for the said P. M. Oosthuizen, in pursuance of an arrangement between himself and the testator, and in furtherance and for the purpose of carrying out the arrangement between the testator and P. M. Oosthuizen, which is embodied in the two deeds of the 10th and 12th March, to wit, the deeds of renunciation and donation which formed part and parcel of an arrangement between the testator and his said son by which the latter renounced his inheritance which would have belonged absolutely to him in order that the said inheritance or its equivalent in land and money should be again donated to him, but in such a way that it would not belong to him absolutely, the said P. M. Oosthuizen having at the said date and prior thereto become greatly addicted to intemperance and in consequence thereof become a squanderer of the moneys given him by said father for the purposes of education and otherwise. The deed of donation of the 12th March, 1901, is registered in the Deeds Registry, together with the said deed of transfer, copy whereof is hereunto annexed, marked "F," but the said deed of donation is not otherwise registered.

14. Under clause 7 of the said deed it was provided that the said Pieter M. Oosthuizen shall never at any time have the right of selling or alienating either the right to the rent or receipts of the said farms, or the interest of the said sum of £1,500, nor shall he be allowed to sell, alienate, or otherwise dispose of his right to the said farms or the said sum during his lifetime except by will or by ante-nuptial contract, it being clearly understood that such disposition by will or ante-nuptial contract shall have the effect only after his death.

15. On March 7, 1892, before the notary, G. E. Boulton, the said Pieter M. Oosthuizen entered into the ante-nuptial contract, copy whereof is hereunto annexed marked "G," with the plaintiff, then Caroline Merle Marincowitz; and the said Pieter M. Oosthuizen and the plaintiff were married on March 15, 1892, and the said contract was duly registered according to law.

16. Under clause 5 of the said contract, and subject to the conditions therein mentioned, the said Pieter M. Oosthuizen settled upon the said Frederick S. Oosthuizen for and on behalf of the plaintiff the sum of £2,000, and it was provided under section (d) of the said clause that at the death of the plaintiff the said sum of £2,000 should go to and become the property of any child or children issue of the said marriage between Pieter M. Oosthuizen and the plaintiff, but should there be no children of the marriage, then at the death of the plaintiff (provided she survive the

said Pieter M. Oosthuizen), the said sum of £2,000 should be equally divided between the brothers and sisters of the said Pieter M. Oosthuizen; and it was further provided, under section (c) of the said clause, that at the death of the said Pieter M. Oosthuizen the plaintiff should be entitled to the interest accruing on the said £2,000 as long as she shall live, but that under circumstances (which did not happen), the said gift bequest should be null and void; the said P. M. Oosthuizen did not hand over the £2,000 to the said F. S. Oosthuizen, and nothing was actually done with regard to any sum of £2,000 under the said antenuptial contract.

17. On December 30, 1893, the said G. B. Reitz died, and thereafter the defendant Herold was appointed in his place as trustee under the aforesaid deed, by notarial deed, executed by J. D. J. Oosthuizen, dated 30th July, 1895.

18. On October 18, 1894, the said Pieter M. Oosthuizen executed his last will and testament, a copy whereof is annexed hereto marked "H."

19. On March 18, 1895, the said Pieter M. Oosthuizen executed a notarial bond for £3,000 in favour of the said Frederick S. Oosthuizen (copy whereof is hereto annexed marked "I"), binding all his right, title, and interest under his parents' will as collateral security for the payment of the said sum of £3,000 owing by him, and in order to render the said bond effectual, ceded, transferred, and absolutely conveyed, subject to an equity of redemption, to the said Frederick S. Oosthuizen all his right, title, and interest to the inheritance coming due and payable to him (the said Pieter M. Oosthuizen) under the joint will of the said Jacobus D. J. Oosthuizen and the late Sophia Johanna Oosthuizen, the said bond has been duly registered; and the parties crave leave to refer to its terms, and also to the terms of a document signed by Jacobus D. J. Oosthuizen, the testator, on the 2nd November, 1904, copy whereof is annexed marked "K."

20. On January 24, 1896, the said Pieter M. Oosthuizen died, leaving the aforesaid will ("H") unrevoked; and leaving two minor children, named Daniel Johannes Oosthuizen and Catherina Jane Oosthuizen.

21. The plaintiff and the said Frederick S. Oosthuizen were thereafter appointed executors dative in the estate of the said Pieter M. Oosthuizen.

22. The minor child, Daniel J. Oosthuizen, died intestate and unmarried on September 28, 1896.

23. The said Pieter M. Oosthuizen left at his death no assets, save such as he may be entitled to, either under the aforesaid deed ("E"), or under the will of his parents; save that the farm Middelwater is registered in his favour according to transfer deed, but the said

farm Modderdrift is still registered in the name of the said Jacobus D. J. Oosthuizen.

24. The bond of £3,000 has not been in whole or in part paid or discharged, and the said sum of £3,000 is owing by the estate of the said Pieter M. Oosthuizen to the said Frederick S. Oosthuizen for advances made from time to time by the said F. S. Oosthuizen to the said P. M. Oosthuizen.

25. On June 9, 1897, the plaintiff was married to Albert Lourens Matthews, without community of property.

26. On September 3, 1901, the said Jacobus D. J. Oosthuizen, the testator (who had remarried) executed the will, copy whereof is annexed hereto marked "L," and on June 11, 1903, he died, leaving the said will unrevoked. By the said will the testator does not purport to deal with the immovable property referred to in the deed of donation of the 12th March, 1891, nor in terms with the £1,500 therein mentioned.

27. The said Herold has taken out letters of administration as sole executor under the said will, the said Frederick S. Oosthuizen not having taken up his appointment.

Wherefore the plaintiff claims: (a) That she is entitled to sum of £2,000, which was originally settled upon her by antenuptial contract, in accordance with the conditions set forth in the said contract, absolutely as her own free and separate property and free from the trusteeship of the said Frederick S. Oosthuizen or anyone else, the same having been given to her absolutely under the will of her late husband (Pieter Marinowicz Oosthuizen). (b) That in accordance with the terms of the said will, she is further entitled to an annual payment of £100 out of the estate of her late husband, she having contracted a second marriage. (c) That she be declared entitled to one-fourth part or share of the remainder of the estate of her said late husband, left after payment of special bequests; she claiming the said fourth as mother and heir *ab intestato* of the deceased minor child of her husband and herself, namely, the late Daniel Johannes Oosthuizen. (d) A declaration that the deed of gift of the 12th March, 1891, is legal and valid; or in the alternative, in case this Honourable Court should find that the said gift is not legal and valid, or is not legal and valid beyond the sum of £500. (e) A declaration that the renunciation of 10th March, 1891, was not valid or binding and that the estate of the late P. M. Oosthuizen is entitled to the farm Modderdrift and the two sums of £2,000 and £4,000 bequeathed to him in terms of the said will of his parents. (f) A declaration: That the bond in favour of F. S. Oosthuizen creates no preferential rights over the property included in the deed of dona-

tion. (g) Alternative relief. (h) Costs of suit.

Sir H. Juta, K.C. (with him Mr. Pynont) for the plaintiff. Mr. Close for the first defendant. Mr. Russell for the second. Mr. McGregor for the third. Mr. Burton for the fourth. Mr. M. de Villiers (with him Mr. Sutton) for the fifth.

Mr. Russell submitted to the judgment of the Court.

Sir H. Juta explained the principal facts of the case. In regard to the pleas of the defendants, he said that the main contention was that the deed of donation was invalid except as to £500. His learned friend (Mr. Burton) contended that Mrs. Matthews was not entitled to the £2,000 individually, but must come in according to the ante-nuptial contract. Mr. Frederick Oosthuizen claimed that his bond of £3,000 was preferent upon the inheritance which Pieter got from his parents.

Edward Thomas Ashley, notary public, said that in 1891 he was in young Mr. Reitz's office in Cape Town, and in the absence of Mr. Reitz he took charge. He knew Pieter Oosthuizen. Pieter was intemperate in his habits, and squandered his money. Witness remembered Pieter and his father calling at his office in March, 1891, when the deed of renunciation was drawn up. Pieter said he knew what the document meant. A deed of gift was being drawn up at the same time. One document would not have been executed if the other had not been executed.

Cross-examined by Mr. Close: The only reason why both documents were not drawn together, he thought, was that they were very busy at the office. Perhaps one of the documents was not quite ready at the time. Pieter knew that he was to get the donation at the time he signed the repudiation.

Mary Jane Oosthuizen, widow of the late Jacobus Oosthuizen, said that she was the second wife of Mr. Oosthuizen and was married in 1885. They came to live in the Gardens, Cape Town. Pieter was educated at the South African College; he was to have been sent to study for medicine in Europe, but he gave way to drink. He was very violent at times, and was a squanderer. Pieter was sent to farm at Middelwater. Witness was acquainted with the deed of gift made by her husband.

On a point raised by Mr. Close, it was agreed that the evidence should be taken down subject to elimination in case it were decided to be inadmissible.

Witness (continuing) said that her husband told her that he had conferred the gift on his son to save him from getting rid of all his property. Her husband mentioned the deed of re-

nunciation. He said the son had given up the whole of his inheritance to him in order to save him (the son) from squandering the money.

By Mr. Close: The son was wanting money, and this was the reason why they took these safeguards.

This concluded the evidence, and counsel were then heard in argument.

Sir H. Juta said that the first point was whether the deed of donation should stand over. He submitted that the fact was clear that everything was done in order to save this young man from himself. The evidence was that the deed of donation was made in consideration of the deed of renunciation. The crisp point might be raised whether want of registration was any defence where the donee sued the donor. If the deed of donation stood, the position would be that one farm already stood in plaintiff's name, and the other would have to be transferred to her.

Mr. Close contended on behalf of the first defendant that the deed of renunciation was valid, and that the deed of donation was not valid, owing to non-registration, to the extent of more than £500. The mere acceptance of the donation by the donee did not make the deed of donation valid; it required registration before the deed became valid.

[De Villiers, C.J.: Isn't there a contract—a contract binding on both parties? Would either document have been executed if the other had not been?]

Mr. Close said that if the object of the parties had been as contended, the contemplated result could have been easily arrived at in a number of other ways.

[De Villiers, C.J.: What could it possibly mean but a mutual consideration?]

Mr. Close said the two documents were quite distinct.

[De Villiers, C.J.: The two deeds stand or fall together.]

Mr. Close quoted a number of authorities in support of his contention that there must be registration to make such a document a valid transaction.

Sir H. Juta said he might shorten the case by intimating that if the Court upheld the deed of donation his client would be quite prepared to withdraw the first claim providing that the matter of the two thousand pounds should be settled in terms of the ante-nuptial contract; and they were further prepared to allow Mr. Frederick Oosthuizen preference for the whole of his debt of £3,186.

Mr. Close said he would submit to the order of the Court in regard to this.

Mr. McGregor said that a difficulty in his mind was whether the trustee could pass by the persons benefited by the donation in order to make a preference in the case of Frederick Oosthuizen.

Mr. Burton said that his case was met by the offer of Sir H. Juta.

Cur. Adt. Vult.

Postea (February 6th):

De Villiers, C.J.: The only question of any importance which the Court has to decide in the present case is whether or not the deed of donation, the so-called deed of donation, was a valid instrument. If it were a valid instrument there would be no difficulty in the decision of all the further questions that have been raised. I understand that the plaintiff withdraws her claim for £2,000 under the ante-nuptial contract. Therefore, it is unnecessary for me to say anything about the other matters, except the simple questions as to the deed of donation.

Sir H. Juta: What the plaintiff withdraws is that she is entitled absolutely to the claim of £2,000.

De Villiers, C.J.: So I understand. The deed of donation was executed under the following circumstances: Jacobus Oosthuizen and his wife, who seem to have been possessed of considerable property, made a mutual will, under which Pieter Marincowitz (the son) acquired very important rights, to take effect on the death of the surviving testator. The testatrix died, and the son Pieter Marincowitz turned out to be a spendthrift and a drunkard, and the father (the survivor), to protect the son Pieter against himself, entered into negotiation with him, with the result that the son repudiated the inheritance, the whole of which was in the father's hands, and the father on his side effected a deed of donation by which this property going to the son would be bound in such a manner that it would be impossible for him to squander it. It is quite clear that the negotiations for the execution of the two documents were entered into at the same time. The deed of repudiation was executed on the 10th March; the deed of donation was executed two days afterwards. But, in my opinion, even if there had been no oral evidence in the case, it would have been a clear case, in which the two documents should stand or fall together. If one of the documents falls, the other must fall also, because, although the second donation is called a "deed of donation," it was intended to substitute one mode of settlement for another. There was ample consideration given for this deed; the father was released by the deed of repudiation from all the liability which he had incurred to his son under the will which he and his wife had executed, and under which, after his wife's death, he had adiated. It is called a deed of donation, but I look upon it as a settlement executed with full consideration given to the father. The Court has repeatedly said that it will look at the real substance of a transaction, and not

at what the parties called it. Even if it were a deed, accepted as a deed of donation, it would certainly fall under the class of donations which are called remuneratory, in regard to which it has been held by Voet and others that no registration is required. This was a document given for valuable consideration, and no registration was required as against the estate of the father, who is now deceased. For the reasons I have stated, I am of opinion that the prayer of the plaintiff that this deed of donation should be declared to be a valid instrument should be acceded to. That seems to be the real question between the parties.

After hearing counsel in regard to other points in the case, and more particularly in relation to the claims in reconvention,

De Villiers, C.J.: I could not have held that the claim of F. S. Oosthuizen for a preference against the estate of Pieter by reason of his bond could be maintained, but that question does not now arise, as I understand it has been agreed between the parties that a sum of £3,186 shall be paid in respect to that claim. Judgment will be for the plaintiff in terms of prayers (b), (c), and (d) of the declaration, plaintiff agreeing to the sum of £3,186 being paid to Frederick Simon Oosthuizen in his individual capacity. There will be no order upon the different claims in reconvention. As to costs, one quarter will be paid by the executors of the estate Jacobus Daniel Johannes Oosthuizen, and the remaining three-quarters by the executors of Pieter Marincowitz Oosthuizen.

Sir H. Juta asked their lordships if the order included both costs of action and costs of special case.

De Villiers, C.J.: All costs.

On the application of Mr. McGregor, De Villiers, C.J., said that the Court would also authorise C. W. Herold as the trustee under the deed of donation to hand over all assets of Pieter Marincowitz Oosthuizen to the executors of the estate.

[Plaintiff's Attorneys: Tredgold, McIntyre and Bisset; Attorney for 1st, 3rd, and 5th defendants: Herold and Gie; Attorney for 2nd and 4th defendant: Blayney.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

GENERAL MOTION.

RHODES V. RHODES AND 1905.
BOWEN. Feb. 3rd.

Mr. P. Jones applied to have this matter set down for the 21st inst., in order

that some date in March would be fixed for trial, as the second defendant, who was being sued for damages, as co-defendant in the action for divorce, was coming from Australia to defend the case.

Application granted.

TRIAL CAUSE.

BRINK V. AVENANT,

1903.
Feb. 3rd.
" 6th.
" 7th.
Apr. 26th.
May 1st.

Trespass—Damages—Beacons—Prescription.

The declaration set out that the plaintiff was a farmer, of Taarbosch Kraal, in the division of Sutherland, and the defendant belonged to Putterskraal, in the same division. From time to time in recent years, and more especially about February, 1903, and thereafter, the defendant wrongfully trespassed by means of his servants upon plaintiff's farm, with his sheep and cattle, which he grazed thereon, and refused to desist when called up to do so. The defendant asserted that the boundary line between his and the plaintiff's farm was the straight line from the point "Zwak water" to point "C," and claimed the whole of the area "Zwakwater, C, and B" as his own property. Plaintiff claimed a declaration of rights as to the boundary line, that the true line was a straight line between the point "Zwakwater" and "B," of the plan, and claimed £500 damages.

The amended plea set out that the true boundary line was a straight line from Zwakwater to the point "G," and that the beacon at "G" was a true and correct beacon in that direction. The defendant asserted there was in existence before 1865, and still in existence near the line "Zwakwater, G," a beacon known as the Bosch Beacon, which was in 1865, and thereafter admittedly the true and correct beacon for the purposes of the Land Beacons Act, of 1865, and in 1880, in the sub-division of Korenplaat, the beacon "G" was erected and adopted by the surveyor instead of the Bosch beacon. Thereafter beacon "G" had been continuously claimed by the defendant, and his predecessors, and until about three years ago was recognised by the plaintiff and his predecessors for more than thirty years as the correct beacon. In reconvention, the defendant claimed a declaration of rights and £300 damages for trespass.

The replication was general.

Mr. Searle, K.C. (with him Mr. Van Zyl), was for the plaintiff, and Mr. Schreiner, K.C. (with him Mr. Gardiner), was for the defendant.

Isaac Merring, Government land surveyor, stated that in November, 1900, he was requested by the plaintiff to re-survey the farm Taaiibosch Kraal. Before proceeding there, he had a paper tracing of the Government's ground, surrounding the farm on the north, east, and west. When he went on the ground the plaintiff and his brother pointed out the beacons at Taaiibosch Kraal, which coincided with a Government survey in 1886. At the point "B" on the plan he found an old beacon on the point of a range of hills. He took that as the south-east corner of Taaiibosch Kraal. There were no mason beacons on the surrounding farms—they were all packed stones. The Boerman's Hoek beacon was also on the edge of a hill. He could not get his survey to fit in with the old diagram, which he now regarded as unreliable. Taaiibosch Kraal was surveyed for sub-division in 1876, and the surveyor then took the beacon marked "B." In August, 1903, he was in the district when a beacon marked "G" was pointed out to him on the edge of the river bed, and he concluded that it was newly piled up in a heap. The angles of the original diagram did not correspond with the beacons.

Cross-examined by Mr. Schreiner: Witness did not go to see if there was beacon "C," which was claimed for the plaintiff. When he did his survey he did not know there was a dispute on between the parties. He did not trace the remains of any old beacons, which had been knocked down. The ground in dispute was about 250 morgen.

Re-examined by Mr. Searle: It was a very hilly district, and it was possible he could not see a conspicuous beacon. Witness made an independent investigation without reference to a previous survey.

Stephanus Brink (plaintiff), owner of the farm Taaiibosch Kraal, stated the defendant was his brother-in-law, and owned an adjoining farm. Witness was born on the farm where he had lived all the time. His father and his uncle previously owned the farm. About five years ago he bought the farm from his mother. After his father's death, the children looked after the farm while the mother was still alive. He had known the beacon on the river side since he had knowledge. There was no other beacon he knew of in that neighbourhood. The defendant had lived at Putterskraal, he believed, from 1889 or 1890. Witness's father had trouble with the defendant about the boundary, and he held a commission because the defendant trespassed on the line. The trespass on that occasion amounted to £7 or £8, through the defendant's sheep coming across the line. There was no further trouble with defendant during his mother's time. The defendant paid the damage claimed, although he did not attend the commission. In Febru-

ary, 1903, the defendant allowed his cattle to again cross the line, and refused to pay the damage. Witness knew the place where the defendant claimed that Mr. Greathead put up a beacon by a river course. Witness first saw the beacon ten years ago. Avenant put it up, and took it away on witness sending him notice. Last year it was put up again. Witness had sustained considerable damage by the trespasses.

Cross-examined by Mr. Schreiner: Witness pointed out the beacon to Mr. Meiring. The defendant was dissatisfied with the land according to his diagram. About a year before his father's death the commission was held. The defendant was quite content with £7 or £8, although he did not attend the commission. There was another commission during his mother's time, and the defendant paid witness £4 or £5. If witness cut off this piece of ground, the dam constructed by the defendant would be of very little use. There was a little dam before the commission, and after defendant paid the money, he constructed a larger dam. If there had been a beacon in the hills, he must have seen it. The defendant knocked the river beacon down after witness gave him notice to remove it. The defendant often asked permission of witness to allow him to graze his cattle. The defendant was always teasing him to have his ground surveyed, and at the same time paid out damages when asked.

Re-examined by Mr. Searle: It was possible for the defendant to use the dam and keep to his own side of the line.

Jacobus Victor, owner of an adjoining farm, said he had known the farms for about thirty or forty years. From 1876, he had known Beacon "B." In February, 1903, as field-cornet, he was called in by the plaintiff to adjudicate in a complaint of trespass against the defendant. It was only in 1903, after Mr. Greef's survey, that he noticed the beacon by the river.

Cross-examined by Mr. Schreiner: Witness was away for fourteen years, and only returned about three years ago. He was in the district, but not on the farm. He had never been asked to go and look for an old beacon in the bushes. Witness assessed damages against the defendant on the commission. Mr. Greathead might have put up a beacon at the spot without witness seeing it.

Re-examined by Mr. Searle: He only recognised Beacon "B." In February, 1903, he went to look at the spot where the trespass took place.

Willem Francois du Toit, a farmer, of the same district, said he had been living on his farm since 1883. He hired the piece of land in question from the trustee in the insolvent estate of Botma. He had known the beacon on the mountain to have been there in 1872.

Cross-examined by Mr. Gardiner: When Mr. Greathead made his survey, he did not put up a beacon by the bed of the river, but he made a mark by putting two stones there.

Phillipus Conradie said he had known the two farms for thirty-five years. In the late seventies he had known the Beacon "B." About '78 or '79 he was called in to settle a dispute between Botma and Brinks, and he drew up the settlement in writing. In 1882 he was called in again, and Botma said there was no dispute about the beacons; it was a difference over the line, and witness defined the boundary. There was a road close to the point "G," and although witness often rode along it, he never noticed a beacon.

Cross-examined by Mr. Schreiner: He remembered the survey in 1876; he was living about five hours' drive off. When he was called in by Brinks, it was not to settle a complaint that the line beacons were knocked down by the owners of Korenplaats. The veld was in dispute.

Stephanus Brink (recalled) stated that most of the papers of his father had been lost. He had not been able to find the document referred to. In consequence of what Conradie told him, he searched for the document.

Marthinus Botma said he had known the farms in question since his childhood. His father formerly owned Putterskraal. The beacon on the mountain was the beacon he recognised as that of Taaibosch Kraal and Korenplaats. He never saw a beacon up in the bush.

Cross-examined: He had heard people speaking of a beacon at the bush before Korenplaats was sub-divided, but not before Donsel was surveyed.

Re-examined by Mr. Searle: He could not say to whom the ground at beacon "B" was granted to first of all. During the time he lived at Korenplaats he did not notice any beacon at the bush. No bush was ever shown to him. He knew of no beacon in that neighbourhood except beacon "B."

Cornelius Jacobus Brink, brother of the plaintiff, stated that his father was one of the owners of Taaibosch Kraal. Witness, who was 47 years of age, had lived on the farm all his life, and he was well acquainted with all the beacons on the farm. On the south-east side, the beacon dividing Taaibosch Kraal and Korenplaats stood on the point of Eenigsteplek. He had known that beacon since he was ten years of age, and never knew of any other beacon in that neighbourhood.

By Maasdorp, J.: The beacon was in the same condition at present as it was when he knew it first.

When he took down sheep to graze, the line he observed was from Zwakwater to Eenigsteplek. He had seen

the beacon in the river bed which had been put up by Mr. Greeff. Formerly there was no beacon on the river side. The dam put up by Avenant was about two thousand yards from the line observed by witness.

Cross-examined by Mr. Schreiner: He was there when Dousel surveyed. Dousel did not build up the beacon at Eenigsteplek. He never heard that there was a claim for a beacon in the bush. Dousel surveyed for a sub-division of Taaibosch Kraal, and put line beacons between Zwakwater and Eenigsteplek. He was not aware that the owners of Korenplaats broke down the line beacons from Zwakwater. The two thousand yards between Avenant's dam and the line at Taaibosch Kraal belonged to Korenplaats.

Re-examined by Mr. Searle: Witness was often on the south-east side looking for horses and cattle.

Philip Johannes du Plessis, one of the defendants in the case, and owner of Boesman's Hoek, said he was on the farm before Pritchard's survey. All the time he had been in occupation he recognised the beacons marked "E," "J," and "G" on the diagram before the place was surveyed. He had a row with Brink, sen., over grazing ground; the Field-cornet was called in, and beacon "B" was decided upon. He was quite satisfied with that beacon.

Cross-examined by Mr. Schreiner: He had no knowledge of that beacon until the Field-cornet pointed it out, and it was after the row that he saw it. The late Field-cornet of the ward told him of a beacon in the bush. He never went to see if there was a beacon at the bush.

Re-examined by Mr. Searle: Witness only recognised beacon "B."

By Maasdorp, J.: Until "B" was pointed out he considered "G" as the beacon regulating his boundary.

Mr. Searle closed his case.

Wilson Greathead, surveyor, said he had been engaged by Mr. De Smit to survey this land in 1880. Witness only surveyed Korenplaats for a sub-division. Lately he had been on the ground to refresh his memory, and paid attention to beacon "G" and the bush beacon. In 1880 two beacons were pointed out to him, the bush beacon and beacon "B." It was Stephanus Boteman who pointed out the beacons. "B" was pointed out to him as a mark taken by Dousel. Witness could not accept Dousel's beacons as being at all consistent with the farm. He had a clear recollection of seeing the bush beacon, and when he revisited the farm he saw a beacon in the same spot. It was clearly manifest that the beacon was of long standing. The beacon "B" could not be seen from the beacon in the bush. He went according to the diagram and not according to the facts on the ground. He was certain he put a beacon at "G,"

and when he visited the spot recently he found that it had been made much larger. He did not accept Dousel's beacons, as they seemed to swing the farm round some eight or nine hundred yards. Witness erected beacons according to his diagram, and sub-divided accordingly. The bush beacon was not visible from the Eenigsteplek, and a person going past very often might not notice it.

[Maasdorp, J.: The witness says he saw a beacon there at a certain time, and any number of witnesses may say they never saw it before that.]

Mr. Schreiner said he had no objection whatever, if his lordship ordered a competent person to go to the spot to see if it was a new piece of work.

Witness said he had no doubt the bush beacon was of many years standing.

Cross-examined by Mr. Searle: Beacon "B" was in a very conspicuous point, and witness had used it as his signalling station. After so many years, he would have had some difficulty in finding the spot in the kloof without assistance, although he thought he would ultimately manage it.

By Maasdorp, J.: Surveyors did not always take a conspicuous spot for beacons. The Boesman's Hoek beacon and the Beacon "B" were more consistent with the diagram from a Taaibosch Kraal point of view.

Witness said that now he would not survey a farm on a diagram as he did then. Dousel also surveyed Korenplaats, and placed beacons which witness did not accept. Dousel's beacons would agree with the beacon on a conspicuous part of the mountain, but they did not agree with the beacon at Zwakwater. At the point "G," witness put up an ordinary pile of stones. He hadn't been there until a fortnight ago, when he heard that Greeff had made a substantial beacon of it.

Re-examined by Mr. Schreiner: He had not seen a single mason in the district. Witness understood that Dousel had made a survey of Korenplaats.

Hert Greeff, Government land surveyor, stated he was called in by the defendant to make a plan when the dispute arose. He surveyed the triangle in dispute, and found it to be of the extent of 250 morgen. Zwakwater and Greathead's beacons were pointed out to him by the defendant and Mr. Walters. The latter was a beacon two feet high, which witness built much higher up. Witness did not go up to the beacon in the bush, but sent a person up to put a flag at the spot. Avenant was claiming Greathead's beacon. It was quite a mistake that he put a beacon beside the stream for the first time.

Cross-examined by Mr. Searle: He thought the bush beacon was too far in

Taaibosch Kraal ground, so he did not go there. He did not make a whole survey of the two farms, Korenplaats and Taaibosch Kraal. He did not test the correctness of Greathead's survey of Korenplaats.

Paul Lodewick Avenant (the defendant) said that he was married to Brink's sister. He first hired his property for two years from Jack Fuller; then he bought it about 12 or 13 years ago. His land, he was told, extended to the bosch beacon; this beacon did not stand on the mountain, it stood on a little kloof. He denied that he had paid money to Stephanus Brink for trespass by his cattle. He had had damages given against him by the last Commission, about two years ago. From the time he purchased his land he had always claimed up to the beacon of Greathead, and had grazed up to that point. He had made a large dam in that part. He found beacons about the site of the dam. He gave notice to Mr. Van der Poel, the Field-cornet, that Mr. Meiring was surveying on his ground. A Commission was held on his ground. There was a piece of ground that Mr. Greathead did not include in his survey. Witness and three others joined in using that ground for grazing in front of their own lots. He did not claim the ground as his own.

Cross-examined: He did not remember any Commissions held in the district in regard to the boundary. Mr. W. Johannes Vieta, the Field-cornet, came to point out his beacons, as he did not know where the beacons went. Witness asked the Field-cornet to come. He did not remember a claim having been made upon him for £4 12s. damages for trespass. He admitted that Mr. Vieta held a commission in consequence of Mr. Brink saying that his cattle had trespassed on his land. Mr. Vieta told him that he need not pay the money, as the land was his own property.

John O. Walter, agent, of Laingsburg, said that he acted for the defendant in connection with this case. Witness went to the defendant's farm with Mr. Greeff the surveyor; he was present when Greeff had the beacons pointed out to him. Avenant's son went and put flags on the beacons. Witness was at Beacon "G" when he saw the flag put on the bosch beacon. They pointed to within six inches of Greathead's beacon. Mr. Greeff was so satisfied with the angle that he said that he did not think it necessary to go to the bosch beacon. They had some view of coming to a settlement over the case, and there was a meeting between the parties. Witnesses came down to Cape Town in August, and the defendant sent by telegraph for Mr. Greathead. They still thought some settlement would be arrived at.

The case was, however, postponed. In January witness saw an old beacon in the centre of two big thorn bushes. Greeff was there that day for his survey. Mr. Greathead had been to the beacon during the past few weeks. The beacon was still there a fortnight ago.

Wm. Angus Hofmeyr, attorney, of the firm of Tredgold, McIntyre and Bisset (the defendant's attorneys); Marthinus Ackermann (aged 75), a farmer, of Modderfontein, district of Sunderland; John Botman, of Van Wyk's Plavey, district of Sunderland, also gave evidence. He stated in cross-examination that in the old days when his grandfather owned both farms, there was no dispute as to beacons.

Johannes Boteman said he was brother of the previous witness and fifty years of age. He was born on the farm Korenplaats, and lived there about 25 years. He left before the Greathead survey, but he came back to the farm last December. He remembered the time when his grandfather had the farms Korenplaats and Taaibosch. The beacons between the farms were Zwakwater and Bush beacons, and those were the same in the days of his father. He knew Cornelius Brink, the father of the plaintiff, and he had always told them when they were children that they must not go over the line. The line was between Zwakwater and Bush beacons.

Cross-examined by Mr. Searle: He had left the properties 25 years ago, but had lived on them from time to time for a few months since. He knew where Mr. Greathead had put up a beacon by the side of the river, east of Swakwater. From that place, one could see the Bush beacon.

Frederick Boteman, brother of the last two witnesses, living in the Sutherland district, stated that he was born at Korenplaats, and remained on the farm until he was twenty-three years of age. Since then he had been on the farm; he passed over it during the month of May last. During his father's time the line between Taaibosch Kraal and Korenplaats was Zwakwater-Bosch beacon. Between ten and eleven years ago he last saw the bush beacon, and it was the same as in his father's time. The Brinks did not graze over that line. He saw the beacon Dousel put up at Keenigstoplek. Before Dousel surveyed there was a small beacon on the spot. After Greathead surveyed, witness still went to the bush beacon.

Cross-examined by Mr. Searle: Marthinus Boteman, who lived on the farm with his father, had stated that he observed the line Zwakwater-Keenigstoplek, but witness knew nothing of that. The bush beacon was near the top of the mountain, but not quite on the peak.

By His Lordship: After Mr. Greathead surveyed the farm, he did not graze any longer on the top line.

Marthinus Boteman (re-called), stated, in answer to his lordship, that he did not graze up to the bush beacon with the last witness; he did not know where it was.

Mr. Schreiner closed his case.

Mr. Searle said that during the adjournment he had discovered that Taai-bosch Kraal had actually been sub-divided on Dousel's survey, and called a clerk from the Deeds Office to prove that transfer had been passed.

Maasdorp, J., inquired if there was any likelihood of any of the witnesses being re-called.

Mr. Searle pointed out that as the plaintiff had no notice of the bush beacon, he came prepared to fight the case on the Greathead beacon. He would leave the case in his lordship's hands, as he was not instructed to apply for a postponement.

Maasdorp, J., said the case would stand over *sine die* for argument.

Counsel having been heard in argument on the facts.

Cur. Adr. Fult.

Postn (May 1):

Maasdorp, J.: The plaintiff who is the owner of the farm Taai-bosch Kraal, sues the defendant, the owner of Putter's Kraal, in an action of trespass, and for a declaration of rights. He alleges that the boundary of his farm adjoining Putter's Kraal is correctly represented in a plan annexed to the declaration, and runs from a point known as Zwakwater to a point on the extremity of a ridge known as Any's River Plaats, which points are indicated on the plan by the letters A and B respectively. He complains that the defendant trespassed across this line with his stock, and that he asserts a right to do so inasmuch as he alleges that the beacon of his farm Putter's Kraal lies to the north of the line claimed by the plaintiff. The defendant denies the correctness of the boundary line indicated by the plaintiff in his declaration, and states that the true boundary between Taai-bosch Kraal and the original farm Korenplaats, of which Putter's Kraal forms a portion, runs from Zwakwater to a point known as the Bushbeacon, which is indicated on the plan by the letter C, but states that when Korenplaats was sub-divided in the year 1880, the surveyor, instead of taking the beacon C standing upon the boundary of the farm, took a point within the boundary indicated by the letter G, and framed the diagram of Putter's Kraal conformably to such beacon. The defendant, who purchased Putter's Kraal, according to the diagram only claims the land up to the line A G; and if A C be found to be the correct boundary between Taai-bosch Kraal and Putter's Kraal, he will be entitled to the land up to A G. He alleges that beacon G was in existence before the year 1865, and is the ad-

mittedly true and correct beacon for the purposes of the Land Beacons Act of 1865, that for more than 30 years it has been recognised by the owners of both farms as the correct beacon, and for more than 30 years the owners of Korenplaats have used the land up to A G as of right. The defendant prays that G may be declared to be the true beacon of his farm, and claims £300 as damages suffered by him by reason of a trespass committed by the plaintiff. The plaintiff, in his replication, traverses the allegations in the defendant's plea, and claim in reconvention, and sets up a claim to the boundary line A B on the ground of prescriptive user. The Court has now to determine whether C or B represents the true beacon between Taai-bosch Kraal and Korenplaats. One of the points raised by the defendant can be disposed of at once by saying that there is no proof of the existence of any of the conditions under the Land Beacon Act which would constitute the beacon C an admittedly true and correct beacon. The only issues left between the parties are whether there is evidence from which it can be inferred that either B or C is an original beacon between the two farms, or whether either of them has been established by prescription. In my opinion it has been established beyond a doubt that the beacon B was in existence in the year 1872. Willem du Toit stated in evidence that at the time he was in occupation of portion of Putter's Kraal as a lessee, and occupied the hired ground up to that beacon, which was always a large and prominent beacon. He knew of no other beacon in the neighbourhood as a boundary beacon between Taai-bosch Kraal and Korenplaats. A number of witnesses were called for the plaintiff, who were positive that for many years beacon B was regarded as the true beacon, and that during that time they did not know of the existence of any other beacon which was claimed as the corner beacon on that side. The original grants of the farms having taken place in 1838, no witnesses were called on either side to give evidence with respect to original beacons pointed out at the time of the original measurement of the farms, and the first occasion after that upon which a survey took place was in 1876. In that year Surveyor Doessel was engaged to sub-divide Taai-bosch Kraal, and in surveying with that object he accepted B as the correct corner beacon. This was also done by Pritchard in 1885, when beacon E was indicated by him in his survey as a dividing point of the four farms Taai-bosch Kraal, Korenplaats, Boesman's Hoek, and Any's River Plaats. It is curious that though Pritchard surveyed after Greathead, who had come across beacon C in 1880, that beacon did not come into Pritchard's calculations, and was not then brought up as a mat-

ter in dispute. It is certain that at both Doessel's and Pritchard's surveys there were present persons acquainted with the beacons, and yet there is no evidence that beacon C was brought up at these surveys as the true beacon. Greathhead, who surveyed for the owners of Korenplaats, says that when he surveyed in 1880 two beacons were pointed out to him as being the corner beacons in the south-east direction of Taaibosch Kraal, between that and Korenplaats. Both were in existence, and he saw them both. Beacon B was pointed out to him as perhaps being the beacon. This is the first occasion on which we obtain reliable evidence of beacon C having been seen after having been lost sight of for many years. Neither of the beacons was, however, adopted by Greathhead, who, accepting the diagram as his guide, erected beacon G now claimed by the defendant. It has been contended, on behalf of the defendant, that although beacon B was in existence some years before Doessel surveyed, it cannot be regarded as an original beacon, because there is evidence to show how it came into existence long after the original measurement of the farms. Evidence was adduced by the defendant to show that beacon B was created by Erasmus Botma, on a place where no beacon existed before, as a line beacon between ground occupied by him at Anys River Plaats and the farms now in question. I am not satisfied upon the evidence that that was the first beacon erected on that spot. Erasmus erected line beacons from Boesmanskop to below beacon B; B stands at an angle, and not in the straight line of beacons erected by him, and I feel sure that that angle could not have been located by him unless there were some beacon to guide. There is no proof that he was aided by beacon C; on the contrary, it is quite clear that beacon C did not fall into the line taken by him. Notwithstanding the evidence adduced by the defendant, I come to the conclusion that B was in existence before the time of Erasmus Botma. The evidence with respect to beacon C is of a most unsatisfactory character. I quite believe the witnesses for the plaintiff, who say they never saw this beacon, or knew till recently that it was claimed as a corner beacon. It is quite likely that a pile of stones did exist there for a considerable time, but it was not treated as a beacon, and its very existence was unknown for a considerable time before the present dispute arose. Witnesses were called who said that somewhere on the hill side in that neighbourhood there was a beacon which was recognised as a corner beacon many years ago by the owners of Taaibosch, but none of them have been to the spot for years to identify that beacon with beacon C where it now stands. I come to the conclusion that the evidence justifies the

inference that B is the original true corner beacon of the farms Taaibosch Kraal and Korenplaats. I am confirmed in that opinion by the character of the locality in which it stands. Surveyor Graaff, who was called as a witness for the defendant, said: "I did not go up to the Bosch beacon because it was going into Taaibosch Kraal. I saw the conspicuous beacon B in Anys Rivers Plaats. The beacon B is the most prominent point in the neighbourhood." It is unnecessary to go into the question of prescription on behalf of the plaintiff, in the view which I take of beacon B; and as to defendant, I may say he has wholly failed to establish prescription on his part. I am of opinion, on the whole, without tracing occupation over a period of 30 years for the purposes of prescription, that the proprietor of both farms for many years past, notwithstanding occasional disputes, regarded beacon B as the corner beacon between the two farms. I come to the conclusion that the line A B upon the plan annexed to the declaration is the true boundary between Taaibosch Kraal and Korenplaats. It was proved that on several occasions the defendant crossed this line with his stock, and trespassed upon the plaintiff's property, but there is no evidence that any material damage was sustained by the plaintiff in consequence. Judgment is given for the plaintiff in terms of prayer (b) of his declaration; and under prayer (c) for £5; on the claim in reconvention judgment is given for the defendant in reconvention, defendant ordered to pay costs of suit.

[Plaintiff's Attorneys: Van Zyl and Buissinne; Defendant's Attorneys: Tredgold, McIntyre, and Bisset.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Sir JOHN BUCHANAN.]

MOTIONS.

In re ESTATE HOFFMAN. { 1905.
{ Feb. 6th.

Dr. Rainsford moved, as a matter of urgency, for the appointment of Gysbert W. Kotze as provisional trustee in the estate of Johannes Jacobus Hoff-

man, of Oudekraal, Malmesbury division.

Order granted as prayed.

REN V. DALY AND HALLAN. { 1905.
Feb. 6th.

Keeping a brothel—Permanently residing therein—Act 36 of 1902.

A prostitute, who permanently resides in a brothel, is liable to prosecution under the 22nd section of Act 36 of 1902, as being a keeper of a brothel.

A woman, who is employed as a servant in a brothel but sleeps in her own home at nights, does not permanently reside there, and cannot be convicted of keeping a brothel.

This was an appeal from a judgment of the A.R.M. of the Cape. The appellants, together with two other women, had been charged with keeping a brothel in Dunkley-street, and had been fined £25, or in the alternative three months' imprisonment with hard labour. Mr. Rowson was for the appellants; Mr. Howel Jones appeared for the Crown.

Mr. Rowson said that of the other women one was acquitted, and the other was fined £25, or three months' imprisonment. The two appellants pleaded not guilty, but were convicted and fined £25, or three months' imprisonment with hard labour. The appeal was brought on the ground that the conviction was not supported by the evidence, and that it was contrary to law. Counsel, after reading the record of evidence, submitted that not only was the conviction against the weight of evidence, but there was not, taking the stringent definition of “keeper” in the Act, a particle of evidence to support the charge. The evidence of Hallan was that she was employed at the house in a menial capacity as a domestic servant. There was nothing to show that she had had anything to do with the management of the house. As to Daly, counsel submitted that no proof had been adduced by the prosecution to show that this woman “resided” at the house, or that she was anything but an occasional caller, calling for an immoral purpose it might be, but still not at all involved in the management of the house. Counsel also pointed out that Chester, who was the other person convicted, paid her fine, but the other two (the present appellants) were unable to pay their fine, and had been imprisoned since the 11th January.

Mr. Jones said that as regarded Daly the evidence was clear that she “per-

manently resided” at the house, and it was quite clear that she had been guilty of a contravention of the Act.

De Villiers, C.J., said that he had confirmed several of these cases, but there was a different element in the present case from the others, because here they had an admitted keeper (Chester), who had been convicted. Could the others who were using the place for immoral purposes be said to be additional keepers?

Mr. Jones submitted that they could. Proceeding, counsel said that he did not wish to press the case against Hallan, but he pointed out that she gave a contradictory statement, first saying that she was employed by Mrs. Wood, and afterwards that she was employed by Chester.

Mr. Rowson having been heard in reply,

De Villiers, C.J.: In this case a distinction must be made between the two appellants. As to the appellant Daly, there is the evidence of the police constable that she, Wood, and Chester resided at 6, Dunkley-street. He says that he knew Chester, Wood, and Daly, and had seen them at the house for six weeks. Moreover, other police officers had watched the premises, and on several successive nights had seen the accused Daly on the premises. There is, therefore, sufficient *prima facie* evidence to require Daly to rebut the proof of a “permanent residence” on the premises, but she gave no evidence whatever herself. The terms of the Act are: “That the following persons shall be deemed to be keepers of a brothel: any person who permanently resides in or occupies or manages, or acts, or assists in that management, or knowingly receives the whole or any share in the money taken in any brothel.” In the present case it appears that the accused did receive a share. But I should not lay much stress on that point, because the share she received was direct from the men, and her own share of the prostitution, and not for any share in the management of the premises. But the difficulty in her case is to get over the words: “Any person who permanently resides in a brothel.” She “permanently resided” according to the evidence, which she does not contradict. Probably, the legislature did not intend to declare that every prostitute who lives in a brothel shall be deemed to be a keeper of a brothel, but the words used are clearly to that effect, and the Court has only to construe the Act as it stands. The extraordinary result would follow that a woman who lives on her own private premises and goes to a brothel every night for the purposes of prostitution would escape prosecution and conviction, but the woman next door who lives permanently at the brothel is to be held to be keeper of the brothel. But the legislature in its wisdom has so provided and the Court has

simply to follow the provisions of the Act, passed by the Legislature. The appeal, therefore, in Daly's case will not be allowed. In regard to the woman, Hallan, her position is entirely different. There is not a single witness to show that she was a prostitute. She was occupied in the menial work of opening the door to persons coming in. Her own evidence is that she went home every night, and she is certainly not mentioned by the police constable as one of the persons whom he had known for six weeks as residing on the premises. There is not, in my opinion, sufficient evidence that the accused Hallan "permanently resided" on the premises, and in her case, therefore, I am of opinion that the appeal should be allowed and the conviction quashed.

Buchanan, J.: I am of the same opinion, and I would only add that, from a number of cases that have come before me, the operation of this Act tends to degrade the unfortunate women who carry on the trade of prostitution and does no good to the public at large.

De Villiers, C.J.: I quite agree with that. It is an opinion which I have repeatedly expressed.

REX V. HOFFMAN. (1905.
{ Feb. 6th.

Liquor Licensing Acts—Transfer of licence—Dissolution of partnership.

A licence to sell liquor by retail was granted to G., who was then in partnership with the appellant. The partnership was dissolved, and the appellant continued to carry on the business on his own behalf, although no transfer of the licence had been granted to him in terms of the 55th section of Act 28 of 1883.

Held, that the appellant had been properly convicted of selling liquor without a licence.

This was an appeal from a judgment of the A.R.M. of the Cape, who had convicted the appellant, under the Liquor Laws, of selling, dealing in, or disposing of certain quantities of intoxicating liquor, to wit, lager beer and gin, on the 2nd November, without a licence. The accused, who was sentenced to a fine of 10s., appealed on the ground that the evidence disclosed no such offence as was charged in the summons, and that the conviction was not

according to law. Mr. Alexander was for the appellant; Mr. Howel Jones was for the Crown.

The matter arose out of the transfer of the licence of Claridge's Hotel. Application was made for the transfer of the licence to accused on the 12th September, the licence was actually transferred on the 14th November, and the alleged sale to two policemen took place on the 2nd November. Hoffman was charged along with one Saachs, but the latter was acquitted, and the former convicted.

Mr. Alexander submitted that, although the appellant had not actually had the licence transferred. Counsel cited the case of *Rex v. Ware* (12, Juta, 4).

Mr. Howel Jones submitted that it was clear the appellant had been guilty of a technical offence.

De Villiers, C.J.: The licence is given to the individual, and the character and position of the individual are always taken into consideration by the Licensing Board before the licence is granted. In the present case, the licensee was Ginsberg, who was at the time in partnership with the appellant and another, but that partnership was dissolved. After the dissolution of the partnership, Ginsberg, the man to whom the licence had been granted, ceased to have any further interest in the sale of the liquor. Clearly, therefore, it was the duty of all parties to make all the necessary arrangements for the transfer of the licence before the actual dissolution of the partnership. The matter was entirely in the hands of the partners themselves. They ought to have known that there might be some delay in the proceedings, and, therefore, there ought to have been no dissolution, no actual dissolution of the partnership until arrangements had been made for the transfer of the licence to appellant, so as to enable him to take the place of Ginsberg, to whom the licence was granted. The case of *Rex v. Ware* had been relied upon, but, in my opinion, that does not affect the decision of the present case. There, there was also a partnership, but the point was that the partnership was continued. As was said in the judgment, Anderson engaged Ware while the partnership was existing, and sold the liquors before it was at an end. But the important fact is that Blow was still a partner at the time the sale took place, and, therefore, the sale was taking place under the authority of the duly-licensed person, Blow. But that is not the state of things here. The sale took place under the authority previously granted to Ginsberg, but under an authority which had ceased upon the dissolution of partnership. It is no doubt a technical breach of the law, but still it was a breach, and the Magistrate seems to have had this in his mind when he inflicted a fine of 10s. The appeal will be dismissed.

REX V. KILL.

{ 1905.
Feb. 6th.

Malicious desertion—Character of party deserted—Amount of maintenance.

This was an appeal from a decision of the Resident Magistrate of Victoria East, under section 2 of Act 7 of 1895, in which the defendant was ordered to pay £3 a month in support of his wife and three children, by reason of his wrongful and unlawful desertion. The appeal was brought on the grounds that the evidence did not support the decision, and that the decision was contrary to law.

Mr. Close was for the appellant, and Mr. Howel Jones appeared for the Crown.

Mr. Close said the question here, now that the parties were living apart, was whether the husband deserted his wife and whether that desertion was an unlawful desertion in the sense of the Act. It was clear from the evidence that the woman was not of much character. She was the mother of an illegitimate child shortly after the marriage, and, in addition she had been fined for what she called a quarrel, and altogether her record was not a good one. In a case of that sort, counsel submitted the Magistrate should have found for the defendant. His version of the story was that his wife deserted him on two or three occasions, and it was admitted that she did go away once. The defendant had one of the children in his custody, and he was willing to keep the other two children. The summons read, “in or about or between, 24th October and the 25th November,” and according to that he could not be found guilty of a continuous desertion. Under the circumstances, the woman being a waster, and disposing of her husband's property, if he left her for a time, it could not be said to be a malicious desertion. There was no evidence of the accused being possessed of any property, and in any case, if the appeal was disallowed, the amount of maintenance was excessive.

De Villiers, C.J.: If the accused were willing to take the wife and children back, I suppose this order would cease?

Mr. Jones: I take it, it is merely conditional.

De Villiers, C.J.: He is prepared, at all events, to take the other two children, and as the father, he is entitled to their custody.

Mr. Jones: Is he entitled to take the children without the wife? Possibly, if there were civil proceedings before the Court, the Court might exercise its discretion, and say if the husband was entitled to the children. Of course, if the children were given to him, and the wife raised no objection, then he could apply before the Magistrate for an

abatement of the amount he has to pay. As regards the property of the defendant, there is the evidence of the headman, and he knew the defendant well.

De Villiers, C.J., in giving judgment, said: It is clear upon the evidence there has been a desertion. At the same time, I think the order should be amended to make it clear that if the defendant is prepared to give support and assistance to the wife and children, although not pecuniary support, that the payment of £3 per month is to cease. The defendant may, for instance, be willing to supply his wife and children with clothes and food, instead of paying the £3 per month. The opportunity should be given to him to do that, and the order will be amended by a proviso added to the following effect: “That the monthly payment shall cease as soon as the defendant is prepared to supply the wife and children with necessaries and support, although such support be not of a pecuniary nature.”

[Appellant's Attorney:

NORTON V. VICTORIA EAST LICENSING COURT.

Licensing Court—Objections to granting of licence—Gross irregularity.

On the hearing of an application for a retail liquor licence, one of the members raised the objection that there was a sufficient number of licensed houses in the district, and a discussion on the point thereupon arose in the presence of the applicant and his agent, neither of whom requested an adjournment for the further consideration of the application. The application for a licence was refused.

Held, that the more formal course would have been to inform the applicant of the definite objection, but that, in the absence of any evidence to shew that an adjournment would have enabled him to meet the objection, he was not entitled to have the proceedings set aside.

This matter came up for review on a refusal of the respondents to grant a retail wine and spirit licence to the applicant at Pepperskop, in the divi-

sion of Victoria East. Mr. Close was for the applicant, and Mr. P. Jones was for the four members of the Licensing Court who had voted against the licence.

Mr. Close said the applicant (Charles Ebenezer Norton) in September, 1904, made application for a new licence for a retail wine and spirit business. No lawful objection was raised, in accordance with any provisions of the Act of 1883 or the Liquor Act, 1891, or any other law, and the licence was refused by the Court without reference to the plaintiff or without giving him an opportunity of replying thereto. The signatures of requisite number of voters were obtained, and there were memorials in favour of and memorials against the petition. The memorials against the petition were thrown out on a technical point, and three members voted for and four against the granting of the licence. Counsel contended that when a Licensing Court took an objection, that they were bound as a Court to give notice to the applicant, and to state what the objection was, and in support of his contention cited section 48 of Act 28 of 1883, which was to the effect that when a Licensing Court of its own accord took notice of any thing or matter which, in their opinion, was against the licence, in any such case the Court should inform the applicant, and should, on request, adjourn the application for any period of not less than four days.

Mr. Jones put in the affidavits of the four members of the Court, to the effect that when the memorials against the petition were presented certain members took notice of the statement that a new licence was unnecessary in the neighbourhood. The objection was raised in the hearing of the applicant and his agent, but neither made any request for an adjournment, under section 48 of the Act. In the opinion of one of the members the premises were in too close proximity to Government and private locations.

Mr. Close pointed out that an affidavit from the Government inspector might have persuaded one of the members, and the licence would have been granted. Supposing one member of a Licensing Court raised an objection, and the Court apparently took no notice of it, and when it came to voting, threw out the application on the objection raised how was the applicant expected to refute it? Counsel's contention was that the Court must deliberate on such objection, and they must give the applicant a chance of refuting it.

Mr. Jones cited the cases of the *S.A. Breweries v. The Wynberg Licensing Court*, *Barnett v. The Namaqualand Licensing Court*, and *Hotchfield v. The Sutherland Licensing Court*, to show the difference between the procedure under the Act in the case of an application for a renewal and an application for a new

licence. The objections raised were founded on the memorials thrown out, and were heard in the hearing of the applicant and his agent, neither of whom made any application for an adjournment. He contended there had been no irregularity, and that the provisions of the Act had been carried out. It might happen in a case that a member might not care to state his objections.

Mr. Close having been heard in reply,

De Villiers, C.J.: The Court has been asked in the present case to set aside the proceedings of the Licensing Court on the ground of gross irregularity. Now I quite agree that if there had been proof of anything in the nature of gross irregularity or illegality, the Court would have been bound to set aside the proceedings. The utmost I can find is that there has been some degree of irregularity, but certainly not gross irregularity. It would have been the more correct course for the Licensing Court to have definitely informed the applicant before they came to the vote, that some members raised the particular objection that the number of licensed premises was sufficient for the requirements of the district, but the point now is whether the fact that this was not definitely stated to the applicant or his agent by one of the Licensing Board, would justify the Court in setting aside all the proceedings, although no injustice was done. The applicant was present at the meeting of the Court and also had an agent to represent him. He heard them discussing this question, and he knew that the objection had been raised as to the sufficiency of the licensed houses in the neighbourhood. It is true that after the objection was raised to the irregularity in the form of the memorials, the applicant knew that some members of the Licensing Court raised this question. There was a discussion upon that question, and notwithstanding this discussion, neither the agent nor the applicant requested an adjournment for the purpose of enabling him to bring further evidence. The Licensing Court, therefore, in the absence of such application, might fairly conclude that the applicant had no further evidence to give. If he had such further evidence to give it would have been a most natural thing for him to have said: "Don't vote upon this question, because I am prepared to give evidence upon the point." But there was no such application for a postponement for the purpose of taking evidence. Under the circumstances, this Court should not after all the proceedings have been taken, order a fresh meeting of the Licensing Board for the purpose of considering the question; more especially in view of the fact that a new Licensing Court will meet in a very short time, when it will be in the power of the applicant to renew his application, and then bring forward his

evidence. I think Licensing Courts should be more careful in complying with the express terms of the Act, but, on the other hand, this Court should not, where there is a slight informality which cannot affect the merits of the case, set aside the proceedings. It is quite clear, at all events, that fresh proceedings before that particular Licensing Board would have ended in the same way, in other words, it is perfectly clear with the four days allowed the decision would have been the same. The Court, under the circumstances, should not set aside the proceedings, the position not being affected by the slight irregularity that took place. For these reasons I am of opinion that the application for review should be refused. There will be no order as to costs.

Buchanan, J., concurred.

[Applicant's Attorneys: Michau and De Villiers; Respondents Attorney: G. Trollip.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and a Special Jury.]

VAN NIEKERK V. WYNBERG (1905.
MUNICIPALITY. { Feb. 7th.

Municipality—Negligence—Personal injury.

This was an action brought by Mrs. Jasper Albertus van Niekerk, of Newlands, against the Wynberg Municipality, to recover £5,000 damages for personal injuries alleged to have been caused through the negligence of the defendants or their servants.

The declaration was in the following terms:

1. The plaintiff is the wife of Jasper Albertus van Niekerk, jun., to whom she is married without community of property, and by whom she is in this suit assisted, so far as is necessary, and she resides at Newlands, in the Cape Division.

2. The defendant is the Wynberg Municipality, constituted under the Act No. 45 of 1882.

3. Within, and passing beyond, the limits of the said Municipality, there is a certain public road, or that known as the Hundred Foot Road, or Rosmead Avenue, which is vested in the Council of the Wynberg Municipality, in so far as it lies within the said limits. The said road or street passes opposite near to the Kenilworth Racecourse.

4. Before the 11th June, 1904, the defendant had caused a number of holes to be made at intervals in the said road or street, where it so passes the said racecourse, apparently with the object of planting therein trees or shrubs, and had again thereafter, but still before the 11th June, 1904, caused certain of the said holes to be again filled up by its servants at a part of the said road, where conveyances would probably draw up or would probably pass or turn on the occasion of a certain meeting held at the said racecourse on the 11th June.

5. On the 11th June, the plaintiff was seated in a cart, drawn by one horse, which cart and horse, driven by her said husband, was being properly driven upon the said road, at the part aforesaid, in the neighbourhood of one of the said holes, which had been so made and afterwards filled up, as aforesaid.

6. The said hole was by the defendant or its servants carelessly and negligently filled with soft and yielding rubbish, and sand, and though not appearing to be so, was in fact dangerous, and owing to the careless and negligent manner in which it had been filled and left, the wheel of the said cart as it was being turned, sank into the said hole or excavation, which was of considerable depth, and the shafts of the cart were in consequence broken, and the plaintiff, who was seated in front, was hurled violently from her seat to the ground, and sustained a compound fracture of the fibia, near to and partially into the ankle joint, on the left side, in addition to severe shock, and other personal injuries. For all of which the defendant is responsible. The plaintiff was for a long time confined to her bed under surgical and medical attendance, in consequence of the premises is crippled, and has suffered, and still suffers great pain, and is unable to resume her ordinary life and avocations, and she has sustained damages in the sum of £5,000 sterling.

Therefore, the plaintiff prays for judgment for the sum of £5,000, or for other relief, and costs of suit.

The defendant's plea was:

1. Paragraphs 1 and 2 of the declaration are admitted.

2. The defendant denies that the so-called Hundred Foot-road is a public road or street, and that it is vested in the defendant. The said road consists of a gravelled made roadway for the use of vehicular and other traffic, with waste unmade land on both sides.

3. The defendant admits that before June 11, 1904, he had caused a number of holes to be made in the said waste unmade land near the said racecourse, with the view of planting trees or shrubs, but says that they were not in or on the

said gravelled roadway, or in or any part of the said Hundred Foot-road used or fit or intended for traffic, and he admits that before the said date he had caused certain of the said holes to be filled up.

4. The defendant denies that the said cart and horse were being properly turned either in respect to driving or as to locality, but he admits that the plaintiff was at the said date in the cart driven by her husband.

5. The defendant denies that the said holes were carelessly or negligently filled, or that they were dangerous, though not appearing to be so, and that he is responsible for any injury sustained by the plaintiff, and he says that if the plaintiff sustained any injury it was owing to the negligent, careless, and improper manner in which the cart and horse were driven and turned by the plaintiff's husband, and that the latter, had he exercised due and reasonable care, and caution in the manner in, and the ground over which he drove, and turned the holes, and the accident could have been avoided.

6. The defendant denies that the plaintiff has sustained £5,000 damages, or any damages for which he is responsible, and save as above, he denies paragraphs 4, 5, 6, and 7.

Wherefore he prays that plaintiff's claim may be dismissed with costs.

The plaintiff's replication was:

1. The plaintiff admits that certain of the holes referred to in the declaration, including the hole mentioned in paragraph 5 thereof, were not situated in that part of the Hundred Foot-road which had been gravelled.

2. Save as aforesaid, and save in so far as any of the allegations in the declaration are admitted in the plea, the plaintiff denies all allegations of fact and conclusions of law therein contained, joins issue therein with the defendant, and again, as before, prays for judgment with costs.

Mr. Schreiner, K.C. (with him Mr. Sutton) for the plaintiff. Sir H. Juta, K.C. (with him Mr. Upington) for defendants.

Mr. Schreiner, in his opening statement, said that a letter had been received from the defendant's attorneys, admitting that the ground was vested in the municipality as vacant Crown land, but not as a road or street. The essence of the case, he added, was the making of these holes at the side of the road, then filling them up in such an improper manner that persons standing there were placed in a position of danger through the act of the municipality, which they denied, and responsibility for which they repudiated.

Evidence was then called in support of the plaintiff's case.

H. R. Caisse, an officer in the Surveyor-General's Department, produced a plan of the part of the Cape Division, embracing the racecourse. On the side

of the Turf Club's property, space, he said, was shown as left for a road. Prior to that date there was a hundred-foot road running to Claremont. There had been a servitude over Blair's farm, dated 1825. In 1845 Blair's successor, on condition of the servitude being released, gave two roads. In 1882 Parliament granted the racecourse to the Turf Club.

Cross-examined by Sir H. Juta: In the grant to the Jockey Club, a road was defined by survey.

Mr. Schreiner said that the Act of Parliament showed that the grant was made to the Turf Club.

Witness said that the grant was made in favour of the chairman of the Jockey Club.

Jasper Albertus van Niekerk (husband of the plaintiff) said that he was accustomed to managing and driving horses. On the 11th June last he attended the race meeting at Kenilworth; he left the racecourse about half-past five or six, and looked for his trap, which he had expected to take him home. He saw a large number of traps and carriages standing on the side of the road. He had at the roadside a Ralli car, to which was yoked a large mare, of quiet habits. The horse was driven by Mr. Louis Vlok; there were also in the trap witness's wife and sister-in-law. The trap was not standing on the gravel portion, but at the side, off the hard road, in some slush. He asked Vlok to move the trap forward; Vlok did so. Witness then got into the cart, and turned to go on the gravel road, taking a short turn carefully, on the pivot of the right wheel. As they went towards the gravel road, the left wheel dropped into a hole; he had then got the cart straight. There was no hole to be seen when he began to move the trap. He found that a hole had been filled in with rubbish and refuse. The surface was fairly level with the surrounding parts of the ground when the wheel sank. There was no fencing or other protection about the holes. The holes had evidently been dug for the planting of trees. He afterwards found that the first eight or nine holes from the principal entrance had been filled in. When the wheel sank, the horse drew out the trap, and the shafts broke, with the result that all, except witness, were thrown forward out of the vehicle. Witness got down on the step and alighted. Mrs. Van Niekerk, who had been sitting at the front, was pitched on the ground; her ankle was broken. She suffered great pain. They had a child about four months old at that time. His wife was laid up for about seven weeks. Mrs. Van Niekerk had to use crutches for a while; she had since moved about with a stick. She was formerly very active, but owing to the injury, she now moved about with difficulty, and still suffered pain.

Cross-examined by Sir H. Juta: There was a gravel road, with a lot of rough ground on each side. As he went towards the racecourse, he had seen the holes alongside the ground. There was a portion partly gravelled near the entrance; he did not know whether it had been gravelled for a cab-stand. The holes were some distance apart; he would say about 30 feet. His trap was not standing very near to the hedge. The distance of the hole from where his trap stood was about 3 yards. There was a sandy track where the carriages stood. The spohr of his trap struck the hole on the racecourse hedge side.

Sir H. Juta: That shows you were driving down the racecourse side, instead of turning to the road?

Witness: No, I went straight to the road.

By De Villiers, C.J.: His horse was facing Wynberg way. He desired to turn to the right to go to Newlands. The wheel on his left, as he sat in the cart, dropped into the hole.

De Villiers, C.J., said he could not understand how the left wheel could have gone into the hole if the witness was turning the road.

Further cross-examined: After he had turned, he went on about three yards. The horse, he supposed, must have just escaped the hole. He did not see the refuse about the hole before the accident occurred. He had not been betting that afternoon; he was not excited at the time. The cart dropped into the hole; he did not know how far it went down, but he should say about 2½ feet. He did not measure the depth. The horse pulled the cart out of the hole without any difficulty; one of the shafts broke as the trap was being drawn along.

Sir H. Juta: I put it to you that it was in the struggle to get out of that hole that the shafts broke, and that if you had told those people to get out before you drove out of the hole, no accident would have happened?

Witness: No, sir; as the wheel went down, the horse swerved round.

By His Lordship: The shafts broke as the trap was coming out of the hole.

Further cross-examined: Witness stepped off the cart as it went down.

Sir H. Juta: I put it to you, that if you had got these people out before you got the cart out of the hole, nothing whatever would have happened to these people?

Witness: There was no stopping the horse.

Re-examined: He turned his cart on the right wheel, the left wheel striking the hole. On the following day he tested the hole by means of a stick, which penetrated the rubbish quite easily. His theory as to the injury to his wife was that her ankle was struck by the seat.

By De Villiers, C.J.: The horse was

walking at the time of the occurrence. When he felt the cart going down he tried to stop the horse, but could not.

Rykie Catherina van Niekerk (the plaintiff) said that her husband took the reins and drove very slowly, and turned sharply, and then pulled towards the gravel road. Witness heard the shafts crack. The horse was a very powerful animal, and immediately it found itself in the hole it dragged the cart out. Her husband did not urge the animal forward. Witness felt the trap going down on one side, and the next moment she was thrown into the road. Afterwards she had been removed home she was attended by Dr. Eyre and Dr. Rowan. Her medical attendant, Dr. L. Beck, was away at that time. Since his return, Dr. Beck had attended her. Witness had to remain in bed about seven weeks; she then had to rest on a couch; afterwards she had a bath chair; then she moved with the aid of crutches, and now she got about with the aid of a stick. She was a cripple. She had formerly been accustomed to plenty of exercise, tennis, cycling, and so on.

Cross-examined by Sir H. Juta: There was nothing to call their attention to the fact that holes had been made in the side portion of the road. The left wheel of the cart dropped into the hole on the inside edge. Witness had no idea how she fell. The horse was walking at the time, but there was really no time to draw it up.

Re-examined: The horse was exceptionally powerful. Witness could arrange for the animal to be outside the court in the afternoon if his lordship and the jury desired.

By De Villiers, C.J.: She did not think her husband tried to stop the horse when the wheel had sunk. Both shafts were broken when the vehicle had been drawn out of the hole.

Miss Maria Johanna Vlok, of Newlands, sister of the plaintiff, said that she was in the trap along with her brother-in-law, the plaintiff, and her brother (Louis Vlok) on the day named. Witness was sitting with her brother at the back of the trap. Mr. Van Niekerk turned slowly to his right to go to the gravel road; witness felt the trap going down on the left, and in a moment they were thrown out, witness being thrown over the front seat. Her sister suffered great pain from the injury for the first fortnight. She was quite crippled still. Witness did not think there was any carelessness in the plaintiff's driving; he turned the horse very slowly.

Cross-examined: After the accident the cart was lying forward on the broken shafts; it was not lying over on its side. She had not noticed that there were holes on the side of the road. She saw refuse about, but she did not think that it covered a hole.

Dr. Eyre said he found that the plaintiff had sustained two fractures of her left leg. The fibula bone was broken

about 2 inches; a small portion of the fibia bone was chipped off. The skin was not broken. The injury was serious; he could not say whether the results were likely to be permanent. He had not lately examined the injury medically.

Evidence was also given by Dr. H. J. Rowan and Dr. L. H. W. Beck to the effect that the plaintiff was likely to suffer permanent ill effects from the injury.

Louis A. Vlok (brother of the plaintiff) also gave evidence as to the accident.

John Edward Paul Close, incorporated accountant, said he resided at Newlands next door to Mr. Van Niekerk. Two days after the accident he went with the plaintiff's husband, Mr. Attorney Holme, and Mr. Surveyor Smuts, to look at the hole where Mr. Van Niekerk said the wheel had sunk on the Saturday. The cart seemed to have struck the hole almost diagonally. Some of the holes in the direction of Newlands had not been filled in. All the holes from the entrance seemed to have been filled in. Judging by the track the cart seemed to have been turned fairly sharp. They tried the hole with a stick and found that it contained house refuse, vegetable matter, and so on, and some sand. Mr. Van Niekerk's horse was a quiet, powerful animal.

Cross-examined by Sir H. Juta: Rain had fallen between the date of the accident and their visit. He had not had his memory jogged of what occurred eight months ago; his memory did not need to be jogged.

By De Villiers, C.J.: He should say that the depth to which the wheel had sunk was 1 foot to 1 foot 6 inches; he would not be at all definite on the point. There was no track left in the hole when they visited the spot.

Re-examined: The wheel track went to and off the hole, but was not shown at the hole itself, as the ground had consolidated again.

Martin Smuts, Government land surveyor, said that when they inspected the hole they found Municipal refuse both in the hole and about it. Witness proved the plans put in.

David Henry Holme, attorney, also gave evidence as to an inspection he made of the hole two days after the accident.

Pieter Johannes Wilmot, cab proprietor, Claremont, said he saw the accident to Mr. Van Niekerk's trap. The policemen from Wynberg compelled all traps to stand on the ground on the side of the road. Mr. Van Niekerk pulled straight towards the hard road when the left wheel sank in the hole. Speaking as an experienced driver, he did not notice any carelessness about Mr. Van Niekerk's driving.

Cross-examined by Sir H. Juta: He should say that the wheel sank about

2 ft. in the hole, probably to the nave. He would not swear whether the shafts were broken before the trap had been dragged out of the hole.

Johannes Graham, retired landowner, Claremont, said that he considered Mr. Van Niekerk an "excellent coachman." The horse was a willing, useful animal. The Hundred Foot-road had long been recognised as a public road; he had used it for 22 years.

Cross-examined: There had been a track that he had used.

Mounted Constable Ashley, formerly stationed at Wynberg, said he saw Mr. Van Niekerk turn round, and the wheel sink in the hole, when the horse had been turned in the straight. The hole had been filled up with rubbish, garbage, etc. It was customary for cabs and carriages to stand on the ground in question when the proper cab stand was filled.

Cross-examined: The horse moved away with a brisk step; it was not a walk, but "a kind of jig-jog." The horse might have got into the hole first. He had said on Monday afternoon that the horse might have slipped, because he saw the horse's head swerve to the right. He did not recollect properly what he said on Monday afternoon, because he was asked so many questions. The wheel went about 5 or 6 inches down into the hole. He said on Monday afternoon that the accident might have been caused by Van Niekerk pulling round the horse's head. Both shafts broke together when the vehicle had been pulled out of the hole.

Re-examined: Witness had had a consultation with counsel for the defendants (Sir H. Juta). He did not say that he saw Mr. Van Niekerk jerk the horse; he thought the horse must have been jerked.

By De Villiers, C.J.: When the trap went into the hole the horse's head swung to the right.

Henry F. Seale, jeweller, Cape Town, and residing at Claremont, said that the turf was fairly even on the left hand side near the racecourse. Carriages stood on the side away from the gravel road.

Mr. Schreiner read the correspondence which had passed between the parties' attorneys and closed his case.

John Geo. Frebus, guard in charge of a convict gang, employed by the Municipality, said that his gang were engaged in making the holes. About 11 o'clock on the 11th June, they were ordered to fill in the holes; he began on the Wetton-road side of the racecourse entrance. On the cab stand he put in at the bottom one load of refuse, and then all the material that had come out. The convicts stamped the material down. He also dealt in a similar way with the other holes. A drizzle fell during the day, and rain fell later on. He did not think that a cart could have fallen 2 ft. 9 in. down one of the holes.

There were indications that a hole had been filled up with refuse.

Cross-examined by Mr. Schreiner: He had ten convicts working under him, they filled up about 32 holes. He was instructed to fill up the holes between 10 and 11 o'clock; the work was finished about half-past 12. On the following Monday he filled further holes, the whole number being about 150. The road inspector told him to fill the holes at the side of the racecourse that day, because of the races.

Re-examined: He filled up all the holes in the same fashion. Witness was paid by the Government. The Municipality did not bring any gravel to the holes. He filled up the holes preparatory to the trees being planted. He was a bit of a gardener, and, naturally, he would not put down a thick layer of gravel in order to plant trees.

By De Villiers, C.J.: He was quite sure that all the holes were trodden down by convicts. There were two convicts engaged at each hole.

George Black, road inspector on the Council's employ, said that a Scotch cart of house refuse was tramped down into the holes, and then on top was placed the material which had been dug out, this being also tramped down. Tins were removed from the refuse, and placed to one side. He watched all the holes being filled up, and went over them to see that they were safe. The holes at the cabstand were dealt with in a precisely similar manner. No accident happened, except to Mr. Van Niekerk's trap. He saw the place where the accident occurred on the day following; the wheel track was 9 or 10 feet long. The hole was tramped round, and was a little lower on one side than the other. Marks could be seen of people having tramped down the ground. He tried the hole with his foot rule, and found that the wheel track was about 3 inches deep. On Monday he drove over the hole with the engineer, and the track then made was about 3 inches deep. The hole contained sand and refuse.

Cross-examined by Mr. Schreiner: Witness put his foot on the hole, and found that the earth was firm. He considered that it was impossible for the cart wheel to go deep down into the hole. A walking stick could be pushed down two or three feet anywhere in the sand alongside the racecourse. They actually put pegs down to mark out the holes without any hammering; they simply pushed down the pegs with their hands.

Re-examined: There were four passengers in the trap, when the engineer and witness went over the hole on the Monday morning.

Further cross-examined: The photograph (produced) showed the Council's cart standing in precisely the same position as Van Niekerk's cart had occupied on the preceding Saturday. A snap-

shot was taken by the Council's engineer.

By the Jury: The hole had been tramped down between the time of the accident and when he visited the scene on Sunday morning.

By De Villiers, C.J.: There appeared to be no tramping or treading on the track of the wheel. The ground round about just appeared to have been walked over.

Hugh Master Ladell, the Council's engineer, gave corroborative evidence as to a visit of inspection on the Monday following the accident.

Cross-examined: He did not know that there were four passengers in the cart. He only remembered the driver and himself having been in the cart when it was driven over the hole. The reason why he took his cart over the hole on the Monday was because he wanted to see if he could break his cart shafts in the same way. He stood with both feet on the hole on the same morning, but not where the water had collected. His feet did not sink. He did not take a stick to see how far it would go into the hole. Only the holes on the gravel cabstand were directed by him to be filled in on that particular day. The men went and filled in other holes, not upon his instructions, but because they had time to spare.

James Barry Munnik, Town Clerk, Wynberg, said that the gravel cabstand at Kenilworth Racecourse had been gazetted. The road was formerly a sand track.

Cross-examined by Mr. Schreiner: He had had no communication from the Turf Club, or anyone in fact, calling attention to the danger from the holes which had been dug.

Sir H. Juta closed his case, and counsel having addressed the jury,

De Villiers, C.J., summed up. The most important question, he said, was whether the plaintiff's husband was guilty of contributory negligence. It seemed to him that the shafts were broken by the horse dragging the vehicle out of the hole. The question was, should the plaintiff not have allowed the trap to be dragged out; should the plaintiff's husband have stopped the cart and relieved it of its burden before the cart was pulled out of this deep hole?

The foreman of the jury stated that they had found that the accident was caused by the negligence of the defendants, and that there was no contributory negligence on the part of the plaintiff's husband. They assessed the damages at £1,500.

Mr. Schreiner moved for judgment which was entered accordingly.

[Plaintiff's Attorneys: Herold and Gie; Defendants' Attorneys: Findlay and Tait.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

TRIAL CAUSES.

BOWERS V. BOWERS AND { 1905.
ARENDSE. { Feb. 7th.

The plaintiff and first defendant were married in community of property at Simon's Town in February, 1893, which marriage still subsisted. There were three children of the marriage, all of them minors. On the 12th August and the 14th August the first defendant was guilty of adultery, and since the latter date the defendants had lived together as man and wife. Plaintiff therefore asked for a decree of divorce, with custody of the children, as against the first defendant, and £50 damages as against the second defendant, with costs of the case.

Mr. Alexander for plaintiff. Defendants in default.

The plaintiff, in his evidence, spoke to seeing adultery committed by the first and second defendants. He had left Simon's Town, and was living in Cape Town, and until Arendse came to the house, the plaintiff and first defendant lived together amicably.

Maasdorp, J., granted the degree of divorce, plaintiff to have custody of the children, and judgment for £50 damages against the second defendant and costs.

BARRITT V. BARRITT.

This was an action for judicial separation.

Mr. Alexander for plaintiff. Defendant in person.

F. W. Barritt (the plaintiff) said she was married to the defendant in community of property on October 24, 1897, at Cape Town. There were no children of the marriage. She was a widow when she married defendant, and there were two children of the previous marriage. She had been keeping a boarding-house, and had saved some £200, and that sum, together with money she obtained for selling furniture, she gave to defendant, who obtained the Roma Hotel. For a year they lived happily together, when defendant became addicted to intemperance and neglected the house. Finally, in 1902, he refused admittance to an inspector of police after closing time, was fined £5, and as a consequence, the brewery company forced them to leave the hotel. Plaintiff then took a boarding-house in Faure-street, and plaintiff returned to her the £250 she had lent him. For the first month or two he

gave her money, but in 1903 and 1904 he had not contributed to her support. Her husband when drunk smashed the furniture, and had treated her cruelly.

P.C. Thorpe said he lived about two doors from the Barritt's in Faure-street. He had had defendant under his observation for about two years, and found that he was practically drunk all the time. One evening he was called into the house, and found defendant strapped down with ropes, and in a state of mad drunkenness.

Evidence was also given by Charles and Frances Hogerman as to defendant's violence and drunkenness.

Alex. Morrison, a boarder at Mrs. Barritt's house, said that defendant was often drunk, when he was obnoxious. When sober, defendant was a quiet man.

Mr. Alexander closed his case.

Defendant denied that he was given to drunkenness, and said the trouble arose through the son-in-law (Hogerman) trying to interfere between defendant and his wife.

Plaintiff (recalled), in answer to his lordship, said the goodwill of the Roma Hotel was £700, and she advanced her husband £200 in cash before the marriage. She did not know whether her husband had paid anything himself towards the goodwill.

Maasdorp, J., granted a decree of judicial separation, furniture declared to be the property of the plaintiff, and no order was made as to costs.

WEIMAR V. SIERREKS. { 1905.
Feb. 7th.
„ 8th.

Accommodation note—Payment
by accommodation indorser—
Right of indorser to recover
from drawer.

Mr. P. Jones was for the plaintiff, and Dr. Greer was for the defendant.

Dr. Greer said that although he had telegraphed for the defendant, who was the only witness for the defence, he was not present. He had been in Court on Friday, and the whole of yesterday. Counsel was prepared to go on with the evidence for the plaintiff if his lordship so desired.

[Maasdorp, J.: Very well, we will hear the evidence for the plaintiff.]

The declaration set out that about May, 1902, the defendant, who was about to purchase certain ground at Parow, and in order to complete the price, passed a note for £25, which was endorsed by the plaintiff through one George Casper Dreyer, who wrongfully negotiated the note. The holder of the note, one Goldfoot, successfully sued the plaintiff for provisional sentence on the note, and obtained judgment for £30 10s. 4d. Plaintiff claimed the

amount of the note, and the costs back from the defendant. The defendant in his plea denied that the signing by the plaintiff and one Lytton of the note was an accommodation. The defendant paid the amount due to Dreyer, as he was requested to do on the day it became due.

Mr. Jones made an application for an amendment of the declaration to the effect that the plaintiff on the 16th May, 1902, endorsed the note as an accommodation, and for the assistance of the defendant, and the defendant agreed to indemnify the plaintiff, and also that the note was negotiated prior to the due date of its becoming due.

Dr. Greer pointed out that such an alteration in the declaration put the case on an entirely different foundation. After three months the plaintiff had discovered that his facts were totally wrong. The defence of the case was made out to meet the original declaration.

[Maasdorp, J.: Had they gone on you would have met a bad case. The question is why they should not go on now, as you are not prejudiced with regard to costs.]

Dr. Greer: I cannot offer any further opposition, but I submit we are entitled to costs.

[Maasdorp, J.: The amendment will be allowed. All costs occasioned by the amendment to be paid by the plaintiff.]

The plaintiff stated that in 1902 the defendant wanted to buy some property of Dreyer, and he had not sufficient money, and asked witness to help him. Defendant asked witness to assist him, and witness proceeded to Dreyer, with whom he signed a note at 30 days. The defendant agreed to pay the money back again when it became due. On the 16th June defendant said he had paid the money to Dreyer, and produced a receipt. Witness told him to go back to Dreyer and get the bill, but he was unable to procure it. After that, Lytton and witness were sued for the amount of the note, and the amount of the judgment was paid through witness's attorney. Dreyer was arrested on an affidavit which was made by witness. The understanding was that the defendant would pay the money back to witness. The defendant gave evidence in the case, and was anxious that the plaintiff should win the case.

Cross-examined by Dr. Greer: He was anxious to see new-comers in the new township of Parow, and in order to get a new neighbour he was willing to guarantee him for £25. Witness was not interested in the sale of the property. He did not tell the defendant to pay the money to Dreyer. Witness's action was one of pure philanthropy.

Re-examined by Mr. Jones: He denied absolutely that he was to get any consideration out of the sale of the property.

Thomas Hazell, broker, accountant and estate agent, stated that in 1902 he held

the plaintiff's power of attorney. The plaintiff and the defendant came frequently to his office with reference to this matter. When the summons was served witness advised the defence. The present defendant assisted the plaintiff in every way to win the case. It was certainly understood that the defendant was to return the money if the plaintiff lost the case. Witness had no doubt if the defendant had been in good circumstances at that time he would have paid the money. Witness, holding the defendant's money which he obtained from the Government over a railway accident, paid over £25 to the plaintiff's account. When the defendant heard of this he objected, and the money was refunded.

Cross-examined by Dr. Greer: The defendant lost considerably over the matter. The transfer had not gone through in consequence of the negotiations with Dreyer. The defendant understood that he was liable to the plaintiff. The plaintiff was certainly very anxious to push Parow ahead.

Charles Edward Price Hughes, plaintiff's attorney, said he handed over the documents in the civil proceedings to the police, which included an agreement between Dreyer and the defendant, and a receipt for £20. He had made every endeavour to recover the documents, but was unable to get them.

Cross-examined by Dr. Greer: It was certainly unfortunate that the agreement was lost. The declaration was drawn up during witness's absence from the Colony.

Mr. Jones closed his case.

Peter Siercks, defendant, stated that in June, 1902, he had negotiations with one Dreyer with regard to the purchase of certain property at Elsie's River Halt. He dealt with Dreyer direct, and thought that Dreyer could sell him the property for which the plaintiff had called on him several times with a view of purchasing. Finally, it was agreed that the property would be sold for £210. Witness paid £30 in cash, £25 on a promissory note, and the rest was on bond. The note was made payable to Wiemar, and it was to be redeemed at Dreyer's office. Witness thought that the plaintiff and Dreyer were acting together in the sale of the property. Witness had not an intimate acquaintance with the plaintiff, who was very anxious that witness should buy the property. He lost over £30 on the transaction. He regarded Dreyer as a party entitled to receive payment for Wiemar. Several times witness called on Dreyer, but could not get the note. Witness never told Hazel that he would indemnify the plaintiff for the note. What he gave Hazel to understand was that although he was not liable he was willing to come to some arrangement. He told Hazel, when the latter paid £25 to Wiemar's account, that he would not pay the money.

Cross-examined by Mr. Jones: In regard to his transactions with Dreyer, the only document he held was the receipt for the money. Dreyer was acting for Bridget to sell the property. The £25 was a commission to the plaintiff. He could not explain, if Hazel was wrong in saying that witness told him to pay the money to Wiemar, that Hazel should have done so. He objected to pay the money because he was told that the plaintiff had got the money from Dreyer. He got the note from the Magistrate's Court, because it was essential for the transfer of the property.

Dr. Greer having been heard in argument on the facts, without calling on Mr. Jones,

Maasdorp, J.: The plaintiff sues the defendant in this case for the recovery of £25. He alleges that the £25 is due to him in respect of a promissory note upon which he became an accommodation endorser for the accommodation of the defendant. He says that he was requested by the defendant to lend his name to assist him in part payment of the purchase price of the property which the defendant had bought from Bridget. He further stated that he subsequently paid the note to the legal holder for value, and is consequently entitled now to recover it from the defendant. If these allegations are true, then it is quite clear that, as an accommodation party to this note, he is now entitled to recover this money from the person to whom he lent his name. It appears that a sale did take place, in which the defendant was the purchaser and a Mr. Bridget was the seller, and this sale took place through the instrumentality of Mr. Dreyer. The defendant admits that the purchase price was to be the sum of £210, and that it was agreed that £55 of this amount should be paid in cash. He states in so many words that he got the £25 to enable him to make up the sum of £55, because he had only £35 in cash at the time; and he said more than once that the £25 was really portion of the cash payment which he had to make. He does say that something was said which induced him to believe that Wiemar was to have the benefit of the £25, but what was said is so vague that it cannot be accepted as proof of anything. We have it, therefore, that the sale did take place to the defendant, who was in want of this assistance, and consequently it is not very difficult to accept the clear and positive statement of the witnesses for the plaintiff to the effect that the assistance was rendered by the plaintiff to the defendant in the shape of this promissory note. Upon reference to the note itself, it seems it is in payment of the balance of the purchase price of the ground at Elsie's Halt. That clearly supports the case of the plaintiff that certain

money was to be paid for the property that was bought, and it was to be paid by defendant, and it was not to be paid to the plaintiff, but to the owner of the ground. Upon these facts, therefore, I come to the conclusion that the plaintiff has clearly proved that the note upon which he was an accommodation party was the note upon which he was subsequently sued by a person by the name of Goldfoot, who satisfied the Magistrate that he was the legal holder for value, and he obtained judgment against the plaintiff for the amount. The plaintiff would, upon these facts, be entitled to recover. The defendant seems to be under some impression which is not justified by the evidence that Wiemar had some interest in the money. Now, take it that Wiemar had an interest in the money, and that he ought to have been the holder of the note, and to have recovered the value from the defendant. Then the defence is set up that he, as the holder of that note, instructed the defendant to pay Dreyer this sum of money as the agent of the plaintiff. Now, even if there was some case made of it that there was a direct liability from the defendant to the plaintiff, and that it was not an accommodation note, then the defendant had utterly failed to prove that he paid this note to Wiemar through Dreyer, because there is not a tittle of evidence that Dreyer was ever the agent of the plaintiff to receive his money. Upon the face of the note, it is provided that the note was to be paid at No. 2, Good Hope Buildings. That does not make the occupier or the owner of that property the agent of the holder of the note, and as a rule, when arrangements are made of this kind, upon the payment of the note, the note must be recovered from the person to whom the payment is made, and if the person fails to recover this note, and if parties afterwards suffer through his negligence, he must suffer for his own conduct in the matter. But I found my judgment upon the fact that this was a bill upon which the plaintiff was an accommodative party, and having had to pay the bill, he is entitled to recover from the defendant. There will be judgment for the plaintiff for £25 with costs. There was a claim for the costs of the previous trial, but it is not necessary now to go into the question whether the plaintiff would have been entitled to recover these costs, as that claim has been abandoned.

[Plaintiff's Attorney: P. Hughes; Defendant's Attorney: W. G. Coulton.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

TRIAL CAUSES.

CLOETE V. DIPRAEM. { 1905.
Feb. 8th.

Mr. Gardiner, on behalf of the defendant, moved for the trial cause set down for hearing on Friday (February 10th), to be postponed. Counsel read an affidavit by Mr. S. Hutton, attorney to the applicant (defendant in the action), embodying a telegram from Dipraem (who is in the Orange River Colony), stating that he could not be present in Cape Town by Friday, that there had been continuous rains, that the roads were heavy, and that he was residing over 100 miles from the railway. Applicant was unwell, and his most material witness could not attend.

Mr. McGregor (for the plaintiff), said that plaintiff's witnesses were already in town. He opposed the application, unless satisfactory security for costs were given.

[De Villiers, C.J.: It is clear that this postponement can only be allowed on one condition. That condition is, that the defendant shall before Friday morning at ten o'clock pay the costs of the day and of plaintiff's witnesses who have arrived in Cape Town, and costs of the motion of the 2nd February.]

At a later stage.

De Villiers, C.J., informed counsel that an alternative condition would be included in the order, viz., "or give security for costs, to the satisfaction of the Registrar."

KUIT V. UNION-CASTLE STEAMSHIP CO. { 1905.
Feb. 8th.

Dog — Injury — Knowledge of vicious propensity — Master of passenger ship.

The plaintiff, a foreigner, being a third-class passenger on board a mail steamer, was bitten by a dog which had been tied up at a spot from which it could reach the part of the ship ordinarily occupied by third-class passengers. The master of the ship was aware of the vicious propensity of

the dog, and had put up a notice in English that it was dangerous.

Held, that the owners of the ship were liable in damages for the injury.

This was an action brought by Jan Kuit, a carpenter, of Stellenbosch, against the Union-Castle Steamship Co., to recover damages in the sum of £250 for injuries sustained by a dog bite on the defendant company's steamer German.

The declaration set out that on the 11th May, 1904, plaintiff, who had duly paid to the defendants passage money (third-class from London to Cape Town), sailed from London in the steamship German, and arrived in Cape Town on or about the 11th June. On the 30th May he was bitten by a dog of the kind known as a boarhound, under the care, custody, and control of the defendants or their servants, which was being carried by the defendants on the steamer. The said dog was of vicious habits. Through the carelessness and negligence of the defendants' servants, the dog was allowed to be in such a position that it could reach and bite passengers who might be going about where they had a right to go. The defendants' servants failed to keep the animal in proper custody and control. Plaintiff had sustained bodily injuries, and had suffered and still suffered great pain, his health had been injured, and he had been put to expenses in medical treatment and medicines, and had otherwise sustained damages in the sum of £250. Defendant refused to pay the said sum or any part thereof. Plaintiff prayed for judgment for £250 damages and costs of suit.

The defendants, in their plea, admitted the allegations in paragraphs 1, 2, and 3, save that they did not admit that the plaintiff when bitten by the said dog was on a portion of the said steamship where he was entitled to be. They admitted that the dog was in their custody and control. They admitted that the dog was of a vicious disposition, but said that due precautions were adopted to prevent the said dog from biting the plaintiff or any other passenger, and that warning was given to the plaintiff and other passengers, by a written notice over the kennel, that the dog was dangerous. The defendants further said that the plaintiff was bitten through his own negligence in wilfully approaching too closely to the kennel. They denied liability, and prayed that the claim might be dismissed, with costs.

Mr. Gardiner appeared for the plaintiff; Mr. Upington (with him Mr. Lewis) appeared for the defendants.

Dr. Frank Muir Morris said that the plaintiff called at his consulting-rooms about the 13th June, 1904, and showed him an injury to his face. There was a jagged wound extending from his nose transversely towards the ear, about 1½ inches long, and there was another jagged wound, which extended downwards, about one inch deep. The plaintiff, he thought, must have suffered great pain. He saw the plaintiff again about ten days ago; although the wounds were healed, a distinct scar had been left. The charges of witness and his partner were five guineas. When witness first saw plaintiff, the latter seemed to be extremely nervous.

Cross-examined by Mr. Upington: He should not call the wound a "simple lacerated wound," as described by the ship's surgeon. There was a difference between a "simple" and a "lacerated" wound. A dog bite invariably caused a septic wound. The plaintiff's lower eyelid was involved in the scar. He did not notice any indications that plaintiff had scratched his face.

Jan Kuit (the plaintiff) said that he was a Hollander; he left England in the German on the 18th May last. On the 30th May he was bitten by the dog. He thought it would be about five days previously when he first saw the dog; it was then in the place where the concerts for third-class passengers were held. Witness had a right to be in this part of the boat; he had never been warned not to go there.

Mr. Gardiner said that he understood the animal was a Russian wolfhound.

Witness (continuing) said that the dog was fastened by a chain about 5 feet long, and the kennel stood against the bulwarks of the boat. The opening of the kennel faced the bulwark. Witness was looking at the dog at a distance of about 3 feet; he was stooping down, but he neither teased nor patted it. The dog suddenly sprang up and bit him on the face. He was not aware before the accident that the dog was vicious; he would never have expected to find a vicious dog on the deck.

[De Villiers, C.J.: But did you not know that there was a notice up warning passengers about the dog.]

Witness said that he was afterwards told so, but, being unable to read English, he did not know of the warning, and none of the passengers had called his attention to it. Before the accident two other persons were bitten and one was afterwards bitten.

Witness saw a paper at the kennel but he was under the impression that it was the name of the dog. Witness went to the surgeon and his wound was attended to. He still suffered from the effects of the injury. When he bent forward at his work he experienced pain; his eye was nearly always moist. His sight was not so clear as it had been formerly. Witness was suing in

forma pauperis. He had been unable to obtain the evidence of the two other passengers who witnessed the accident.

Cross-examined by Mr. Upington: He had not approached the dog prior to the accident except once when the dog was without water, and it was given water by another passenger. He had not patted the animal, nor had he rubbed his hands over its head and ears. He went up to the dog because he was attracted by its enormous size and because it was so miserably thin. He was not a judge of dogs, though he was very fond of them. He could only read a few words of English. He did not speak to anybody about the notice. After he had been bitten he heard that a passenger and a sailor had been bitten.

Dr. Julius Petersen said that he saw the plaintiff on the same day as his partner, Dr. Morris. He found a lacerated wound about 2½ inches long under the man's left eye.

Mr. Gardiner closed his case.

Mr. Upington called

Michael O'Mahoney, sanitary inspector, employed by the Table Bay Harbour Board, who said he was engaged on the destruction of rats. He was a passenger by the German, when the defendant was injured. The dog had been brought down under the awning on the fore-deck owing to the hot weather. After they had been at sea for some few days he saw the plaintiff repeatedly go to the dog and he considered that he must be the owner. The plaintiff, the butcher, and the boatswain were the only persons who approached the animal. The plaintiff handled the dog as if it belonged to him. Witness saw a notice on the kennel to the effect, "Beware of the dog; it is dangerous." Witness saw the accident. The plaintiff went straight up to the dog, began to handle it, and then stooped with his hands on his knees and faced it. The dog made a rush and bit him.

Mr. Upington: Have you any interest in this case, Mr. O'Mahoney?

Witness: Not as much as a single match. I paid the Castle Company the last penny of the passage.

Cross-examined: After the accident the dog was again taken to the upper deck, although they were still in the tropics. He thought the plaintiff must have been making grimaces at the dog when he was bitten. The plaintiff was bending forward with his hands on his knees and was staring the dog "in the countenance."

Another passenger by the steamer, a German, who said he was a fruit-dealer, also gave evidence. He declared that he saw the plaintiff playing with the dog twice or three times. The plaintiff snapped his fingers to call the dog to him; witness saw him stroke the ani-

mal. When the accident happened the plaintiff had been stroking the dog. There was a notice over the dog's kennel.

Evidence taken on commission was then read.

Captain Silvester said that the dog was so placed that it was not possible for him, by tugging at his chain, to get beyond his kennel. A notice was fixed over the kennel to the effect that the dog was dangerous. He had frequently brought out dogs to this country, and he adopted in the present instance the ordinary and usual precautions.

The Surgeon of the steamer said that he had great difficulty in preventing the plaintiff from irritating the wound by touching it. The plaintiff was not of cleanly habits. He discontinued the treatment of the plaintiff on the 9th June.

Other evidence by the officers of the ship was to the effect that due precautions were taken to protect the passengers from the dog.

Mr. Gardiner: The dog was admittedly vicious, and hence it was the duty of the Company to take such precautions as would make it impossible for him to inflict injury. *Le Roux v. Fick* (Buch, 1879, p. 29), *Arker v. Reed* (14 C.T.R., 720). The plaintiff was not aware of the vicious propensities of the dog; see *Doig v. Forbes* (7 Juta, 119). More than a mere notice in English is required to bring to the knowledge of alien third class passengers the fact that a dog is vicious. It is not as though the plaintiff had been throwing stones at the dog or otherwise irritating it when he was bitten; he was merely looking at it. The dog had been kept without water in the tropics, and was probably angry. It is said that the plaintiff and others had patted the dog, but even if that was so (and the evidence on this point is very contradictory), it would not amount to contributory negligence. The medical evidence as to plaintiff's injuries is very clear. As to damages, he has had to pay £5 for medical attendance, and the pain and suffering he has undergone must also be taken into account.

Mr. Upington: There is no doubt that the plaintiff was bitten, and O'Mahoney's evidence clearly shows that he patted the dog. As a matter of law, plaintiff had no right to touch the dog. A quiet dog will often bite a stranger if touched. Every precaution was taken to prevent the dog from inflicting injury.

[De Villiers, C.J.: The dog might have been put into cage.]

Even so, a man might have opened the door of the cage. Of course that would have been contributory negligence, but the plaintiff was guilty of contributory negligence. In the case of *Doig v. Forbes* the dog was not tied up, the decision, no doubt, would have been

otherwise had he been. Here the plaintiff went up to the dog for the purpose of handling it, and he had only himself to blame.

[De Villiers, C.J.: Was the dog tied up at a place to which third class passengers had access?]

No doubt they could go there, but the Company can always restrict passengers from using a portion of the deck, e.g., they may put a horse box there. Here a line was chalked on the deck to denote the length of the chain, and a notice was put up.

[De Villiers, C.J.: How was anybody to know that that chalk line denoted the length of the chain?]

The plaintiff could have seen that from his own observation.

[De Villiers, C.J.: Was the notice up when he was bitten?]

Yes. He has been guilty of more than contributory negligence. The fact that he cannot read English will not help him. If O'Mahoney's evidence is to be believed, all the other passengers knew that the dog was dangerous, and I submit that the Company took every reasonable precaution. Among English cases see *Block v. Copeland* (1 Esp. 203).

[De Villiers, C.J.: That is quite a different case. There the plaintiff had no right in the yard; here the plaintiff had a right to be where he was.]

But the general principle of English law is that where an injury results from a man's own negligence and improvidence he cannot hold anybody else liable. The proximate cause of the injury was his going up to handle the dog. In illustration of what I have said, I refer to Voet. (9, 1, 61). I have not found a single case in which the owner of a dog which was securely chained up has been held liable.

Mr. Gardiner was not called upon in reply.

De Villiers, C.J.: The first question to be decided in the case is whether there was negligence on the part of the company. The next question is whether there was contributory negligence on the part of the plaintiff. If both of these questions are decided in favour of the plaintiff, the last question will be what amount of damages should be awarded. As to the first question, whether there was negligence, I am clearly of opinion that it was an act of very great negligence on the part of those who were in charge of the ship to place the dog at the place where they did place it. It was first tied up in another part of the ship, but it is said that it was removed to this part, because of the heat. We know that the steerage passengers in a ship have very little room as a rule, and in my opinion the little room which is allotted to them should not be partly occupied by a dog known to be vicious. There is a great lack in the evidence as

to how the captain acquired a knowledge of the dogs vicious propensity. That he knew the dog to be vicious is perfectly clear, because he says he put up a notice. It is suggested that others had been bitten before, and there is some slight evidence to that effect, but certainly the fact that the captain knew of the dangerous propensities of the dog would rather show that something of the kind had happened before. However, the captain says that he himself used to pat the dog. The dog must have known him; and the fact that he patted it does not alter the fact that the captain knew that it was a vicious dog. In my opinion, it was not a proper place to tie the dog where the steerage passengers congregated, and where they would have access to the dog. We all know how, with the life on board, little things interest even first-class passengers. It was to be expected that the steerage passengers would go up to the dog. Well, then the dog did undoubtedly bite the plaintiff severely in the face. The next question is whether the plaintiff contributed to the injury by his own negligence. The evidence as to what really took place is conflicting. The plaintiff says he was looking at the dog at the time. One of the witnesses for the defendants says that at the time he was bitten he was not actually touching it, but he had his hands on his knees and was looking at it. Another witness says that he was touching it. It lies on the defendant to prove contributory negligence, and where there is any conflict upon the evidence I should certainly give the benefit of the doubt to the plaintiff who has sustained the injury. The plaintiff says he was not touching the dog at all. The captain, or whoever was responsible, would have surely known that passengers, with so little to amuse them, when a dog was placed there, would have a natural inclination to go and look at it. The dog took a snap at the plaintiff and bit him. In my opinion there is not sufficient proof of contributory negligence. It is said that there was a notice up. The plaintiff says he did not see the notice. He says he is a foreigner, and he does not understand English. But even if he did, I am not satisfied that the mere looking at a dog would have been such negligence on his part as to bar his remedy. It is said that he had previously patted the dog. There are witnesses to that effect. But if he had previously patted the dog then he might well look at it without fear of the consequences which ensued. In my opinion there was not contributory negligence on the part of the plaintiff. With regard to the amount of damages, I do not think this is a case for very heavy

damages. The plaintiff has appeared in Court. He might, it is said, suffer some inconvenience from his eyesight in future. There is no clear evidence on that point. Some substantial damages should be awarded, and I think the sum of £100 would do justice to the case. There will be judgment for the plaintiff for £100, with costs.

Mr. Gardiner asked that the costs should include the costs of the application for leave to take the evidence of the pursor, which were ordered to stand over, and plaintiff's expenses as a necessary witness.

De Villiers, C.J., said that these costs would be included in the order.

[Plaintiff's Attorney: P. Cloete; Defendant's Attorneys: Fairbridge, Arderne and Lawton.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

TRIAL CAUSES.

MCCARTHY V. VISSER.	{	1905.
		Feb. 8th.
		" 9th.
		" 10th.
		" 13th.
		" 23rd.

Building contract — Defects —
Time limit—Architect's certificate.

This was an action brought by Mrs. McCarthy, who was joined by her husband as co-plaintiff, to recover from the defendant £125 damages, by reason of his negligence in the erection of two villas at Observatory-road.

The declaration set out that the defendant contracted for the sum of £1,760 to erect two villas for the plaintiff, but the work was not up to the specifications and plaintiff suffered damages to the extent of £125. Mr. Alexander, at this stage, asked for leave to amend the declaration, by putting the damages at £220.

Mr. Upington (with him Mr. Alexander) was for the plaintiff; and Mr. Burton (with him Mr. Struben) was for the defendant.

Mr. Burton opposed the motion, pointing out that the defence was brought into Court to meet a certain schedule of defects.

Mr. Alexander said the defendant denied the liability altogether, and submitted that, under Rule 334, the plaintiff was entitled to amend his declaration.

Maasdorp, J., said, if the plaintiff paid the costs of the day, a postponement would be granted, but the case

could not possibly go on with the amendment.

Mr. Alexander said if that was the case, he preferred to go on. Counsel continued to read the declaration, which further set out that the defendant failed to complete the buildings according to the contract. On the 31st March, 1904, the defendant promised to rectify the building in accordance with the contract, but he failed to do so.

In his plea, the defendant stated that he completed the work to the satisfaction of the architect. If any defects did exist, which he denied, he was not responsible for them.

John McCarthy (co-plaintiff in the case) stated that the agreement was entered into between himself and the defendant. Witness was acting on behalf of his wife, to whom he was married out of community of property. Neither of the houses were completed when possession was taken. In the house witness lived in, he noticed the building was not according to specifications, and pointed out defects in the cement work, painting, and doors to the defendant. According to the money charged by the defendant, it was a poor job. The other house was damp, through bad plastering; the painting was also bad. The defendant was advanced money freely; he was always hard up. He had never seen anything of a final certificate; the building was not completed. In consequence of a letter he received from the architect, the defendant agreed to stand by the work for another three months from the 31st March. Three weeks later the defects were shown to the defendant in presence of the architect, and he promised another three months from date. The defendant put the blame on his workmen. The doors were quite loose and the chimney-pieces had to be fastened together. Several letters were sent to the defendant who promised to look after the defects, but he never came to the house. The Municipality threatened him with summonses.

Cross-examined by Mr. Burton: The Municipality complained of the water-courses. He approached the defendant on the appearance of the outside of certain villas he had built. He thought £1,760 sufficient for the job according to the specifications. The conversation about the indifferent plastering took place before April when witness pointed out that the weather wall was not done in pure cement. The foot-path defendant constructed was not to make up for the cement work. Witness would not have paid on a final certificate from his architect, but he paid on a letter from the architect saying that the defendant was short of money and if the witness paid the defendant would remedy the defects. Defendant never asked witness to have the weather wall made 14 inches. Up to

June 27 witness did not write to defendant about the defects, because the defendant knew all about it. Witness told Mr. Poole, the architect, in July, about the defects not being rectified, and Mr. Poole got a clerk of the works and a master builder to come and examine the buildings, and they drew up a schedule of defects.

Re-examined by Mr. Alexander: The defects he referred to were defects that were there when the building was handed over by the defendant. The painters were still working in February. The promissory note was made payable at a date when the defects should have been made right.

Louisa McCarthy stated her husband signed the contract for her, and the defendant was aware of that. In April Mr. Poole, the defendant, and witness's husband examined the building. Her husband complained of the floors, the plastering and the painting. The back part of the house was damp at the present moment.

Cross-examined by Mr. Burton: The defendant did not say that he wanted to settle the case. A week before Christmas the defendant advised her to withdraw the case as it had no foundation. The leakage took place long before June. She selected the window fasteners herself. She never told the workmen that she was satisfied with his work.

Vivian Poole, architect's assistant, employed by Messrs. Baker and Masey, stated that he drew the plans and supervised the work for the villas. At the beginning of the contract in September the defendant borrowed £60 from the plaintiff. Witness never granted a final certificate for the work. As a matter of fact at the beginning of the year he had to draw the defendant's attention to the omission of a parapet. In March the defendant came to him for money, stating that he was hard up, and witness gave him a note to the plaintiff asking him to pay the balance, and that the defendant would put the defects right. The main defects were the plastering, the painting, and the flashing. In April witness took the defendant to the house to point out the defects to him. The houses were very damp. There was only about 10 per cent. cement in the plastering. The defendant guaranteed in three months to put right the defects. The house had not in point of fact been completed according to the contract.

Cross-examined by Mr. Burton: The floors were got in so quickly that he could not say whether the sleeper walls were put in or not. The floors shook considerably. The defendant was prepared to swear that he had put in sleeper walls and was willing to take up the flooring on witness's suggestion, but the plaintiff did not wish to go to the inconvenience. The whole of the external painting was bad, and it was

represented to the defendant that he should do the work over again. The defendant agreed, but failed to do so. Witness called on the defendant within a week after he had been paid, to urge him to proceed with the work. There were about a dozen holes in the roof, and the defendant's attention was drawn to this, but he failed to rectify it. The omission of the skirting was also pointed out. The guttering could not, as the buildings were constructed, be put up. The defendant somehow got his roof too high. It was pointed out to the defendant that as the guttering would not go along, lead flashing must be put, and the defendant promised to have it done, but he failed to keep his promise. The guttering was on the house in November before the contract time expired. He inspected the building once a week. He knew of no arrangement by which the chimney pots put up were to be substituted for the flashing left out. The only way to put the floors right was to take them up, and put sleeper walls in. The painter said he had done the painting according to specification, but witness told him that he must do all the external painting. The holes in the iron roof were about three-sixteenths of an inch in diameter. He did not believe the cement used was better than what was specified.

Re-examined by Mr. Upington: Witness never gave a final certificate, nor did he ever give a certificate that the work had been done in a proper and workmanlike manner. Witness never heard anything of the chimney pots taking the place of the lead flashings, the lead flashings were indispensable.

David Francis Ellis, clerk of works to Messrs. Baker and Masey, architects, who examined the premises at the request of Mr. Poole, in July 26, stated that he drew up the schedule of defects. The villas were indifferently finished, the principal defects being the omission of the flashings on the roof, owing to this omission the houses were damp. The outside painting was very bad, and the plastering, he concluded, was 10 of sand to 1 of lime. Witness, Mr. Orr, and Mr. Ketteringham estimated that it would take £169 18s. 6d. to put the houses in proper order.

Cross-examined by Mr. Struben: Witness was employed by the same firm as Mr. Poole. The account put in showed the value put in the defects in the schedule. Witness considered all the prices fair, but had not itemised them; Mr. Orr would speak as to the prices. The cisterns were not erected according to the plan, and the back doors were not according to specifications. Witness could swear that he could see daylight through the ceiling. The painting was bad throughout, and not according to specifications.

Mr. Struben cross-examined the witness at considerable length as to an ex-

cessive estimate, and reverting back to item six asked him why it appeared on the list when it was not on the specifications.

[Maasdrorp, J.: You have asked him that before.]

Witness: Yes, my lord, and we have wasted some time over it. I have already explained that Mr. Orr will be able to give the detailed statement.

Re-examined by Mr. Upington: Mr. Orr made an examination of the premises quite independently of witness, who checked the items. From his general experience, the cost to remedy the defects was very reasonable.

Robert Chas. Orr, architect and quantity surveyor, stated that in January, at the request of the plaintiff, he examined the two villas, and made a careful examination. He took up floors, and discovered a number of defects that were not in the schedule. He had compared his report with the schedule attached to the declaration. He considered it would cost £169 to remedy the defects.

Cross-examined by Mr. Struben: It was twelve months after the villas were completed that he made the examination, but twelve months would not change cement into lime. He could judge the painting just as well as he could a couple of days after it had been put on. The painting was in a wretched state throughout. There might have been a good many arrangements made between the defendant and the plaintiff that he knew nothing about. The paper was discoloured, clearly showing dampness. Paper could be discoloured without dampness, but there was no doubt that the cause of the discolouration in this case was dampness. The fact that it was a very severe winter last season he did not consider as the cause, as he thought it unnecessary in the case of these villas. Five or six sheets on the iron roof were apparently old sheets. The class of work done in South Africa would make an architect's hair stand at Home, and there was a fair specimen of bad work here. Every matter in the schedule was important to the plaintiff, as some time or other he would have to remedy the defects.

In further cross-examination, witness explained that the doors were badly constructed, and could easily be pulled away from the hangings.

Mr. Struben: They could be pulled away by a weak man?

Witness: Oh, yes; you could pull them away easily.

Walter Ketteringham, builder and contractor, who made a joint examination of the premises with the last witness, also gave evidence. He considered that the schedule was a reasonable one. He agreed generally with the report of Mr. Orr.

In cross-examination, witness said that he would have liked, as a builder, to take

the contract at the price the defendant charged. He thought he should have made £150 to £200 out of the contract. He could have built such a pair of houses for £1,500.

Charles John Howard, commercial traveller, tenant of one of the houses, also gave evidence.

Frederick Visser, the defendant, stated that in March he went over the houses with Mr. Poole, the evening before he went to the plaintiff's house. He could not see the plaintiff on the evening of the 17th, and next morning the plaintiff told him that he must bring the final certificate. The architect complained of the capping, but he had seen it in the course of construction three months before, and said nothing about it. Leading into the backyard, there were a few cracks above the door and witness had that remedied next morning. The architect a week later said he had sent a final certificate, and gave witness a note for final payment. The following Sunday witness and Mr. Poole went to see a few defects in the house. The plaintiff said that when he walked in the dining-room the glasses jingled, but they did not jingle when witness was there. Witness offered to open the floor, and while Mr. Poole was in favour of this Mrs. McCarthy objected to the removal of her linoleum. Witness had put sleeper piers instead of walls. The plaintiff then said to let that matter stand, and they proceeded into the bathroom, where the painting wanted a final coat. Two days afterwards his men put the matter right. Witness admitted that his men had made a mistake about the external plastering, and offered to have it done again. Mr. McCarthy agreed to the suggestion. Witness put in more shutters than were specified. The extra shutters were worth £5. Witness was asked to paint the place all over again, but said that, on principle, he could not do it. Witness did not chose the colours. Mrs. McCarthy chose the colours. Mr. and Mrs. McCarthy were there every day, and never objected. Mr. Poole did not insist upon the repainting before he gave a certificate. Witness told Mr. McCarthy that he would stand by the work for a further three months beyond the two months. Mr. McCarthy had told him to come for his money before that. Witness had all the defects pointed out rectified. The painter did his work well. He was a man of reputation, and was at present employed on Fletcher's Retail buildings. Mr. Poole and witness went to see Mr. Lansdown, the painter, to ascertain the number of coats of paint. Mr. Lansdown detailed what he had done. Mr. Poole asked Mr. Lansdown to give another coat, as, if not, he was afraid he would not get all his money. Witness said, "Then sue Mr. McCarthy." Mr. Poole did not complain further to Mr.

Lansdown. Next evening witness went to get his payment from Mr. McCarthy on the final certificate of the architect. This was on March 31. Witness gave Mr. McCarthy the final certificate as in previous cases. The paper stated, "Final certificate. The work is now completed, and Mr. Visser is now entitled to final payment." Witness saw McCarthy, and Mr. McCarthy asked him to take £90 cash, and a promissory note for the balance, and that he would allow the bank interest, so that witness would not lose anything. The payment included the extras. Mr. McCarthy said nothing about repainting or cementing the wall. The verbal promise made by witness was for three months. Witness made the promise because he thought Mr. McCarthy considered he had wilfully omitted to cement the wall, and he therefore made the promise to show he did not want to evade responsibility. On June 14 Mr. McCarthy showed him the paper coming loose in the sitting-room. Witness said, "I will come and fix it up." Witness did so the next day. Mr. McCarthy was mistaken in saying he did not see witness after April. On June 21 Mr. McCarthy said there was damp coming in the kitchen. Witness examined it, and found a few small spots. It was driven in by the rain. The walls were nine-inch walls.

[Maasdorp, J.: What's the use of building a wall if it must let the rain through?]

Witness: I pointed out to Mr. and Mrs. McCarthy that these walls should be 14-inch walls.

[Maasdorp, J.: Cannot you build a 9-inch wall to keep the damp out?]

Witness: Sometimes you can, and sometimes you cannot, my lord.

Examination continued: Witness suggested the alteration, as he thought it dangerous as regards damp. Witness offered to do it without cost. Plaintiffs, however, did not agree to the suggestion. There were very heavy rains about that time, and many houses were damp. He could not say if any houses fell down in consequence of the rains. A week later, on June 28, witness received a letter from Mr. McCarthy saying he would be pleased to meet him early as possible with reference to the houses built at Observatory. Witness replied saying that he did not know what was wanted, and was sorry he did not give particulars. Witness had heard of leakages, and wished to know why he had not been informed before, so that it could have been attended to; he had suggested the painting to Mrs. McCarthy. Mr. McCarthy said nothing about defects between March and June 28. On July 5 witness received a registered letter from Mr. McCarthy, saying he was sorry witness did not come to see the condition of the houses, owing to bad workmanship, and saying

he would stop payment of the promissory note, and that unless the defects were repaired, he would take action. Witness replied that his liability had ceased, but was willing to do what he could to rectify any defects that were his fault. Mr. Poole then called, and said Mr. McCarthy had complained about the north wall not being cemented, and a lot of other things. Mr. Poole advised him to see Mr. McCarthy, as Mr. McCarthy was going to take him into the Supreme Court. Witness told him he did not see why he was called upon to do things that he had no need to do, and pointed out he had received his final certificate, and had been paid. Mr. Poole admitted that an arrangement had been made about the cement wall, but said Mr. McCarthy denied it. Witness was taken at great length through the various items in the schedule of damages, and maintained that many items were only a matter of a few shillings or so, and in other cases where things were said to be broken or inferior, they were not so. The ridding at the junction was water tight. The architect never told him it was badly fixed. The ridge could be taken down very carefully without any risk. A carpenter did not require a mate to put up ridding. The whole of the ridding could be refixed for £5. There was no disadvantage in placing the tanks where they were at present. When witness inspected the house, Mrs. McCarthy showed him a window fastener loose. The covers of the cisterns must have been twisted. The iron sheets were perfectly new when he put them on the roof. The best of paint might accidentally get a trifle gritty. Plenty of painters would be glad to re-do the external painting for £20. It was entirely wrong to suggest that he was hard up during March; he had between £100 to £300 in the bank.

Cross-examined by Mr. Alexander: He kept no book in connection with the building; he only kept rough memoranda. He was not hard pressed for money at the time. The bank had ample security for the overdrafts which appeared against him in 1903. The architect never gave him a certificate to the effect that the work was completed in a workmanlike manner. He brought no vouchers to show what he spent on the building. The architect was not telling the truth when he said that from time to time he handed witness slips of defects. The plastering was already done, not according to contract, before the suggestion was made about substituting the garden path. The mason failed to get the specification before the plastering was done. He saved nothing by putting in the sleeper piers instead of the sleeper walls. The plaintiffs accepted the cisterns without covers, and therefore he was not liable. He did not tell his foreman that the mixing of the plaster-

ing was not according to the specifications. He had repaired some cracks, but others appeared. It never struck him to ask for a written authority for the deviations he had made in the contract. It was in the specifications that he was not to deviate without the authority of the architect.

The guttering was not continued on account of the roof having been raised. He did not agree with the other witnesses that flashing was omitted because of this deviation, or with Mr. Poole that it was the most serious omission in the whole complaint. He did not fulfil his promise to go and look at certain leakages in June on account of a letter he subsequently received from the plaintiff. There was an interval of a week from the time he gave the promise up to the day he received the letter, but it did not rain materially during that period or he had not sufficient time. All the papers and the books in connection with the building had been destroyed. Up to February 7 he had never stated that he regarded Mr. Poole's letter to the plaintiff as a final certificate. The papers had been destroyed by a quantity of paint having been spilt, and rough notes in the book produced were made before the catastrophe. It was merely as a matter of courtesy that he offered to do any repairs, but after he consulted his attorney he decided not to do so as he might prejudice his case.

Re-examined by Mr. Struben: He offered to do repairs that were necessary during the time he was at the building. The terms of Mr. Poole's letter were that he was entitled to final payment as the work was completed. Mrs. McCarthy told witness that it was her house, and that she would order any alterations she wished. When witness received the final payment from Mr. McCarthy he did not complain of anything.

By Maasdorp, J.: The architect must have noticed a deviation in the doors.

Proceeding, under re-examination, witness said that on Mrs. McCarthy's instructions and with Mr. Poole's knowledge, he omitted the parapets.

By Maasdorp, J.: It was only after the house was completed that he noticed the failure to cement the north wall, and then he suggested making the path instead without any charge. Previously he had arranged with Mrs. McCarthy to construct the path for which he was to be paid, and it was when the plastering was pointed out to him that he offered to make the path free.

Frederick Gibson, in the employ of Smith and Cochrane, stated that he supplied paint to Mr. Lansdowne in October, 1903. The paint was the "genuine quality."

Cross-examined by Mr. Upington: A great deal depended on the mixing of the paint. Too much turpentine would destroy it altogether.

William Lansdowne, painter, who worked on the cottages, stated that one villa was completed inside about the 24th December, and the other inside about a week later. He never saw an architect on the work. The defendant did not complain of anything. The first time he saw the architect was the 28th March, when he called to see witness with the defendant. Mr. Poole pointed out a few little things, and told witness to go and see Mrs. McCarthy, who would point them out in detail. Witness refused to give the paint another coat as he had put the specified number of five on. He used the best of material. His work also included the paper hanging, which was all dry when he left it. After he had seen Mr. Poole and the defendant witness went to see Mrs. McCarthy; and in two hours he remedied the little defects complained of.

Cross-examined by Mr. Upington: For the painting by itself £65 was his price, and he arrived at that price by looking at the job as a whole. He drew the defendant's attention to the omission of the paper hanging and the glazing, and witness did it, and charged £5 for it. When his attention was drawn to the patty being a bit full, he discovered that in one case the glass was too small. The last day he was at the job was January 9. The tenant came in later than that, but he did not recollect being asked by the lady to leave off work. He would swear that the doors produced received five coats of paint. At the same time he had another job at Camp's Bay, which he had to give some attention to. Approximately he could not give what the job at Camp's Bay was worth. It was possible there might have been little omissions. When he was at the house he noticed the external painting wanted a coat of varnish, which was the duty of the defendant's men. The defendant never complained of witness's painting; not even as a joke. He did remember the defendant saying that the painting was bad along with the other work, and he (witness) would have to be subpoenaed. That was no joke to witness. Two days before he was subpoenaed he went on his "dignity" to see Mrs. McCarthy to explain that no negligence could be attributed to him. He was proud of the painting of these villas, and considered it was a credit to him.

Re-examined by Mr. Struben: The materials came from a good firm, the work was well done, and he had not made an exorbitant profit on the job. He could see no difference in the work done by himself, and that done by the others. When he had the interview with Mrs. McCarthy two days before the trial, she did not complain of the painting. The defendant himself, did not complain of witness's work; he was merely transmitting the complaint from

the McCarthys. He would make the external painting all right for £10.

By Maasdorp, J.: All the teak work required varnishing. Had that been done in the first instance the work would have kept better. He repudiated the suggestion that he had done the job cheap by making the paint thin.

Alexander Denny, a painter, who was working with the last witness at the job, stated that Mr. Lansdowne never complained to him of his portion of the work.

Cross-examined by Mr. Upington: Witness mixed some of the paints. A little could be saved by making the painting thin.

By Maasdorp, J.: It would be no advantage to him to put on less coats than he was instructed to do.

Thomas Polson, mason, stated that he heard the plaintiff suggest several alterations in the plan to the defendant. To comply with the Municipal Regulations they had to increase the width for the foundations. That made the work more expensive, but he could not say if anything was allowed for that. The specification called for three of sand to one of lime, and 10 per cent. of cement for the other walls, but it was actually mixed two of sand to one of lime, and 10 per cent. of cement.

Cross-examined by Mr. Upington: The heading of the certificate was "Final certificate." It was signed by the architect. Mr. Poole only once complained to witness about the work. Witness was not asked about the certificate until the case was mentioned.

David Jacobs, carpenter, who was engaged on the villas, stated that he worked partly on the specifications and partly to the instructions of the defendant. There were no complaints made to him about the work, with the exception of the sleeper walls. The floor was firm.

Cross-examined by Mr. Upington: The defendant told him that the sleeper walls were to be left out. He reckoned it better to have a better joist. He had no clear recollection of how many sleepers there were in the rooms. The doors that had been inspected by his lordship were good doors. The three doors he had put in were not according to specifications; he put them in on the instructions of the defendant.

John Mitchelmore, builder and contractor, who examined the buildings on the 2nd February this year, considered the job a very fair work of lime plaster. Lime plaster was not supposed to keep out damp. Villas of that description could not by any means be termed a first-class job. It would have been a wiser policy to have 14-inch walls on the weather side. He would re-cement the wall for about £6. Heat in the lime would eat away the paste, and the paper would drop off. Observatory was such a windy place that the dust

might have got in just after the painting was done.

Cross-examined by Mr. Upington: He did not consider £1,760 a flash price for the buildings. Assuming that the defects in the plastering were remedied, as Mr. Orr suggested the claim was not exorbitant. If the painting had to be done again, £10 would be sufficient to go round each house outside. The omission of flashing even on a third-rate job, would be an important thing. Witness did not go on a tour of inspection himself; the defendant told him he had got his final certificate, and that was sufficient.

Re-examined by Mr. Struben: Painters were at a great disadvantage in the summer in a district such as Observatory.

By Maasdorp, J.: When they had parapet walls, the flashing must be on the weather side. He would say that about four coats were put on the doors brought into court.

Francis John Freeman, architect, stated that he would not grant a final certificate before he was satisfied the work was completed. It was the ordinary course to rectify defects that appeared before the certificate was given. Looking at the houses generally, after a year, the painting would show the signs of the effects of the summer and winter. As far as he could judge, the internal and external painting were the same. By the general appearance of the woodwork, he would say that it was according to the specifications. With the deviations, the buildings were substantially the same as if carried out strictly to specifications. A deviation could not appear as a defect within the two months allowed after the completion of the contract; it must have been noticed at the time. The cistern covers were worth half-a-crown each. If the cisterns had been fixed according to specifications, the room below would have been flooded. As they were erected at present, it was the custom in houses of that description.

Cross-examined by Mr. Upington: He had 12 years' experience as an architect. He reckoned that after five years' apprenticeship. For that class of building, the specifications were for a good class job. The doors he had seen in the court were certainly not according to specifications. When he went over the building, he noticed a considerable amount of flashing had been omitted. He had allowed for the crack in the wall, which had to be made good before the bad weather. The absence of the lead flashing was a "deviation," not a defect. Before witness examined the building, the defendant told him that he got his final certificate, and it was all right, but he did not necessarily go on a futile examination. The "wily" Visser did not draw his attention to the defects in the iron roofing. It was the

usual custom to use the iron on the temporary shed for the roof of the building. He attributed the dampness to a 9-inch wall made of clay, but ordinary plaster would not keep out the damp. As an architect, he would have passed the grate, although it had a little bit of "give." He would allow 2s. each for the "easing" of the doors. He would not say that they required "easing," because there was difficulty in getting them opened and closed. He would not say that the plastering of the Bowden-street wall was according to specifications.

Re-examined by Mr. Struben: He took his prices from quantities of work carried out in 1903. He could hardly agree with Mr. Orr that the doors could be lifted off the hinges.

This closed the evidence.

Counsel having been heard in argument,

Cur. Adr. Vult.

Postea (February, 23rd).

Maasdorp, J.: The plaintiff sues the defendant, who is a builder by trade, for the recovery of £120, in respect of defects and omissions in a certain building, which it is alleged the defendant failed to complete in accordance with contract and specifications, and the plaintiff further states that the defendant on the 31st of March, 1904, in consideration of the payment of the whole of the contract price promised to rectify and complete the buildings before the 30th of June, but failed to do so. The defendant pleads that he duly performed his part of the contract to the satisfaction of the employer's architect, admitting that there was deviation from the specifications, but saying that these took place at the request of the plaintiff and her architect. The defendant also says that when a settlement was effected on the 30th of March he promised to make good any defects which might appear before the 15th of March, but he received no notice of such defects until the 30th June, 1904. A contract was entered into between the parties on the 7th of September, 1903, by which the defendant agreed, in consideration of the contract price of £1,760, to build for the plaintiff two villas, and to complete them before the 7th day of January, 1904, in accordance with drawings and specifications under the superintendence and to the satisfaction of Mr. Poole, the employer's architect. The plaintiff agrees that, subject to and on the performance by the defendant of this contract, that he will pay the contractors the said sum of £1,760—in such sums and at such time or times as the architect grants his certificate for work actually done and completed, always retaining 20 per cent. of such amount in bond, which is to be kept in hand for two months after completion to make good any defects which may occur in the contractor's work. I may

at once refer to two of the conditions contained in the specifications, which bear upon the issues in this case, which are to the following effect: The contractor is not to deviate from the drawings or specification, or excavate extra work unless upon the authority of the architect. No order from any other person will be recognised as a claim for extra payment. The contractor to be responsible for and to make good all defects, shrinkage, or other fault which may appear in the work within a period of two months after completion. The defendant set about constructing the buildings, which form the subject of the contract, and on the 4th of December he got a certificate from the architect certifying that a sum of £600 is due to him on account of work done, and upon the face of this document it appears that two certificates had been granted previously for the payment of the respective sums of £360 and £300. On the 31st day of December a further certificate was granted certifying that £250 was due to the defendant on account of work done. I may say at once that although there may be cases where interim certificates, granted in pursuance of the express terms of the contract, and expressing approval of and satisfaction with the work done up to date, may be binding on the employer and debar him from thereafter questioning the quality of such work, I am of opinion that the present case does not fall under that category. The certificates above-mentioned are merely the ordinary progress certificates, intimating to the employer that there is sufficient value upon the premises to entitle the builder to an advance on account and leaving the question of defects open for adjustment upon the granting of the final certificate, and subject to the maintenance clause. These certificates will, however, have an important bearing upon points where the witnesses disagree in their evidence. The decision of the case will depend almost entirely upon what occurred on the 30th of March. The defendant's case is that upon that day he delivered to the plaintiff's husband, who acted for the plaintiff in the execution of the contract, a final certificate—by the architect—that the work was completed, and received in final settlement of the contract price some cash payment and a promissory note for the balance, amounting to £115 17s. 6d., which note was subsequently paid upon its due date. The plaintiff adduces evidence to the effect that the settlement was effected, not upon a final certificate, but upon a letter from the architect stating that the defendant had promised to put right a number of defects brought to his notice, and in consideration of such promise McCarthy might pay him the balance due. The Court has to decide whether the document in

question was a final certificate or not. If the builder were the plaintiff in this case, the burden of proving that he had received a final certificate would have rested upon him, but circumstances have altered the position of the parties. Upon the document in question a final payment was made by the plaintiff, and in the ordinary course of business this document should be in the custody of the plaintiff. However, it could not be traced by either party, and secondary evidence of its contents was admitted. It is clear that at the time the document was written some defects did exist which had been pointed out to the builder, and which he agreed to rectify, but the defendant says he proceeded at once to remedy them, and it was not until he had done so that he was paid by the plaintiff. This circumstance would not in my opinion deprive the instrument of the character of a final certificate. The circumstances of the case, *Lord Bateman v. Thompson*, are in many respects similar to those in this case. There the architect wrote to the employer passing the work, and he also wrote a letter to the builder saying: "I have written to Lord Bateman passing the Court and Uphampton, excepting the square of glass to the former and the slates to the latter." These defects were afterwards made satisfactory. In that case, notwithstanding the qualification contained in the letter, it was regarded as a certificate of satisfaction upon the specified omissions being rectified. It is quite clear that payment was not made in the present case upon the mere production of the document, but a few days afterwards, when the defendant says he has made good the defects pointed out to him. It is quite clear that the defects discussed at that time are not the alleged defects contained in the schedule to the declaration. The architect says in his evidence—"I made out a list of defects at the time, and handed it to the defendant. The schedule in the declaration is not based upon my list of defects, but upon an examination undertaken at my request by Mr. Ellis, our clerk of the works." I mention this to meet the contention that it is very unlikely that the architect would grant a final certificate with defects valued in the declaration at £120, and stated during the trial to be upwards of £200. The defects there valued were not in the contemplation of the architect or employer at all at the time of the settlement. They were then dealing with matters very trivial in comparison. They were dealing with a full knowledge of the omissions, alterations and deviations which they had consented to, whereas Ellis and Orr, without regard to this, made an examination of the buildings, and put down as defects whatever did not agree with the specifications. I feel quite satisfied that if McCarthy had re-

garded as defects what are put put down in the schedule as such he would never have made a settlement. I come to the conclusion that on the 30th of March the defendant delivered to McCarthy a document certifying that the works were completed to the satisfaction of the architect. It was contended for the defendant that the buildings were completed in the 15th of January, and consequently his liability to make good defects lapsed on the 15th of March. But, in my opinion, the work cannot be regarded as completed until the architect has expressed his satisfaction seeing that the work had to be completed to his satisfaction. That view was taken in the case of *Cunliffe v. Hampton Wick Local Board*, reported in the 2nd volume of Hudson, page 265. That being so, the maintenance clause ran for two months from the 24th March, 1904, when the certificate was handed by the architect to the builder, until the 24th of May, 1904. The defendant was in terms of the clause responsible to make good defects appearing before the 24th of May. The next question to decide is whether the items in the schedule are defects in terms of this clause, and did they appear before the 24th of May. I shall confine my attention to the items appearing in the schedule to the declaration. It was proposed at the trial to extend the list, but when it was shown that that could only be done on condition that the trial was postponed, and on plaintiff paying the costs of the day, he preferred to go on with his case as it stood. That excludes from consideration the structure of the floor which appeared to be an important item, but I desire to say that if it formed part of the plaintiff's claim, I should have come to the conclusion that the matter was discussed and disposed of when the certificate was granted and payment made. The same may be said with respect to all the larger items on the list. As an example, I shall take the items of plastering. The defendant says that when the mistake of omitting cement on the north wall was discovered he offered to rectify it or to continue cement path in lieu thereof, and the plaintiff accepted the latter alternative. The architect stated that when he went over the house with the defendant and McCarthy something was said about the plastering, but he understood from the defendant that the garden paths had been put in to make up for it. Some controversy arose as to the time when this alleged agreement came to the knowledge of the architect. However that may be, the effect of his evidence was that the cement was no longer insisted upon either by him or McCarthy. The garden paths were in value the equivalent of the cement, and I am satisfied the matter was settled to the satisfaction of the architect. A claim

is made for the removal of the water cisterns to a place under the roof. The defendant says they are in their present situation with consent of the plaintiff and knowledge of the architect when he gave his final certificate, and he is supported by the fact that the claim in this respect was, in the first instance, only for cistern covers, without any complaint as to situation. Defendant says part of the parapet was given up by the plaintiff for ridging, and in lieu of portion of the flushing he put up chimney pots as an equivalent. Now, all these alterations are obvious to the most casual observer, and existed when the architect gave his progress certificates, and although the progress certificates are not conclusive, still they could not have been granted without an examination of the works by the architect, under whose superintendence in terms of the contract the work was carried on. I therefore come to the conclusion that the architect had full knowledge of these obvious alterations when he granted his final certificate, and that he sanctioned them, and they cannot be regarded as defects appearing during the period of maintenance. These remarks apply, amongst other items, to the back doors. It cannot be said that when the architect passed these doors as satisfactory that he was not aware that they were a deviation, and if he passed them as a deviation he must have been satisfied with the reasons for the deviation. It is true that deviations could not be made without the authority of the architect, but subsequent approval serves the same purpose. This case has been largely contested upon expert opinion, which was of little service. The deviations from the specifications are glaring, and required very little expert evidence to establish, and if they were not sanctioned the defendant's liability would have been unquestionable. Unfortunately, the plaintiff comes into Court upon the strength of expert opinion when his experts were not in possession of the true facts of the case. I have said that in my opinion the period covered by the maintenance clause expired on the 24th of May, 1904. The question of defects was raised after the completion of the work in June; that upon the authority of *Lord Bateman v. Thompson* was too late. The question was raised upon the 27th of June, when over the three months contended for by the plaintiff had expired. But I may say that in my opinion the promise respecting the three months was a gratuitous promise, without consideration, and not legally binding on the defendant. My finding that the larger items in the schedule were deviations sanctioned by the architect's certificate, and the smaller items of defects did not appear and were not complained of within the period of the maintenance clause, would generally dispose of the schedule; but

I desire to say specifically that I am not satisfied that the damp walls are due to any fault on the part of the builders, or that the grates have not been properly fixed, or the outside painting badly done. The expert opinion is very evenly balanced, and plaintiff, who must prove his case, has failed to do so. These remarks will cover a number of smaller items. On the whole, the plaintiff has failed to establish his claim, and judgment must be for the defendant, with costs.

[Plaintiff's Attorney: J. Buirski;
Defendant's Attorney: J. T. Wege.]

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

PROVISIONAL ROLL.

FEDERAL SUPPLY AND COLD { 1905.
STORAGE V. COTTCHIN. { Feb. 9th.

Mr. Gardiner moved for the final adjudication of the defendant's estate.
Order granted.

BRITISH GENERAL ELECTRIC CO. AND
OTHERS V. TORQUE ELECTRIC EN-
GINEERING CO.

Mr. Gardiner moved for the final adjudication of the estates of the defendants, John E. Neale, W. S. Forbes, S. B. Griffiths, F. Biliotti, and G. F. Herron.

Mr. Alexander, on behalf of the defendant Herron, opposed, and read an affidavit by Herron denying that he was in any way responsible for the debts of the company or its members, and saying that he should not be joined as defendant.

Mr. Gardiner read a replying affidavit by Walter Bernard Phelps, the manager of the South African branch of the plaintiff firm, stating that the conduct of the defendant Herron suggested that he was a partner in the defendant firm. The defendant firm was intimately associated with the firm of Neil, Herron. For practical and business purposes, the firms of the Torque Engineering Company and Neil, Herron, were identical. Neil was now believed to be in the Transvaal.

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Mr. Alexander said that he had an answering affidavit dealing with certain new matters raised by the plaintiff.

Mr. Gardiner objected to any further affidavit being put in by the defendant, seeing that the affidavits had been closed.

Mr. Alexander submitted that the plaintiff's manager had raised new matters that did not appear on the summons, and that his client was entitled to answer these allegations.

[Buchanan, J.: It is not admissible. Mr. Alexander.]

Mr. Alexander argued that there was no proof that his client was a partner, and that the provisional order should be discharged, with costs, so far as he was concerned.

Buchanan, J., said that the estate of the company would be finally adjudicated as insolvent, with leave reserved to Herron who said that he was not one of the partners in the firm, to take action to have it declared that he was not a partner in the insolvent estate.

KADIE V. ABASS.

Mr. Alexander moved for the final adjudication of defendant's estate as insolvent.

Order granted.

SELLAR BROS. AND OTHERS V. SAND
BROS.

Mr. Sutton moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

SPRING AND CO. AND OTHERS V. PEASE
AND CO.

Mr. P. T. S. Jones moved for the final order of adjudication of the defendant's estate as insolvent. He also applied for the appointment of Alfred Newton Foot as provisional trustee, with power to sell certain cattle in the partnership estate.

Final order granted. The second part of the application was ordered to stand over until the papers had been filed with the Registrar.

Later on, Mr. Jones said that the papers had been filed, and he renewed his application.

Order granted as prayed.

VAN RENEN AND OTHERS V. ATTAWAY.

Mr. Alexander moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

SCHULTZE AND CO. V. LABAHAN.

Mr. Russell moved for a decree of civil imprisonment upon an unsatisfied judgment for £55 18s. 9d., and £11 1s. costs.

Defendant denied that he owed anything to the plaintiffs, and said that he had a claim against Kramer and Co.

Mr. Russell said that the defendant had not previously set up a counter-claim.

The matter was ordered to stand over till the 26th February, to enable the defendant to file his counter-claim.

SCHULTZE AND CO. V. LEGGE AND INGRAM.

Mr. Van Zyl moved for provisional sentence for £750, due on a mortgage bond, the bond having become due by reason of the non-payment of interest. Counsel also asked for property specially hypothecated to be declared executable.

Order granted.

TRADES, MARKETS, AND EXHIBITION COMPANY V. HILDEBRANDT.

Provisional sentence—Illegal contract.

The defendant had agreed to pay the plaintiffs a certain rental in consideration of being allowed to place certain automatic machines within the Exhibition grounds. The police having objected to these machines, the defendant was ordered by the Exhibition authorities to remove them. Defendant having been sued for provisional sentence on a promissory note given by him for balance of rent.

Held, that as this note was a liquid document, provisional sentence must be granted, though possibly defendant might have an action for damages against plaintiffs.

Dr. Rainsford moved for provisional sentence on a promissory note for £150, with interest and costs.

Mr. Gardiner read an affidavit by the defendant, who stated that on the 12th October he applied to plaintiffs for right to place and operate certain 15 disc automatic machines in the grounds of the Exhibition at Green Point, on payment of £225 as and for rent. The application was granted on the 28th October. He paid £75, being one-third of the total rent. Difficulties occurred in December, and he was ordered to discontinue run-

ning the machines by Mr. Dale, who said that the police looked upon the machines as a game of chance.

Dr. Rainsford read a replying affidavit by Mr. Dale, who said that the police having declared the machines to be a game of chance, he had no power but to stop the machines.

Mr. Gardiner submitted that if the police were correct in their attitude towards the machines, the money was not due because the contract was illegal. It was clear that Mr. Dale took the machines with knowledge of any illegality that may have attached to them. Mr. Dale could not now shelter himself behind the plea that he did not think the police would interfere. Mr. Dale did not for a moment raise the point as to whether the machines were to be run for a profit. Counsel contended that, although the manager had a right to order the removal of goods from the Exhibition, he had no right to claim rent for the whole currency of the Exhibition. The plaintiff could not set up the contention that the space should be utilised by the defendant for some other purpose.

Buchanan, J.: According to the written contract put in, the defendant agreed with the Cape Town Industrial Exhibition to hire certain places, upon which to exhibit certain machines. These machines are described in the contract. The rent was fixed at £225, £75 of which was paid down, and a promissory note given to Mr. Dale for the balance of £150. This note has now become due, and has not been paid, and provisional sentence is asked for. *Prima facie* this is a liquid document. The defendant says that the machines have been condemned by the police as illegal machines, and therefore he is not able to make the profit he otherwise would have made by their use by the public, in other words, he may have a claim for damages. This seems to me, on the application for provisional sentence, to be no defence. I will not go further at the present stage. Judgment will be given for the plaintiff as prayed, with costs.

[Plaintiff's Attorneys: Van Zyl and Buissinné; Defendant's Attorneys: Herold and Gie.]

RETIFF, DE VILLE AND CO. V. LATEGAN.

Mr. Sutton moved for provisional sentence on a promissory note for £45 5s., less £25 paid on account, with interest and costs.

Order granted.

RETIFF, DE VILLE AND CO. V. COOKE.

Mr. W. P. Buchanan moved for provisional sentence on a promissory note

for £115 13s. 6d., less £55 paid on account.
Order granted.

BRINK V. BLIGNAULT.

Mr. Van Zyl moved for provisional sentence on a mortgage bond for £30, with interest, the bond having become due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

VAN WYK V. KAMIES.

Mr. Roux moved for provisional sentence on a mortgage bond for £108, the bond having become due by reason of notice; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

ESTATE BEVERN V. HEMSWORTH.

Dr. Greer moved for provisional sentence for balance of promissory note for £226 odd, together with interest and costs.

Order granted, subject to production of certificate that plaintiff was an executor.

ILLIQUID ROLL.

WOOD AND CO. V. PATERSON. { 1906.
Feb. 9th.

Mr. Swift moved for judgment, under Rule 329d, for £200, less £100 paid on account, with interest and costs, and for £8 16s. 6d., balance of account for work and labour done.

Order granted.

VACUUM OIL CO. V. CROYDON BRICK CO.

Mr. Swift moved for judgment, under Rule 329d, for £178 6s. 2d., goods sold and delivered, with interest *a tempore morae* and costs.

Order granted.

LOMBARD, VAN AARDT AND CO. V. LOUBSCHER.

Dr. Greer moved for judgment, under Rule 329d, for £198 8s. 5d., goods sold and delivered.

Order granted.

THESEN AND CO. V. VAN SCHOOB.

Mr. Russell moved for judgment, under Rule 329d, for £68 14s. 6d., goods sold and delivered, with interest *a tempore morae* and costs.

Order granted.

VAN DER BYL AND CO. V. ACKERMAN.

Mr. M. Bisset moved for judgment, under Rule 329d, for £42, less £10 paid on account, for rent, with interest *a tempore morae* and costs.

Order granted.

WIENER AND CO. V. GORDON.

Mr. M. Bisset moved for judgment, under Rule 329d, for £180 3s., goods sold and delivered.

Order granted.

ROBERTSON AND CO. V. COCHRANE AND FITT.

Mr. M. Bisset moved for judgment, under Rule 329d, for £46 11s. 8d., goods sold and delivered, with interest *a tempore morae* and costs.

Order granted.

CAPE TIMES, LTD. V. FITZGERALD.

Mr. W. Porter Buchanan moved for judgment, under Rule 329d, for £39 9s. 6d., owing by defendant for goods sold and delivered, and for work and labour done, and materials supplied, and advertising executed from September, 1896, to May, 1904, with interest *a tempore morae* and costs.

Order granted.

HAYWOOD AND CO. V. TRUSTEES, AFRICAN METHODIST EPISCOPAL CHURCH.

Mr. Sutton moved for judgment, under Rule 329d, for £502, work and labour done, and materials supplied, with interest *a tempore morae* and costs.

Order granted.

REHABILITATIONS.

Mr. Roux moved for the rehabilitation of George Wearne.
Application granted.

Mr. Lewis moved for the rehabilitation of Jacob Krachmel.
Application granted.

GENERAL MOTIONS.

SONDOM V. SONDOM. { 1905.
Feb. 9th.

Mr. M. Bisset moved for the rule *nisi* to be made absolute, authorising the petitioner to sue *in forma pauperis* for divorce.

Rule made absolute, the matter being referred to Mr. J. E. R. de Villiers as counsel, and Messrs. Van der Byl and De Villiers as attorneys.

NORDEN V. KETS.

Mr. Gardiner moved to have a rule *nisi* made absolute calling on the respondent to show cause why he or his agent should not be restrained from advertising the sale of applicant's goods and chattels in the "Government Gazette," or proceeding therein until the appeal now pending between Messrs. Bosman, Powis and Co. and Jos. B. Norden, shall have been disposed of. Counsel said that the appeal was set down for the 20th inst., and he suggested that the motion should stand over.

Mr. Searle, K.C., for the respondent said that they wished to have a settlement made as early as possible. He thought it would be clear from the affidavits that the whole difficulty was due to Mr. Norden's own fault.

The matter was ordered to stand over until the last day of term.

LIGHTFOOT V. LIGHTFOOT.

Mr. Searle, K.C., moved for an order declaring the respondent, Helena Gertrude Lightfoot, incapable of managing her affairs and appointing a curator. Mr. P. S. T. Jones appeared for the curator *ad litem*.

Robert Mark Lightfoot, the respondent's step-son, said that she was confined to the Eaton Convalescent Home. Witness asked to be appointed curator of her person and property.

Mr. Jones said that he did not oppose the application.

Dr. Landsberg also gave evidence.

Order granted declaring the respondent incapable of managing her affairs, and appointing her stepson, R. M. Lightfoot, curator of her property, costs to come out of the estate.

Ex parte FRITZ AND ANOTHER.

Mr. W. P. Buchanan moved for an order authorising transfer of certain property at Beaufort West in the estate of David Reunners, to L. J. Fritz, purchased by him at public auction.

Order granted as prayed.

Ex parte LE ROUX.

Mr. Close moved for the release of the petitioner as executor in a certain estate.

Order granted as prayed subject to the petitioner duly accounting to an executor *ad litem*.

Ex parte VAN NIEKERK.

Mr. Van Zyl moved for leave to raise money on a mortgage on certain property.

Order granted as prayed.

Ex parte GRIPPER AND ANOTHER.

Mr. Close moved on behalf of the petitioners, man and wife, residing at Queen's Town, for the registration of certain contract to operate as an ante-nuptial contract.

Order granted, authorising the Registrar of Deeds to register the post-nuptial contract entered into at Queen's Town on the 20th October, 1904, before Notary Herbert Bolus, as embodying the ante-nuptial contract entered into by the petitioners previous to their marriage.

ESTATE DE JAGER V. THYSSE.

Mr. M. Bisset moved for a writ of attachment against the respondent for contempt of Court in disobeying an order restraining him from trespassing upon certain land at Buffel's Drift, in the division of Oudtshoorn. The defendant and his family, it was stated, had taken possession of certain of the land, and were cultivating it, and although given an opportunity to bring an action for a declaration of rights, had failed to institute proceedings.

Order granted, requiring the respondent to give up possession, and quit portion of the farm, Buffel's Drift, district of Oudtshoorn, occupied by him, and, on his failure to do so, authorising the Deputy-Sheriff to remove the respondent from the property, order to carry costs.

Ex parte MICHELS.

Mr. Sutton moved for leave to the petitioner, a labourer of Willowmore, to sue *in forma pauperis* for divorce, by reason of his wife's adultery.

Buchanan, J., said that the petition would be referred to the next sitting of the Circuit Court at Uniondale. The Court had no desire to encourage actions of this kind, and it was important that the petitioner should appear personally before the Court.

HOWBOTHAM V. DONOVAN.

Mr. Searle, K.C., moved for the removal of the hearing of this case to the next Circuit Court at Port Elizabeth. Application granted in terms of consent paper.

Ex parte **ESTATE REINHARDT.**

Mr. Roux moved for transfer to be passed of certain property in Cape Town, which had realised at auction about £620.

Order granted as prayed.

HEYDENRYCH V. INSOLVENT ESTATE MACKIE, YOUNG AND CO. AND STANDARD BANK.

On the application of Mr. Schreiner, K.C. (for the second respondents), this matter was ordered to stand over till Thursday next.

Ex parte **EXECUTOR DATIVE, ESTATE SNYMAN.**

Mr. W. Porter Buchanan moved on behalf of Johannes Lodewicus van der Walt, executor dative in the estate of his granddaughter, for leave to have transfer passed of certain property in the division of Middelburg bought by petitioner at public auction.

Ordered to stand over till Thursday week for further information.

VAN DER HEEVER V. MARAIS.

Mr. W. Porter Buchanan moved for the removal of the hearing of trial to the next sitting of the Circuit Court at Aliwal North.

Application granted.

JEANNERET V. ESTATE SHARPE.
Master of Supreme Court—Proof of debt.

This was an application on notice of motion, under section 27 of Ordinance 6 of 1843, brought by Arthur Henry Jeanneret, calling upon the trustee in the insolvent estate of Hugh Ross Sharpe to show cause why an order should not issue authorising the Master to admit proof of debt for £600 against the insolvent estate, being amount of money lent by applicant to the insolvent, with interest reckoned at one-fourth of the net profits of the tailoring business carried on by the said H. R. Sharpe in Cape Town, and for taxed costs in an action instituted against the said Sharpe; or, in the alternative, for leave to pro-

ceed against the insolvent estate for recovery of the said sum, and for costs of the application. Mr. P. S. T. Jones was for the applicant; Mr. Searle, K.C., was for the respondent.

Mr. Jones read an affidavit by the applicant, who stated that on the last September, 1903, he advanced to Hugh Ross Sharpe £600, for the purpose of extending his business in Burmester's Buildings, and that he was to receive one-quarter of the net profits of the business as interest on the loan. On the 15th February, 1904, deponent obtained a provisional receipt pending fuller agreement to be drawn up and signed. On the 29th February a further agreement was drawn up and signed. Subsequently, on the 8th April, 1904, deponent wrote to Sharpe requesting him to furnish him with a statement of the profits of the business, showing the amount due to him. He did not receive such statement. Deponent caused summons to be issued against Sharpe on the 23rd November, 1904, and thereupon the latter surrendered his estate. At the second meeting of creditors, deponent presented his claim, but it was not allowed by the Master, on the ground that there was a partnership between Sharpe and deponent. Applicant denied that he advanced the money except by way of loan, and said that at no time had he had control over the management of the business. Subsequent to the first loan, in December, Sharpe applied to him for a further loan of £153, but this he refused.

Mr. Searle read an affidavit by Mr. T. H. Hazell, the trustee in the insolvent estate, who stated that among the papers found in the estate was a receipt signed by the applicant and insolvent for £500, paid over to the insolvent by the applicant. This receipt set out that the money was in consideration of applicant being admitted to partnership. An affidavit by the insolvent stated that not only was a partnership contemplated, but was absolutely entered into. The amount of £600 was put in by the applicant for his share in the partnership. The receipt put in by the trustee was signed by the applicant, and showed that he had become a partner. Deponent emphatically denied that the money was put into the business at his request, and said that it was the applicant's own urgent desire that he should be admitted as a partner. The applicant was to receive one-quarter of the profits as his share of the business, but not by way of interest.

Mr. Jones read an answering affidavit by the applicant, who stated that, with reference to the receipt produced by respondents, he was unaware that he ever signed such a document. It would appear to him that the latter part of the wording had been added in after the receipt was signed. Deponent de-

nied that he had requested to be admitted to the business.

Buchanan, J., said that the original receipt should be produced. It was not annexed to the affidavits.

Mr. Searle said that he was not in possession of the receipt, and he supposed it was in the hands of the respondent's attorneys, Messrs. Friedlander and Du Toit.

Mr. Jones submitted that the documents clearly showed that there was no partnership between Jeanneret and Sharpe, and that the applicant was entitled to prove against the insolvent estate.

Mr. Searle submitted that the matters were such as should not be decided upon motion, and that the applicant should proceed by way of action. Counsel relied on the recent case of *Davidson v. Auret* (15 C.T.R., 21). The documents were, to say the least, very peculiar, and the Court would require evidence in order to construe them.

Mr. Jones having been heard in reply, Buchanan, J., said that the document referred to, and which was questioned, must be produced to the Court at once. The case would stand over until the document was produced, and he would give judgment to-morrow (Friday) morning.

Postea (February 10.)

Buchanan, J.: This is an application to authorise the registration of a proof of debt, which was rejected by the Master. The papers were not fully put before the Court yesterday, but now they have been produced. The Master rejected the proof of this debt upon a receipt, which has now been put in. The genuineness of this document has been impugned, and certainly it is contradicted by other documents made about the same time, and which documents were not before the Master. After seeing the alleged receipt, and comparing it with the other documents, as the matter at present stands, there is not sufficient grounds for rejecting the claim of the applicant. An order will, therefore, be granted for the admission of the applicant's proof of debt, with costs. If the trustee, or any of the creditors of the insolvent estate wish to have this claim expunged, leave is reserved to them to bring an action to set aside the proof if so advised. For the present, I will not make any further comments on the documents produced.

[Applicant's Attorney: P. Wrensch;
Respondent's Attorneys: Friedlander
and Du Toit.]

Ex parte THE CAPE DISTRICT MUTUAL BUILDING SOCIETY.

Mr. Russell moved for leave to sell certain property for a sum less than the reserved price fixed by the Sheriff.

After hearing the report of the Sheriff, Buchanan, J., said that the Sheriff would be authorised to receive the offer of £700 for the property, which was £25 below the reserve price fixed by him.

GARDINER AND EASTON V. NEW ZEALAND STEAMSHIP CO.

This was an application for an order authorising the refund of a sum of £170 lodged by the applicants in terms of an order of Court.

The affidavit of Mr. C. Gardiner stated that his firm were ordered, on the 29th September, to lodge the sum of £170, pending an action to be brought by the respondents. The matter arose out of a shipment of cattle to the applicants by the steamship *Nordkyn*. The respondents did not cause a summons to be issued until the 20th October. A question was then raised as to the respondents providing security for costs. The declaration of the respondents had not been filed.

The answering affidavit of Mr. Eradfield, of the firm of Messrs. Van Zyl and Buissinne, stated that the summons was delayed at the request of the applicants. The declaration was being drawn at the time the notice of motion was being served. Delay had also taken place, because the respondents had been called upon to provide security for costs. It would also be necessary to take certain evidence on commission.

The replying affidavit of Mr. A. C. Fuller, attorney, having been read, Mr. Close (for the applicants) submitted that the applicants were entitled to repayment of the money, which was lodged in court on a distinct condition, viz., that the respondents should commence an action forthwith.

Sir H. Juta (for the respondents) said that the state of affairs which the affidavits disclosed was the state of affairs in December, when the motion was in the list for hearing. The pleadings had now been closed.

Buchanan, J.: This matter cannot be allowed to drag on indefinitely. The parties now appear to be ready to go to trial. The plaintiff must go to trial within a month from this date, failing which the money will be repaid to the defendants. The order will be for the repayment of this money, unless the plaintiffs go to trial within a month of to-day, or some further order of Court is made. As to the costs of this application, if the plaintiffs do not go to trial within one month, they will have to pay the costs of this application. If the case be heard in the meantime, then the question of costs will be decided at the trial.

VALENSKI AND LIPSCHITZ { 1905.
V. LATEGAN AND WIFE. { Feb. 9th.
Mar. 1st.

Insolvent Ordinance—Rehabilitation—Release from sequestration.

This was an application upon notice of motion for an amendment of a certain order of Court granted under the Insolvent Ordinance. Mr. Close was for the applicants; Mr. Searle, K.C., was for the respondents.

Mr. Close stated that some time ago the respondents, who were insolvent, applied to this Court for an order of discharge. No meetings of creditors had been held, no trustee was elected, and therefore the procedure under the Insolvent Ordinance could not be followed. When the order of discharge was granted, the respondents, as a matter of fact, received from the Registrar, what was called an order of rehabilitation. Upon this order of rehabilitation, the respondents, when they were sued in the Magistrate's Court at Oudtshoorn by the applicants for £200, balance of a promissory note, were discharged from all liabilities for debts. The applicants said that the order of rehabilitation was granted in error, and that that error should be rectified.

Affidavits filed on both sides were read from which it appeared that the applicants said that the order of court only had been intended to operate as a release of the respondents from sequestration, while the respondents said that the order of Court was not inaccurate.

Postea (March 1st).

Mr. Searle, in the course of argument, quoted the case of *Simon and Jackson*, decided in the Transvaal Courts. He urged that the Court had power to, and did in this instance grant an order of discharge. Either the order of the Court had no effect at all, or it means the discharge of the insolvent. It was not now, he submitted, open to the applicant, after lying by for months, to move in this form to amend the order. Such procedure was wholly irregular, and was not in accordance with any rule of Court. The Court could only act upon motion for review or appeal, and this was neither. It was neither of these procedures, and there was no other procedure by which the matter could be brought before the Court.

[Buchanan, J.: It is not a matter of review or appeal; it is a matter of amending the Court's own order, which has frequently been done.]

Mr. Searle, said he did not remember any case in which it had been done after such a lapse of time, except in the case of clear error. Here other rights—the rights of creditors—might enter into the matter.

Mr. Close, in reply, submitted that the only course open to the applicant was to move to have the order amended. Clearly all the Court intended was to relieve the man from the particular position, and to re-invest him with his estate subject to all his liabilities.

Buchanan, J., in giving judgment said: Under the Insolvent Ordinance there were several descriptions of discharges provided for, and though the term "rehabilitation" was not used in the text of any of our statutes, the term had come to be applied generally to all the different kind of discharges granted by the Court. The certificate provided for under the 117th section of Ordinance No. 6, 1843, when allowed by the Court, had by the 120th section, the effect of discharging the insolvent from liability upon claims proved or proveable upon his estate. The discharge which the Court granted under the 106th section, when the creditors agreed to a composition, reserved to such creditors a claim against the insolvent for the amount of composition agreed upon, and also reserved the rights of preferent creditors, and made provision for the claims of unproved creditors and absentees to the extent of the amount of the composition agreed upon. The release under the 107th section granted upon the payment in full of debts or upon the consent of creditors, does not operate as a discharge from liability of the insolvent or affect the rights of creditors who have not proved. Then again when a discharge has been granted under the 117th section, the insolvent's estate remains vested in the Master or the Trustee for the benefit of creditors. When the discharge is granted under the 106th section or the release is given under the 107th section, the effect is to put an end to the sequestration and to re-invest the estate in the insolvent. There was no statutory provision for the discharge granted in this case, but the practice has grown up for the Court, where no creditors have appeared and no debts have been found to grant a discharge, which has the effect of terminating the sequestration, and re-vesting the estate in the insolvent. This was what occurred in this case, but the order of Court was entered short by the Registrar simply as "rehabilitation granted." It was contended on the authority of a Transvaal decision, that the Court had an inherent power at its discretion to deprive creditors of their rights. I am not prepared to uphold such a contention as a broad proposition of law. But I would point out that the Transvaal statute used the word "rehabilitation," and that it was upon the construction of that statute the decision of the Transvaal Court was based. The Transvaal Court made it clear that in the future at all events, the course to be adopted in cases similar to the one under con-

sideration would be to order the sequestration to be set aside and to place the insolvent in his original position. Here the insolvent had been re-vested with his estate, and when sued in the Magistrate's Court first set up his discharge as a complete bar, and then pleaded that before the release of his estate he had compromised with his creditors for 5s. 3d. in the pound, and that the plaintiff who had consented to such compromise must reduce his claim accordingly. If there was such a compromise agreed upon, it would be grossly inequitable and unjust to allow an insolvent who had thereby induced his creditors to abstain from proving their claims or opposing his discharge, to get back his estate and then to snap his fingers at his creditors and refuse to carry out his agreement, and to shelter himself behind the interpretation he wishes to put on the order. The Magistrate sustained the plea in bar, apparently upon the opinion given by a clerk in the Master's Office of its effect. If the particulars upon which the order had been granted had been before the Magistrate, it would have been clear to him that the rehabilitation was not equivalent to the discharge obtainable under the 117th section of the Ordinance. I do not propose to alter the recorded order of Court, but to make clear its effect, I think the words should be added, "i.e., order of sequestration discharged, and the insolvent re-vested with his estate." This would make the position clear should the plaintiff sue again in the Magistrate's Court for his debt. The Magistrate could then deal with the claim on the merits. As to costs of this application they may be left to depend on the ultimate result of the proceedings in the Magistrate's Court.

[Applicants Attorneys: Michau and De Villiers; Respondents Attorneys: Tredgold, McIntyre and Bisset.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.).]

TRIAL CAUSES.

WESTERN WINE AND BRANDY (1905.
CO. V. WAINSTEIN.) Feb. 10th.

This was an action brought by the Western Wine and Brandy Company, of

Worcester, against Solomon Wainstein, hotelkeeper, of Dordrecht, to recover a sum of £702 9s., for certain dop and F.C. brandy, supplied to and at the request of the defendant.

The declaration set out that on the 27th May, 1904, plaintiffs supplied to the defendant, at his order, 25 hogshheads of straw-coloured dop brandy and 25 hogshheads of F.C. (dark mellow) brandy, which was to be similar to the stuff supplied on the 19th May. The brandy was to be forwarded, as instructed by the defendant, to him at Dordrecht. The defendant was to sign a draft at 120 days from the arrival of the brandy at Dordrecht, less 5 per cent. discount, the defendant to have the option of returning the wood in which the dop and brandy were sent. The plaintiffs were to deliver the brandy to the Railway Department, at Worcester Station, whereupon, so far as the plaintiffs were concerned, the agreement was completed. A portion of the order was sent on the 6th, 7th, and 8th June, and the remainder on the 8th, 10th, and 11th June, and delivered to the railway station in certain special casks. The price of the brandy with the wood was £702 9s. The plaintiffs had performed their part of the contract, but the defendant, in breach of his part, refused to sign the draft forwarded, and had definitely stated that he refused to pay for the said dop and F.C. brandy, and absolutely refused to perform his part of the contract. The plaintiffs claimed judgment for £702 9s., or, in the alternative, for damages.

The defendant, in his plea, admitted the contract, but denied that the plaintiffs had performed their part of the contract. He found that certain of the six casks of F.C. brandy that he opened did not contain dark mellow brandy, such as the plaintiffs had supplied on the 19th May, and which he had ordered. He said that the brandy was inferior in quality, strength, and flavour. Thereupon, he gave notice to the plaintiffs that he would not accept the brandy, and the other casks were allowed to remain at the railway station. With regard to the dop brandy, defendant said he discovered on the 7th July that the casks were not full, and that there was a shortage which he estimated at three gallons per cask, and he claimed a reduction for it. He had been ready and willing to pay the sum of £177, or sign a promissory note in respect of the dop brandy, which was for 54 casks less estimated shortage, and 5 per cent. discount, and that amount he tendered. He refused to accept the F.C. brandy, but said he had been ready and willing to perform his part of the contract with regard to the wood. In reconvention he claimed the carriage, which he said he paid to the Railway Department on the F.C. brandy, which he was unwilling to

take. He also claimed £50 for storing the casks at 6d. per cask per day.

Sir H. Juta, K.C. (with Mr. Gardiner), for plaintiffs; Mr. Burton (with Mr. Van Zyl), for defendant.

Hendrik Petrus du Toit, secretary of the plaintiff company, gave evidence as to the receipt of the orders and the de-patch of the liquor. Witness said he had been in the brandy trade for nine years; they had a large number of customers, and especially in the Dordrecht and neighbouring districts. He considered that 25 hogsheads of dop and 25 hogsheads of F.C. brandy was an exceptionally large order for a retail dealer to give. The Excise Act was promulgated on the 31st May. On the 3rd June he received a request from the defendant to forward sharp as much of the order as possible in quarter casks. They had to make arrangements to get quarter casks from the South African Produce and Wine Company. The brandy was delivered to the Railway Department at Worcester, in accordance with the contract. All the casks were in good order, the majority being new ones. On the 8th June he received a wire from the defendant saying that the dop must be good and of straw colour, and asking to be supplied with as much information as possible as to the operation of the new duty on brandy, and whether the duty would be paid by the retailer. On the 11th June the company replied, and pointed out that the duty was only leviable and in force from and after the 1st July, 1904, on which date a return would have to be made to the Excise by the dealer of his stock, and he would have to show his sales at the end of each month. On the 13th June they received a wire from the defendant, "Don't forward any brandy until I advise," to which the company replied on the same day, "All brandy forwarded in accordance with order." Further correspondence followed, in which the defendant objected to F.C. brandy, on the ground that it was not equal to what he had had before, and that it was not in accordance with sample of 10th May, and also that certain of the casks were not full. The brandy, said witness, was of the same quality on both occasions. F.C. brandies varied in colour; in order to mellow the F.C., sweetened matter was put in, and colouring matter was also put in to give colour. That, however, did not affect the quality of the brandy. After the pleadings had been closed, witness went to Dordrecht and took samples of the brandy sent to the defendant, and still lying at the station. He tested the samples by Sykes' hydrometer; the hydrometer was not strictly accurate, and showed the brandy to be weaker than it was. The test showed the brandy to be 24.3 deg. under-proof. He considered that it was a good mellow brandy. Bottles were taken from the

casks and sent to the Civil Commissioner at Worcester. Witness afterwards asked the defendant to allow him to take samples of the brandy in his store, which had been sent to him by the firm. Defendant refused permission to allow him to take samples of the later consignment or that of the 19th May. He saw the brandy kept in a side store, but again was refused permission to take samples. Witness went to the place where the defendant kept his F.C. brandy. Defendant shook the casks, and said that they were not full; witness told him that that was not the way to ascertain whether casks were full, and said that the brandy should be weighed. On his return from Dordrecht, witness went to the Civil Commissioner's office at Worcester and saw two sealed bottles of brandy which had been sent from Dordrecht. Witness was accompanied by Mr. Myburgh and others, who tasted the brandy, and then went to the company's offices and tasted the sample of the 19th May. As to the casks, they charged 17s. 6d. per cask to their customers; the arrangement with the defendant was that he could return the casks within a reasonable time.

Cross-examined by Mr. Burton: The strength of the spirit of wine was the most valuable element in an F.C. brandy. He considered that a brandy showing 24.3 under-proof was a good brandy as good as any other.

By De Villiers, C.J.: The sample of the 19th May was 20 deg. under-proof. F.C. brandy was never sold by his firm according to strength; it was all a matter of quality.

Cross-examination continued: The extent to which a brandy was under-proof would not affect its value, so far as the retailer was concerned. Quality being equal, he would take the stronger brandy. Quality was not entirely a matter of strength; witness was aware that 25 deg. under-proof was the limit allowed under the Food and Drugs Act. The whole of the consignment, both in May and June, was sent from two hogsheads. They kept an average sample from the two hogsheads. It was not the plaintiffs' experience that the demand for brandy from retailers was very great just before the Excise Act came into operation. In a period of six months, they would allow 1½ to 2 gallons for evaporation and absorption upon a cask of 30 gallons.

Henry Day Gibson, Chief Constable of Worcester, gave evidence as to receiving the sealed bottles from Dordrecht, and the opening of the bottles in the presence of Mr. Du Toit, Mr. Hoffman, Mr. Van der Spuy, and others.

Gert Johannes Hoffman, manager and manipulator of the plaintiff company, said that, in compounding F.C. brandy, he always used the same recipe.

In order to make a brandy mellow, they put in sweetening matter, which affected the strength. The brandy for the orders of the 19th May and the 27th May was the same, except that he added some sweetening matter to the brandy for the later order, so as to make it mellow to suit the customer. Witness was present at the gauging when the casks were filled; gaugings were kept (produced); these were checked by the witness. The samples sent from Dordrecht to Worcester were good brandy; he tested the sample at the Civil Commissioner's office, and the sample they had at the office of the 19th May order, and found that they were alike, except that the later consignment was more mellow.

Cross-examined by Mr. Burton: They only kept one quality of F.C. brandy; the strength varied, but they did not sell brandy by strength. The strength varied from 18 to 20 deg. under proof. The strength of the second brandy was brought down because it was made more mellow, sufficient to account for a difference of 4 points in the strength. He did not think there could be a shortage of 109 gallons upon 34 casks within six months. He did not think that, barring tampering, such a thing could happen.

Professor Hahn, of the South African College, said that if sweetened matter had been added to brandy the result would be to reduce the strength as shown by Sykes's hydrometer. When sweetened matter had been added to brandy he did not think that a Sykes's hydrometer should be used to test the brandy.

S. J. Mostert, clerk in the office of Messrs. Silberbauer, Wahl and Fuller, spoke to receiving a sample of brandy sent by Mr. Du Toit, and handing it to Mr. Bosman, of Messrs. Bosman, Powis and Co.

Ferdinand Bosman, employed by Messrs. Bosman, Powis and Co., said that he analysed his firm's brandies, etc. He tasted and analysed the sample received from the last witness. He considered that it was a very good F.C. brandy. He found the strength to be 21.2 under proof. He distilled the brandy.

Witness tasted in court the sample produced of the brandy sent by the plaintiffs to the defendant, and expressed the opinion that it was a good brandy, but slightly inferior to the sample he had previously tasted. The other, he thought, was a sweeter brandy.

Mr. Burton: The sample tested last is that as good as your F.C.?

Witness did not reply.

Mr. Burton: You think it is rather a delicate question?

Witness: Yes, I do. Witness added that the sample was a good brandy; he should say there was a slight difference in favour of the sample. He considered

the sample, to his personal taste, to be superior to his firm's brandy.

Witness next tasted a sample from a bottle produced by the defendants, and said that he considered this to be a very good brandy indeed, and to be better than the two samples that he had previously tasted.

Mr. Burton: Yes, I thought so.

Mr. Labatte, assistant manager to the plaintiff company, spoke as to the gauging of the brandy sent to the defendant on the order of the 27th May.

Further evidence was given by Roland Myburgh, manager and manipulator of the Van Ryn Wine Co., Worcester, and Archibald Chambers, manipulator of the South African Produce and Wine Co., to the effect that the sample submitted to them by the plaintiffs were good saleable brandies; and Moses Cohen, manager of the Railway Hotel, Middelburg, who said that the F.C. brandy which he received from the plaintiffs in May and June was fairly good brandy.

Sir H. Juta closed his case.

Solomon Wainstein (the defendant) said that he received from the plaintiffs on the 19th May, 1904, brandy with which he was pleased, and which sold well. He sent another order on the 27th May for 32 casks of F.C., and opened one of the casks. He supplied people at the bar, but they complained of the quality of the brandy. Witness noticed a difference in the taste, strength, and colour compared with the stuff sent upon the 19th May order. Several customers who had bought bottles of the second lot of brandy brought it back, and complained about it. Witness thereupon sent a note to the Railway Department to stop further delivery of the casks. He had the brandy tested, with the result that it was found that the samples of the later brandy were 24.3 below proof, whereas the old brandy was 16.7 below proof. There were still 32 casks which were unopened. In the casks which witness had opened he estimated that there was an average shortage of about three gallons.

Cross examined by Sir H. Juta: He sold from 10 to 12 hogsheads of brandy in six months. He usually bought 5 to 6 hogsheads of brandy at a time; sometimes he bought 10 hogsheads.

Sir H. Juta: What induced you, all of a sudden, to order 50 hogsheads of brandy?

Witness: I thought perhaps I would not have to pay duty.

So it was on account of the Excise. You thought if you could get 50 hogsheads in before the Act became law you would not have to pay on stocks?—Yes.

Further cross-examined: He did not order the plaintiffs to stop delivery because he found that the retailer would have to pay duty after his sales. He would take the brandy now if the plain-

tiffs would supply him with brandy of the quality that he ordered. He thought that he would have escaped duty.

By the Court: The direction to stop delivery had some connection with the duty.

Cross-examination continued: He denied that he had refused to give samples of the brandy to Mr Du Toit.

Walter John Hare, manager of the Commercial Hotel, East London, and formerly manager of the defendant's hotel at Dordrecht, said that the 19th May brandy sold very well, and people liked both the flavour and the colour. As to the 27th May brandy, it was found to be not so good in flavour, and people refused it. He was speaking from his experience with the customers at the hotel. The casks appeared to be of short weight because of the noise made by the brandy when they shook the casks.

Henry J. Holworth, storekeeper, of Dordrecht, said that he used to get Colonial brandy by the bottle and at the bar from the defendant. He got brandy from him in the latter part of May and early in June. He also got brandy about the end of June, and early in July; but he afterwards returned it because he found it was not equal to the other. He had seen people refuse brandy in the hotel; he himself had refused it. Witness did not care for Colonial brandy as a rule, but the old brandy was of exceptionally fine quality, and he took rather a liking to it.

Dirk C. Marais, general merchant, Dordrecht, and George Chantler, chief constable, Dordrecht, also gave evidence. The chief constable was asked by Sir H. Juta to taste one of the samples. After doing so, witness observed: "I think very little of it."

Daniel Francis Martin, Excise officer, was next called. At the outset he said he wished to explain to the Court that it was greatly against the wish of the Government that he had been subpoenaed to give evidence in this case. The Government protested against—

[De Villiers, C.J. (interposing): Oh, well, let the Government protest; you are here, and you must give the evidence.]

Witness gave evidence as to the gaugings of 34 casks which he had taken in December at Dordrecht Railway Station, sent to the order of the defendant. He found that the total contents as indicated by the figures on the casks should have been 1,009 gallons; the gaugings showed the total to be 899½ gallons. The shortages varied a good deal in the different casks. The last cask he gauged should have contained 30 gallons, whereas it only contained one gallon. The staves of the cask had sprung, and the liquor appeared to have leaked. In January he tested the brandy both at the defendant's hotel and at the railway station,

and found that it was 24.7 under proof.

Franz Kaufner, manager of the Castle Wine and Brandy Co., spoke as to three sealed bottles of brandy sent to him from Mr. Kramer, one of the partners of the firm, on behalf of defendant, and an examination that he made of the samples. The strength was about 16 under proof in No. 1 sample, and 24 under proof in No. 2 and 3 samples. He could not now speak as to the quality of the brandies.

Leopold Kramer, a partner in the Castle Wine and Brandy Co., also gave evidence.

Mr. Burton closed his case.

His Lordship said he understood that the plaintiff consented to a deduction of £13 from his claim on account of shortages.

Sir H. Juta said that that was so.

Having heard Mr. Burton in argument on the facts,

De Villiers, C.J.: On the 27th May last year the defendant sent an order to the plaintiff company for "25 hogsheads of F.C. brandy, 5s., No. 1, dk. mellow, same as sent on the 19th May, 1904." The brandy was duly sent, and there is no question now as to the quality and the identity of the brandy which was sent upon this order. A sealed bottle has been put in, which has been clearly identified as the bottle taken from the casks which had been rejected by the defendant, so that there can be no doubt as to the identity of that one single bottle. The difficulty in the present case is to ascertain what was the real quality of the brandy which was to serve as the sample for the brandy to be sent, and upon this point the evidence of the defendant appears to be wholly unsatisfactory. He has produced the large bottle on the table to prove that the quality was excellent, but the evidence does not satisfy me that that bottle was taken from the cask which contained 19th May brandy. I am bound to say that the evidence given on behalf of the plaintiff company itself is very unsatisfactory in regard to the sample which the company kept. It would have been much more satisfactory if the plaintiff company had produced in court the original marked bottle which, according to Mr. Du Toit's evidence, was kept on one side at the time the order was supplied; but, upon the whole, I have come to the conclusion that the other small bottle does represent the true quality of the brandy which had been supplied on the 19th May. The witness to whose evidence I attach the greatest weight in the present case is the witness Cohen. He appears to me to have no connection with any of the parties, he comes from a distant part, all the other witnesses were in some way connected with the plaintiff or the defendant, but the witness Cohen is subpoenaed from Middelburg, and a very

important question was put to him by me. Apparently counsel on either side must have been afraid to put the question. I put the question to him, in regard to the sealed bottle, as to whether he considered that a good quality of brandy, and he said, "Certainly." I gathered from his evidence that if similar brandy had been sent to him in execution of an order to supply brandy, similar to that which had been previously supplied to him, he would have accepted it. Now this evidence of Cohen. I think, is of great importance, because I connect it also with the evidence of Du Toit, who says that the brandy he sent to the Railway Hotel at Middelburg, of which Cohen was the manager, was the same brandy, and of the same quality as had been sent to Wainstein. The date of the first order sent was the 11th May. It was, therefore, before the order of the 19th had been executed, and the witnesses for the plaintiff are perfectly satisfied that this was the very same brandy, and, considering the nearness of the dates, it does seem to me extremely likely and probable that Du Toit is right in saying that it was the same quality. Well, if that is so, there can be no doubt that the brandy which was sent in pursuance of this order was in accordance with the sample which had been agreed upon. I quite agree with Mr. Burton that there must be a substantial compliance with the order that the brandy sent must substantially be of the same quality as the sample. Now, in my opinion, it was. It appears to me that the only reason why the two articles are somewhat different was because the plaintiff company had been more intent upon mellowing the last order than they had been in regard to the first. They seem to have thought that because the words "dark mellow" were expressed again, special attention ought to be paid to it. It appears to me that this brandy, in consequence of the order of the 27th May, had been made more mellow than the previous order, and it was in consequence of the greater presence of the sugary ingredients that the difference in the proof between the two articles occurred. There was only a difference of two degrees. The quality of a brandy is not to be gauged entirely by the proof spirit. No doubt, the proof spirit should enter into the matter, and, if the discrepancy had been very great, that discrepancy would have been proof positive that the sample which was brought into court by the plaintiff company was a different sample from that which had been agreed upon. But the discrepancy is not so great as to justify me in coming to the conclusion that the plaintiffs are wholly wrong in saying that the sample which they now produce is exactly the same as that which had been supplied to the defendant on the 19th May. Under these circumstances, I am

of opinion that the defendant had no right to reject the brandy when there was a substantial compliance with the contract between the parties, that there had been no breach, and that the plaintiff is entitled to recover the purchase price. In regard to the shortage of brandy, the impression on my mind was that there was a greater shortage than would be justified by the ordinary evaporation and absorption. There is an amount of £13 which will have to be deducted on that account from the amount of £702 9s., leaving £689 9s. The judgment of the Court will be for the plaintiffs for £689 9s., with interest from the 10th October, 1904, the plaintiff company undertaking upon the return of the casks within six months from this date to repay to the defendant the sum of £94 10s., being the value thereof, defendant to pay the costs of the action.

CLOETE V. DIPRAEM.

This was an action brought by Gideon Stephanus Cloete, an attorney-at-law, residing and practising at Lady Grey, division of Aliwal North, against John Hamilton Dipraem, formerly of Lady Grey, and now of the Orange River Colony, to recover a sum of £648, with interest, alleged to be due for money lent and advanced and paid on behalf of the defendant.

The declaration stated that the defendant had formerly been in the plaintiff's employ as his chief clerk and bookkeeper, at Lady Grey. Plaintiff lent the defendant various sums of money, to be repaid by him, and paid for and on his behalf various sums. The defendant wrongfully and unlawfully, while acting in the aforesaid capacity, appropriated to his own use various sums of money belonging to the plaintiff. Plaintiff prayed for judgment for £648, with interest *a tempore morae*, and costs.

The defendant, in his plea, denied that he was indebted in any sum to the plaintiff, and set up a counter-claim of £172.

Mr. McGregor was for the plaintiff; the defendant was in default.

Evidence was given by the plaintiff, who put in an account of the transactions between defendant and himself. The amount now due to witness was £621 18s. 1d., for which sum he asked for judgment. Witness also asked for interest on the sum of £599 9s. 4d.

[De Villiers, C.J.: How was it you allowed your clerk to run into your debt to the extent of £600.]

Witness: He was my bookkeeper, and I trusted him, my lord. I have only lately discovered how things are, on balancing up the books.

Philip Jacobus Fouché, articled clerk, at present in the plaintiff's employ, gave corroborative evidence in regard to the account put in by the plaintiff.

Ernest L. Morensi, formerly of Lady Grey, was also called in support of the plaintiff's case.

De Villiers, C.J., said that judgment would be given for the plaintiff for the payment of £621 18s. 1d., with interest on £599 a *tempore morae*, and absolution from the instance on the claim in reconvention, defendant to pay the costs, including the plaintiff's expenses as a necessary witness, and costs of an application made by the defendant for a postponement.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

GENERAL MOTION.

SCOTT V. WOOD. } 1905.
 } Feb 10th.

Mr. P. Jones moved, as a matter of urgency, for an interdict against the defendant restraining him from removing certain furniture from a house in Rosebank, which was let to the defendant, who had failed to pay the rent for December, January, and February, and who had re-let the premises to one Hedley. Hedley was about to remove the furniture on a debt owing to him by Wood.

An interdict was granted against Wood and Hedley, restraining them from removing the furniture, pending an action with leave to both respondents to set it aside, the order to be served on Hedley.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.) and the Hon. Sir JOHN BUCHANAN.]

GENERAL MOTIONS.

WALKER V. RECEIVERS GRAND } 1905.
 JUNCTION RAILWAYS. } Feb. 13th.

Partnership—Salaried partner—
Sequestration—Remuneration.

*On the sequestration of a
partnership estate a salaried*

partner cannot claim payment of his salary out of the assets in competition with other creditors, but if after the provisional order of sequestration he has continued to perform valuable services in the administration which he was not legally bound to perform, the trustee may, with the sanction of the Court, award to him a fair remuneration for his services as part of the costs of sequestration.

This was an application on behalf of Thomas Mouat Cameron Walker for an order for the admission of a certain claim for salary.

The Receivers of the Grand Junction Railways were called upon to show cause why an order should not be granted, declaring that the applicant should rank as a creditor for the sum of £1,427 9s. 2d., against the assets of the Grand Junction Railways, and for costs against the respondents in their said capacity. The applicant's affidavit stated that on the 23rd May, 1902, a provisional order of sequestration was granted against the Grand Junction Railways. On the 14th May, 1903, the said provisional order was superseded, and respondents were appointed receivers in terms of consent paper. Prior to the provisional order deponent was general manager of the Grand Junction Railways, having previously fulfilled the position of chief inspector of the undertaking at a salary of £700 per annum. Deponent appended a letter dated 1st August, 1900, appointing him as general manager at a salary of £1,000. He went on to say that, after the receivers were appointed, he remained in their employ. His claim was for salary during the whole of the time during which the Grand Junction Railways were under sequestration. During that time it was absolutely necessary that the affairs and interest of the Grand Junction should be carefully protected, and this from his past knowledge of matters he was able to do, and, he considered, with satisfactory results, to the general body of shareholders. The receivers declined to receive his claim, on the ground that they treated him as a partner. The receivers, after they had been appointed, retained his services. Deponent denied that he had ever been a partner in the Grand Junction Railways. He was only an official of the said railways, just in the same way as B. T. Tonkin, whose claim had been ranked.

The answering affidavit of Messrs. Syfret and Closo, the receivers, stated that the allegation made by the applicant

that the period covered by his claim was from the 31st May, 1902, to 14th November, 1903, was not wholly correct. The sum of £466 13s. 4d. was alleged to be for salary due prior to the provisional order of sequestration, which was not covered by the period referred to in paragraph 3 of the affidavit. With regard to paragraph 4, defendants said that £466 13s. 4d. would approximately be included in the referee's report as portion of the "actual cost" payable by the Colonial Government. Deponents admitted that during the said period the applicant rendered services which were valuable to the general body of creditors, and they felt that, while the applicant might be entitled to some payment for the services he had rendered, they had before them a difficulty caused by the fact that the applicant seemed to have been a partner in the firm of John Walker and Sons. Applicant had held himself out as a partner. Mr. Arnold F. Hills had also rendered valuable services in the prosecution of the action against the Colonial Government, but he had received no remuneration.

The replying affidavit of the applicant stated that with reference to the item of £466 13s. 4d., this portion of the indebtedness was expunged by the operation of the set-off. On the question of partnership, he admitted having held himself out as a partner to certain plaintiffs, but said that he subsequently received a cable from his principals to the effect that he was not a partner, and, in consequence, he advised the plaintiffs referred to of the inaccuracy of his former statements. He reiterated that he had never been a partner in the said firm of John Walker and Sons.

Buchanan, J., asked how the claim was really made up?

Mr. Gardiner (for the applicant): The applicant claims for salary due on the 21st May, 1902, a sum of £466 13s. 4d., i.e., prior to the provisional order of sequestration, and for salary from the 1st June, 1902, to the 14th November, 1903, the sum of £1,458 6s. 8d. There are certain credits that the applicant allows, thus reducing his claim to £1,427 9s. 2d.

We say that the applicant was not a partner, but that even granting he had been a partner, he would still be entitled to salary for services rendered which he was not legally bound to render. First, he was not a partner since he was not entitled to remuneration on the basis of profits made: and there is no evidence that anybody relied on his partnership.

[De Villiers, C.J.: Was he not held out as a partner? The only point is whether he should not be admitted as a creditor for salary, and come in after the other creditors are satisfied.]

The creditors are not prejudiced. They well knew that John Walker was a partner in receipt of salary.

[De Villiers, C.J.: I see that the provisional order directed the Master to appoint a curator. Whom did he appoint?]

Mr. Walker looked after the business in Cape Town. Mr. Hills was in England. There can be no question of partnership after the sequestration. That in itself put an end to any partnership which possibly may have previously existed.

[Buchanan, J.: A partner is responsible for debts of his firm even after sequestration.]

Of course that is so, but if a partner does anything to assist the trustee, beyond giving information as to partnership transactions, he is entitled to remuneration like anybody else. He is entitled to payment for his services even though he may be sueable for contribution by reason of his holding himself out as a partner; but should any action be brought against him as a partner, of course the holding out would have to be proved. As the very least, by his services subsequent to the liquidation, he became a *negotiorum gestor*, and as such was entitled to remuneration.

[De Villiers, C.J.: We will assume, Mr. Schreiner, that he was a partner, but is he not entitled to some remuneration for doing after the sequestration what he was not bound to do?]

Mr. Schreiner: There was no property in the hands of Walker after the sequestration. After that he was not paid by the partnership but by Hills, and from p. 21 of the liquidator's report it appears that Hills is now claiming £2,300 in respect of these payments as out of pocket expenses. As receivers we cannot go behind the rules of distribution in insolvency; but we do feel that Mr. Walker may well be entitled to some remuneration for having rendered valuable services. His case is, however, one of the weakest, as he may still claim against Hills.

Mr. Gardiner was not heard in reply.

De Villiers, C.J.: The evidence in this case satisfies me that the applicant was a partner in the firm, and that even if he were not as between the other members of the firm and himself a partner, he held himself out as a partner, and that now he should not be allowed to compete with the creditors of the partnership. It appears, however, that after the date of the provisional order of sequestration, the applicant has discharged valuable services towards the estate of the partnership. There was no legal obligation upon him to render those services, and after the appointment of the receivers, they continued to employ him at a salary at the rate of £1,000. Under these circumstances, the Court is of opinion that for the period between the provisional order and the appointment of receivers, some amount should be paid to the applicant, and, upon the whole, we are of opinion that a sum of

£500 would be a fair reward to him for his services. The Court will, therefore, make no order upon the application as it stands, beyond directing that the sum of £500 be paid to the applicant as part of the costs of sequestration of the estate. As to the costs, they may fairly come out of the estate. Of course, the £500 is only the balance, after allowing for the £507 which applicant has already received. The receivers are to pay £500, independently of all other costs.

After hearing counsel on the question of costs.

De Villiers, C.J.: In fixing the amount at £500, the Court made a very liberal allowance. The order, therefore, will be that there is no order upon the application, except that a sum of £500 be paid to the applicant as the balance due to him for his services between the date of provisional order and appointment of receivers, such sum to be treated as part of the costs of the sequestration; no order as to costs of this application.

[Applicant's Attorney: G. Trollip;
Respondent's Attorneys: Moore and Son.]

WALKER V. GLYNN, MILLS, CURRIE AND CO.; WALKER V. LIQUIDATOR, GRAND JUNCTION RAILWAYS, AND LONDON AND WESTMINSTER BANK, LTD.: WALKER V. SMART: WALKER V. DOWSON, AINSLIE AND MARTINEAU; WALKER V. JAMES AND EDWARDS; WALKER V. LIQUIDATORS, GRAND JUNCTION RAILWAYS, AND F. C. HILLS AND CO.

Mr. Russell appeared for the applicant (John Walker). The respondents were represented as follows: Smart, Dowson, Ainslie and Martineau, Glynn, Mills, Currie and Co., F. C. Hills and Co., and Liquidators, Grand Junction Railways, by Mr. Searle, K.C.; London and Westminster Bank, by Mr. McGregor; James and Edwards, by Mr. Close.

Mr. Russell moved for a postponement until Thursday next, in terms of consent paper, in so far as the parties who had signed the consent were concerned.

Mr. Searle explained the circumstances under which his clients had consented to a postponement, and stated that they had intimated to the applicant that, as soon as the motion came on, they would take the preliminary objection that no security for costs had been given, although it had been asked for. That preliminary objection he was now prepared to take.

Mr. McGregor and Mr. Close said that their clients had not consented to a postponement, and they also took the preliminary objection as to security for costs.

De Villiers, C.J., remarked that it was strange that the consent to a postponement until Thursday was not brought under the attention of the learned judge who fixed the hearing of the motions for that day (Monday).

Mr. Searle said he was informed that the fact was mentioned, but it appeared to have escaped the notice of the learned judge.

Mr. Russell said he had to apply for a postponement in the matter of the London and Westminster Bank.

De Villiers, C.J., asked if the applicant was prepared to give security for costs?

Mr. Russell said he was instructed that they had communicated with their client, and that he was not prepared to give security for costs. Counsel went on to say that the applicant was subject to the jurisdiction of this Court, and that he had property in this colony, which he understood had been attached.

De Villiers, C.J.: These cases will be postponed until Thursday, but they will not be heard on that day, unless in the meanwhile security for costs is given by the applicant. The applicant is a *peregrinus*, and the Court, under the ordinary rule, whether it is an action or whether it is a motion, holds that he must give security for costs. It is suggested that he has some property on which an order for costs may be enforced, but there is no evidence whatever before the Court on that point. The order of the Court is that the cases be postponed until Thursday, but they will not be heard on Thursday or at any future time unless security in the meanwhile be given for costs by the applicant.

MAFEKE V. MPAMBANE. { 1905.
Feb. 13th.

Review—Gross irregularity—Adjournment of Resident Magistrate's Court.

In an action to recover certain sheep or their value in a Transkeian Magistrate's Court, it appeared that the plaintiff was too old and infirm to attend, and, on the application of the plaintiff's agent, the Magistrate adjourned the hearing to the plaintiff's residence, which was in the same district, for the sole purpose of taking his evidence. Due notice of the time and place was given to the defendant, but he refused to appear either at the plaintiff's residence or at the subse-

quent hearing in the Courtroom, of which he also had notice. There was evidence without that of the plaintiff to justify the defendant being called upon to produce his evidence, but he tendered none. The Magistrate having given judgment for the plaintiff, the defendant applied to have the proceedings set aside on the ground of gross irregularity.

Held, that the irregularity—if such it was—was not of such a nature as to justify a review.

This was an application upon notice calling upon the respondent (plaintiff in the action) to show cause why the proceedings before the Assistant Resident Magistrate of Mount Ayliff should not be reviewed and set aside, on the ground of gross irregularity and illegality. Mr. Gardiner was for the applicant; Mr. Close was for the respondent.

From the record it appeared that an action was brought in the Court below by the present respondent to recover certain five sheep or their value (£5), an account of their increase while in the possession of the defendant, damages in the sum of £5, and costs of suit. The Magistrate heard a portion of the case, and then adjourned the Court to the residence of the plaintiff at Rode, about 19 miles distant from Mount Ayliff, for the purpose of taking the plaintiff's evidence, Mpambane being old, infirm, and ill. The defendant did not attend the hearing at the residence of the plaintiff, and he contended that he had been prejudiced by such adjournment. On the Court resuming at Mount Ayliff, defendant did not tender any evidence, as he had taken an objection to the adjournment to Rode, on the ground that it was irregular.

Mr. Close said that, before the case was gone into, he wished to take an objection that the matter should not have been brought before this Court. The case was one as between two natives, and counsel desired to raise the point as to whether this Court could hear such a matter coming from the Magistrate's Court, or whether it should not have gone to the Chief Magistrate's Court.

[De Villiers, C.J.: A question of irregularity does not affect native law.]

Mr. Close said that the point would be the interpretation of the statutes dealing with native law. Counsel quoted the 3rd section, Act 26 of 1894, referring appeals in matters where natives were

concerned to the Court of the Chief Magistrate of the territories. He added that he could not find any reference whatever to "reviews."

De Villiers, C.J., said that that was no reason why there should be no review on the ground of irregularity by the Supreme Court. The Court would hear the case; of course if it were an appeal under colour of a review then the question could be raised later.

Mr. Gardiner called the Court's attention to section 9, Act 35 of 1904 (Better Administration of Justice Act).

The affidavit of the appellant, Shadrack Mafoko, stated that the adjournment to the area Rode would have involved him in heavy additional costs had he gone to defend the case there. Further affidavits were also produced to the effect that the town of Ayliff was the regular place for the holding of the Court.

The answering affidavit of the respondent's attorney, stated that it was impossible to have the respondent removed to the Court. The evidence was taken at the home of the respondent, who was about 80 years of age, and was very infirm. Affidavits by the interpreter of the Court and a policeman were also read.

De Villiers, C.J., asked why interrogatories were not sent?

Mr. Gardiner: I don't know, my lord. Counsel argued that the Magistrate had no authority to remove the Court from Mount Ayliff. The Acts only provided for the holding of the Court of Resident Magistrate in each district. Counsel said that the applicant also applied for review on the ground that the Magistrate gave judgment for an account of the increase, as well as for damages. The damages, he submitted, were an alternative prayer. It was clear that the plaintiff himself did not claim damages as well as an account of the increase that damages were an alternative item.

[De Villiers, C.J.: That is a ground of appeal and not review.]

Having heard Mr. Close on the question of the admissions made by the defendant upon which evidence was called in the Court below.

De Villiers, C.J.: The position in which the Magistrate found himself at the trial of this case was this: Some of the plaintiff's witnesses had given their evidence, and it was found that the plaintiff himself, who lived some 34 miles off, was old, infirm, and too ill to travel, with every probability that he had not many more days to live. The question was, what the Magistrate had to do? In strictness, the better course would have been for the parties to have applied for interrogatories. The defendant's attorney then would have filed cross-interrogatories, and these interrogatories might have been sent to the place where

the sick man was, and afterwards used for the trial. It does not seem to have occurred to any one present to have interrogatories, and the first proposal was to have a Commission to take evidence. The Magistrate, however, found that that would not be legal, and accordingly, when an application was subsequently made to him to adjourn his Court to the residence of the plaintiff, not for the purpose of the trial of the case, but for the purpose of taking the evidence of this man who would probably die within a very short time the defendant objected. The Magistrate, however, allowed it to be done, and notice was given to the defendant and his attorneys of the day on which the evidence would be taken. The defendant's attorneys protested that it was utterly illegal, and when the examination of the plaintiff took place, defendant refused to take any further part in the proceedings, and he refused to appear at the subsequent stage when the case was re-adjourned to the Court at Mount Ayliff. Now, the point is whether, assuming it to have been an irregularity, was it such a gross irregularity as would justify the Court now in setting aside the proceedings altogether? I am by no means satisfied that it is a gross irregularity, but the law certainly is obscure. It would appear that the law in regard to the Transkeian territories does not specifically require that a place shall be fixed where the Court is to be held in the same way as the Acts relating to the Magistrate's Courts of the Colony, but I think it is unnecessary to decide the point whether a Magistrate in the Transkeian territories has the power exercised in the present case, for the simple reason that the defendant, in my opinion, has altogether mistaken the course which he ought to have adopted. If he refused to appear at the taking of the evidence of the plaintiff, he ought at all events to have appeared at the re-adjournment, and if he considered that the evidence was illegal he ought to have objected to the admissibility of the evidence, and have given his own evidence. If then the Court, upon the whole of the evidence, had given judgment for the plaintiff, and the defendant could have shown that the evidence of the plaintiff had been illegally taken, and that without such evidence there was no case against the defendant, there might have been a good ground of appeal. But instead of taking that obvious course the defendant refused to appear at all, and now moves the Court to set aside the whole of the proceedings on the ground of gross irregularity. Without the plaintiff's evidence there was sufficient evidence to justify the Court in calling upon the defendant to support his defence by evidence. It is impossible, therefore, to hold that the irregularity—if such it was—was so gross as to invalidate the

whole of the proceedings. The application must be refused with costs.

Buchanan, J., concurred.

[Applicant's Attorneys: Zietsman and Bosman; Respondent's Attorneys: Findlay and Tait.]

PHILIPS V. NROQOZA. } 1905.
} Feb. 13th.

Promissory note Signature —
Mark—Witnesses.

It is no valid defence to an action on a promissory note signed with his mark by the maker that the mark is attested by only one witness.

This was an appeal from a judgment of the Resident Magistrate of Willowvale in an action brought by the appellant, R. G. Philips, against the respondent to recover £34 10s., with interest from the 6th October, the amount of a promissory note made and signed by the defendant in favour of the plaintiff. Mr. Gardiner was for the appellant (Philips); there was no appearance for the respondent.

Mr. Gardiner said that in the Court below exception was taken to the summons by the respondent, on the ground that there was only one witness to the mark of the maker, and not two, as by law required. The exception was upheld, the Magistrate stating that his reason for judgment was that the mark should be attested by two witnesses. Counsel submitted that there was no law requiring two witnesses to a mark on a promissory note, and that the Magistrate was clearly wrong.

De Villiers, C.J.: The Magistrate, in my opinion, clearly erred in his judgment. The exception taken was that there is only one witness to the mark of the maker, and not two, as by law required. Then, the answer to that was that there is no law which requires two witnesses to a mark. The result would be, if the defence were allowed, that a man might for valuable consideration give a promissory note signed by himself with his undoubted mark, and yet escape liability, because it is not duly attested. Clearly such is not the law. The duty of the Magistrate was to have given the plaintiff an opportunity of proving that the mark was the mark of the defendant. If it is his mark then it is his signature by which he binds himself to pay the amount of the note. The appeal must, therefore, be allowed, with costs of appeal, and the case will be remitted to the Magistrate to be decided on its merits, and also for decision as to the costs in the Court below.

[Appellants Attorneys: Walker and Jacobsohn.]

STERRENBURG V. NORTH.

Magistrate's inferences from facts.

This was an appeal from a judgment of the Resident Magistrate of Gordonias, in an action brought by the appellant (Theo. W. Sterrenberg), a contractor, of Upington, against the respondent, Victor Herbert North, hotel-keeper, for £20 damages for breach of contract.

From the record it appeared that this matter arose out of certain work given to the plaintiff in the way of building certain rooms and improving another. Plaintiff said that a contract was entered into; defendant said that the plaintiff was engaged on piecework, to be done as his (defendant's) funds permitted. At the first hearing the defendant's attorney applied for absolution from the instance, on the ground that no damages had been proved. The Magistrate gave absolution from the instance, with costs. At a second hearing, further evidence was led, and the Magistrate gave judgment for the defendant, with costs.

The Magistrate, in his reasons for judgment, said that the defendant had a right to terminate the agreement with the plaintiff at any time on his tendering to pay for the work already done, which he desired and tendered to do.

Dr. Greer (for the appellant), said that this matter came before the Court on a question of fact, but he submitted that the Magistrate did not in this case give due weight to the probabilities of the case, which ground his lordship (the Chief Justice) had already laid down was a sufficient ground on which to move the Court. He contended that the plaintiff had a good case, supported by independent evidence, and that he had suffered damages.

Mr. Gardiner (for the respondent), said that the question was one entirely as to what the contract was, that there was a divergence of testimony on the facts, and that the Magistrate was best qualified to judge of the credibilities. If the plaintiff had suffered, he had suffered through his own fault. He had not shown due diligence in his work.

De Villiers, C.J.: The decision of this case does not depend so much upon the credibility of the witnesses, as upon the inferences to be drawn from the clearly proved facts in the case. The written documents in the present case afford a very good clue as to what took place between the parties. On the 29th October, 1904, the agent for the plaintiff wrote what I consider to be a civil note, asking defendant to allow the plaintiff to proceed with the riding on of materials. Then on the same day comes this letter from the defendant: "As Mr. Stellenberg has thought fit to

put the matter into the hands of his agent without explaining the matter to me first, I am willing to pay him for work done and for bricks, etc., ridden on at a fair valuation. I refuse to do further business with the gentleman in question, after the action he has taken, which I consider is quite uncalled for." This is clearly a letter written by a person who seeks to get out of a bargain. It would appear that he had already, behind the back of the plaintiff, made arrangements with somebody else. When asked about this letter, he said he wanted to give the plaintiff an opportunity to go on with his work. That is ridiculous. I do not think the Magistrate paid sufficient attention to the true relations between the parties. He seems to have known them individually. That advantage this Court has not had, but, at all events, the Court has the documents before it, which enable the Court to form an estimate as to what the true relations between the parties were. The appeal is, I think, on the second case. It appears to me that the plaintiff has sufficiently proved that the damages sustained by him amount to £20. The appeal will be allowed, and judgment entered for the plaintiff for £20 damages, with costs in this Court and the Court below.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

GENERAL MOTION.

Ex parte CREDITORS OF ATTAWAY.

Dr. Rainsford moved as a matter of urgency, on the petition of creditors, to the extent of £2,100, in the insolvent estate of Mr. A. H. Attaway. Kalabas Kraal, for the appointment of Mr. E. R. Syfret as provisional trustee, with general power to carry on the farm.

Order granted.

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

RAUBENHEIMER V. RAUBEN-HEIMER. 1905.
Feb. 14th.

This was an action brought by the plaintiff, Antony M. Raubenheimer, against his wife for restitution of con-

jugal rights, failing which, divorce, by reason of her malicious desertion.

The declaration set out that the parties were married at Mossel Bay on the 29th April, 1873, out of community of property. There were six children of the marriage surviving, two of whom were minors. The defendant maliciously deserted the plaintiff in March, 1904.

Mr. P. S. T. Jones was for the plaintiff, the defendant had been barred from pleading.

Wm. Thomas Birch, clerk in charge of the marriage registers at the Colonial Office, gave evidence as to the registration of the marriage.

Mr. Jones applied for the postponement of the case, in view of the non-arrival of an affidavit sworn by the plaintiff in support of his case.

The defendant appeared in person, and said she wished to explain that she left her husband because he did not support her, and had not supported her for five years. She had a letter from the plaintiff, in which he said he would not take her back again. Witness resided in town.

Maasdorp, J., advised the defendant to appear when the case was again called.

The case was postponed *sine die*.

HEYDENRYCH V. FRAME.

Security given by wife—*Senatus consultum Vellejani*.

This was an action brought by Benjamin G. Heydenrych, financier, of Observatory-road, against Mrs. Frame, wife of Alexander K. Frame, of Wynberg, to whom defendant was married out of community, to recover a sum of £146 9s., with interest from the 5th February, 1896, upon a promissory note.

The declaration set out that on the 25th April, 1904, plaintiff sued the defendant in this Court upon two promissory notes for £146 9s. and £19 10s., with interest. The latter claim was settled by defendant, after issue of summons and before the hearing; but upon the former claim, the Court ordered plaintiff and defendant to go into the principal case, costs to be costs in the cause. On the 5th February, 1896, defendant was, and still is, indebted to plaintiff in the sum of £146 9s., as and for money lent and advanced to her, and on the same date he received from her the promissory note now sued upon. Defendant failed and refused to pay the said sum. Alternatively, plaintiff said that on the 5th February, 1896, defendant was indebted to him in the sum of £146 9s., and on that date she undertook to repay the said sum, with interest. She refused and neglected to pay the said sum, wherefore plaintiff claimed payment of the note, with interest from the 5th February, 1896, and costs.

Defendant, in her plea, admitted the formal allegations, except that she craved leave to refer to the annexure for the true construction of the acknowledgment of debt. Prior to the 5th February, 1896, the plaintiff had from time to time advanced to the defendant's husband Alexander Kay Frame various sums of money, against which indebtedness payments were made from time to time by the said Alex. K. Frame. Amongst the moneys so advanced is the amount of £200, advanced on the 2nd December, 1893, for which the plaintiff received from the said A. K. Frame an acknowledgment for £230, being for capital and interest. Defendant signed the same as surety for and on behalf of her said husband, and not otherwise. Defendant's husband, by payments made from time to time, reduced the amount to £146 9s., for which balance an acknowledgment of debt was given and signed by defendant as surety for her husband, and not otherwise. Defendant at no time received any consideration from and out of the said acknowledgment, and was not a public trader, and when she signed the said acknowledgment as surety for her husband as aforesaid, the meaning and effect of the benefits and exceptions which she purported therein and thereby to renounce were not explained to her by a notary or at all, nor did she understand the same, and the said exception of the *senatus consultum Vellejani* was hereby opposed to plaintiff's claim as against her. On the 5th March, 1896, £300, and on the 25th March, £55 14s., were paid by her husband to plaintiff in full and complete settlement between her husband and plaintiff, and no part of the said sum of £146 9s. was due to the plaintiff.

Plaintiff, in his replication, said he denied that the sum of £200 was advanced to defendant's husband, or that she signed an acknowledgment in respect to the said sum as surety for her husband and without receiving any consideration therefor. He said that the defendant herself applied to him, through her attorney, for a sum of £200, and the said sum was advanced to her and not to her husband. He did not admit that the meaning and effect of the exceptions were not explained to defendant. As regarded the alleged settlement, plaintiff admitted that there was a settlement between himself and A. K. Frame in 1896, but he denied that the sum now in dispute was included therein.

Mr. Burton (with him Mr. Gardiner), for plaintiff; Mr. McGregor (with him Mr. Upington), for defendant.

Mr. Burton submitted that the onus lay upon the defendant to prove her case.

Mr. McGregor said he was quite prepared to take the issue, and he at once called

Johanna M. Frame (the defendant), who said she knew nothing about the loan transactions between the plaintiff and her husband. She admitted having signed an acknowledgment of debt for £146 9s. A cheque of the 2nd December, 1893, for £200 bore her endorsement. Of that amount she received nothing whatever; she signed the note at Mr. Frame's request.

Mr. McGregor, in answer to the Court, said it was common cause between the parties that the acknowledgment of debt for £146 represented the unpaid balance of an original acknowledgment of £230, signed by Mrs. Frame in December, 1893.

Witness (continuing) said that there had been talk beforehand between her husband and herself in regard to this cheque. She denied having approached the plaintiff for a loan through her attorney. In regard to the acknowledgment of debt, she simply signed at Mr. Frame's request; she denied that it was explained to her what was meant by renouncing the benefits of the *senatus consultum Vellejani*. She did not understand what such a term meant. Witness paid no amount to Mr. Heydenrych upon the sum of £230. In March, 1896, some money came from the trustees of her husband's father in Scotland to clear off all the debts that she and her husband had. On the last occasion, when she signed the acknowledgment of debt, nothing was said to her about the legal exceptions.

Cross-examined by Mr. Burton: She received certain money after her father's death. She did not know how much it was or when she received it. She thought the amount would be about £200. She had not lent money to her husband. He went into insolvency in July, 1897, and witness claimed against the estate for £990, which was money belonging to her son, and which had come to him from his late father, Commissioner Chalmers, who died about 16 or 17 years ago.

Mr. Burton: You see we have the insolvency proceedings, and nothing is said about the money being lent by your son. The acknowledgments are made out by your husband to you.

Witness: It was always understood that the money was my son's.

Mr. Burton: You see here is a sworn claim in your own name against your husband's estate for £992?

Witness: Then it must be so.

Mr. Burton: From the documents in the Master's Office we find that your first husband's estate was surrendered as insolvent by you, as executrix?

Witness: I don't know anything about that.

Mr. Burton: What about the money, then? Where did that come from?

Witness: The money that came to me was from a life policy.

Further cross-examined: She had never borrowed money from the plain-

tiff. She knew nothing of an application to Mr. Heydenrych for a loan on her account. In spite of the cheque she was confident that the debt was a balance of an old account between her husband and the plaintiff.

Re-examined by Mr. McGregor: She did not take proceedings to have her husband's estate sequestrated.

Alexander Frame, husband of the defendant, stated that in November, 1893, he approached the plaintiff for a loan of money, and on the advice of Mr. Du Preez the plaintiff advanced him £200. The cheque was made payable to Mrs. Frame, who did not get a sixpence of the proceeds. The loan carried interest at 2½ per cent. per month. The acknowledgment for £230 was signed by Mrs. Frame. Witness signed as surety and co-principal debtor. The money was advanced to witness, and the plaintiff knew that perfectly well. It was understood that only in the case of his death was Mrs. Frame to become liable. There was a reduction of the debt in 1896 to £146, although no actual payments were made. He did not object to pay the plaintiff's rate of interest, but he objected to pay the capital twice over. Messrs. Reid and Nephew, who held the money sent to witness from Scotland, would not entertain 30 per cent. interest, and the plaintiff got witness to sign certain notes ante-dated at the rate of 6 per cent. The money was sent to Messrs. Reid and Nephew especially to free Mrs. Frame from debt. He implicitly trusted the plaintiff as a friend, and when he came into witness's office and destroyed a number of papers he understood that the bundle included the acknowledgment for £146.

Cross-examined by Mr. Burton: The last time Mrs. Frame advanced him money was in 1899. Du Preez was the plaintiff's attorney. The cheque was made out to Mrs. Frame, and she signed the acknowledgment of debt. Witness had to worry the plaintiff to draw up a statement for Messrs. Reid and Nephew. Witness understood that the statement of account made out to the solicitors included his wife's liability. All the documents were dated wrong to suit the plaintiff's purposes. There was no mention of that in his affidavits; it was only recently he commenced to remember anything about it. The document dated the 5th February might have been signed on any date. The plaintiff purported to destroy all documents, including the one on which he now sued, but witness believed that he retained the latter. When the money was sent from Scotland he did not know whether Messrs. Reid and Nephew wiped out all the liabilities; he supplied them with everything he was aware of. He had never handled more than £200 from the plaintiff, and he had paid him back £600. All his liabilities were in-

cluded in the three promissory notes for £300.

Re-examined by Mr. McGregor: On the same day as he received the cheque from the plaintiff for £200, he wrote out a cheque to the plaintiff for £52 for previous loans. Out of the £200 he had to his credit something like £140 after giving cheques to the plaintiff and his attorney.

Wm. Young Wilson, of Cape Town, said he was in 1895 and 1896 a clerk in the employ of Reid and Nephew. He remembered that certain communications passed between Messrs. Reid and Messrs. McGregor, Donald and Co., and a sum was sent by the latter firm amounting to £993. Witness advertised for claims; he saw Heydenrych, and told him that the money was sent in order to clear off the claims against Mr. and Mrs. Frame. The claims were as a matter of fact in excess of the amount remitted from Scotland; in case the liabilities were not cleared off by this sum, it was to be sent back. He notified the plaintiff, who sent in a claim for £455. Plaintiff agreed to accept £355. Witness understood that amount was in full settlement of the plaintiff's claim.

Cross-examined by Mr. Burton: He was sure that he told Heydenrych that he was to send in his claims against both Mr. and Mrs. Frame. He notified Heydenrych both verbally and by letter; he thought there would be copy of the letters in Messrs. Reid's letter book. He admitted that all the vouchers sent back from Scotland were the liability of A. K. Frame, except one endorsed in blue pencil "and Mrs. Frame."

Mr. Burton: The letters refer to the claims of "A. K. Frame and Co., or Mr. A. K. Frame."

Mr. McGregor closed his case.

Benjamin Godlieb Heydenrych (the plaintiff) said that he had lent both the defendant and her husband money from time to time. In December, 1893, Mr. Du Preez (who had since died) called upon him, and applied for a loan. Witness gave a cheque for £200 to Du Preez in favour of Mrs. Frame upon Du Preez handing to him the signed promissory note. The note was renewed in 1894 and 1895. The document now sued upon was drawn up in February, 1896. Frame had called upon him asking him to draw up the statement of his indebtedness; Frame told him that he did not want it to appear to the trustees the terms on which he had borrowed, and he asked witness to take off some of the indebtedness of his wife, and add it to his (Frame's) debt, thus making up with certain interest three notes of £100 each. The indebtedness of Mrs. Frame was thus reduced to the £146 9s. In February he drew up a statement showing Frame's indebtedness; this did not include Mrs. Frame's indebtedness of £146 odd.

Cross-examined by Mr. McGregor: He admitted that he had waited within five days of the period of prescription before he sued upon the promissory note. Frame had large schemes all the time; witness did not want to take action against Mrs. Frame.

Mr. McGregor: Yes, we can quite appreciate the reason in such a case as this.

Mrs. Frame had never seen him personally about any loan.

Mr. McGregor: How a person of your vigilance and keenness of intellect—

Witness (interposing): I am not so very vigilant and keen, or I would not have trusted these people.

He did not consider the rate of interest that he charged Mrs. Frame ($2\frac{1}{2}$ per cent. per month) to be high. Mr. Frame had offered 5 per cent. per month for small loans. The acknowledgement for 146 included both principal and interest.

Mr. Burton closed his case.

Counsel having been heard in argument on the facts,

Mansdorp, J.: The Court has to decide upon the evidence which has been laid whether the defendant is the principal debtor, and liable upon the promissory note, or whether, notwithstanding what appears in that promissory note, she is not merely a surety. I find Mrs. Frame in order to assist her husband, consented to sign the document as surety for his indebtedness, and the document must be taken as an agreement of suretyship. In that document I find that Mrs. Frame has renounced the exception of the *senatus consultum Vellejani*. If a wife becomes security for her husband, or a woman for a man, and renounces that exception effectually, then the indebtedness upon the acknowledgment would be established. Now how can such an exception be renounced effectually? It has been laid down in the authorities—and we have decisions in the Supreme Court upon that point—that for it to be done effectually, the person renouncing must be well aware of the effect of the renunciation, and what she will lose by renouncing. Mrs. Frame has told the Court that she did not understand a word of this, and she does not now understand; and I am quite satisfied that she did not, and that, from the nature of her evidence, she is a woman who would not understand. If that be so, then the exception has not been effectually renounced, and defendant can take the benefit of it. She has taken advantage of it, and she now set it before the Court as an exception to the claim of the plaintiff. That being so, it is a full and sufficient answer on the part of the defendant, as surety, to say that when she became surety, she did not renounce the exceptions in respect of which she was entitled to the benefits. But I would go further, and say that, if that point had

not disposed of the case, then if it had been established that there was an indebtedness whereby which these parties jointly, whether as principal or surety, became indebted to Mr. Heydenrych, that matter was long ago settled. Looking at the acknowledgement of debt, we find that it was a few days before it would have been prescribed when this action was brought. The matter was delayed to that date, and the impression on my mind is that the delay took place because the plaintiff had no confidence in the justice of his cause. I believe that the indebtedness under this acknowledgement was extinguished after the money had been sent out by the trustees in Scotland to Frame, because money was paid to the plaintiff on the understanding that it should be a full payment. Judgment will be given for the defendant, with costs, including costs of the previous application.

[Plaintiff's Attorneys: Van der Byl and De Villiers; Defendant's Attorneys: Van Zyl and Buissinne.]

DARTER V. DARTER.

This was an action brought by Georgina Darter against her husband, Adrienne Albert Darter, to recover certain moneys advanced. Mr. Close was for the plaintiff; the defendant did not appear. The suit was by edictal citation.

The declaration set out that the plaintiff claimed a sum of £300, with costs, upon a bail bond given in favour of defendant, which had been estreated.

No evidence was called.

Judgment was entered as prayed, and property already attached, *ad fundandum jurisdictionem*, to be declared executable.

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

GENERAL MOTIONS.

MEDELSSOHN V. LAVIGNE. { 1905.
Feb. 15th.

Mr. W. P. Buchanan moved as a matter of urgency for an interdict restraining Messrs. Van Zyl and Buissinne from parting with certain money, the property of the respondent, who had been arrested on the application of the applicant, to whom he owed £64 for goods sold

and delivered. On the 10th January the respondent gave the applicant a cession of certain rents of property which he had subsequently sold. The balance of the purchase price, £30, had been handed to Messrs. Van Zyl and Buissinne.

A rule *nisi*, operating as an interim interdict, was granted, the rule to be returnable when the suit between the parties is heard, the rule to be served on the respondent and Messrs. Van Zyl and Buissinne.

Ex parte EBERT AND CO.

Mr. W. P. Buchanan moved for an order against respondent, Joshus Heilbuth, calling on him to give satisfactory security for a judgment of £41 18s. 9d. obtained against him in the Transvaal, failing which an order for his arrest. The respondent was about to leave for England by the mail boat.

Buchanan, J., said he was afraid the Court had no jurisdiction to grant such an order. The defendant was simply passing through this country, and no order could be made. The debt was contracted in the Transvaal between a branch of the plaintiff's firm and the defendant, who had no property in this country.

TRIAL CAUSES.

KROHN V. KROHN.

This was an action for divorce by reason of the defendant's adultery with some person or persons unknown. The parties were married in October, 1893. They lived happily together for a number of years, until a child was born of the defendant, of which the plaintiff was not father. In 1902 another illegitimate child was born, and a third followed in 1903.

Mr. Upington was for the plaintiff, and the defendant was in default.

Johann Krohn, plaintiff, stated that the first child was born in October, 1897, and the defendant told him who was the father of the child. After that witness and his wife were constantly quarrelling. Two more children were born, of which he was not the father; he was with the Boer forces when the third child was born. The defendant in a letter acknowledged her guilt. Plaintiff claimed a decree of divorce, and if the Court so ordered it he was willing to take charge of the eldest girl, whom he had practically adopted.

Buchanan, J., said that the only child that was actually proved to have been born in adultery was the third child, and the other two being born in wedlock would be presumed to be the children of the plaintiff. A decree of divorce would be granted, the plaintiff to have custody of the eldest child.

HANDS V. SHAPIRO.

This was an action brought by Harry Hands, in his capacity as churchwarden of St. Saviour's Church, Claremont, to recover from the defendant £15 5s. 2d., being the balance of rent due for certain premises in Primrose-street.

The claim was for £64, less taxed costs amounting to £16 4s. 10d., and against that claim there was a set off of £30 for rent due by one Friedman to the defendant and £2 paid in cash, and further untaxed costs incurred concerning a rule nisi interdicting the defendant from parting with the property amounting to £16 odd.

Mr. P. Jones was for the plaintiff and Dr. Greer was for the defendant.

Herr Shapiro stated that he hired from Friedman certain premises in Primrose-street, for which he always paid in advance. An order was granted against him, and then he refused to pay. On the same day as proceedings were taken against him by St. Saviour's Church, Friedman also took proceedings over the same matter, and it was necessary for him to come to the Court a second time to explain his position. Supposing he had not received Friedman's interdict he would not have incurred any costs over the St. Saviour's Church application.

Edward Collins, articled clerk to Mr. Stanley Jones, stated that if proceedings had not been instituted by Friedman he would not have advised any opposition to the St. Saviour's Church application. The duplication of the proceedings caused confusion and expense. The present defendant had nothing to gain by his previous action, as the rent had to be paid in any case.

Counsel having been heard in argument on the facts.

Buchanan, J.: This action is brought by Friedman against Shapiro, the defendant, for the recovery of rent. The premises leased by plaintiff to defendant were banded to the churchwardens of St. Saviour's Church, Claremont. During the currency of the bond, Friedman granted the churchwardens an irrevocable power, entitling them to receive the rent from the tenant and to apply it in reduction of their claim. After they had obtained this irrevocable power in consequence, I presume, of the conduct of Friedman, the churchwardens obtained a rule nisi, having the effect of an interim interdict restraining Shapiro from paying his rent to Friedman. The day before this rule was obtained, Friedman had also obtained a rule nisi against Shapiro, by which he also claimed the rent, and attached certain of Shapiro's property as security. Now the rent claimed at that time amounted to £64. Shapiro was willing to pay the rent, but being harassed in this way he did not know to whom to pay. As orders of Court had been obtained he was justified in retaining

the money until the Court decided in favour of one party or the other. The matter was further complicated by the fact that Shapiro had a set off against Friedman for one month's rent—£32—which he had already paid, and of which payment the churchwardens were ignorant. The churchwardens, though bringing this action in Friedman's name, are really the plaintiffs in the matter. When the action for the payment of the £64 came on for hearing they discovered the payment by the defendant to Friedman, and they consequently withdrew so much of their claim. They also found that the costs incurred by the defendant in consequence of Friedman's action had to be allowed. The present suit depended on the amount of these costs. It is said by defendant's counsel that had it not been for Friedman's action the defendant would have made no opposition to the application of the churchwardens, as it was immaterial to him to whom he paid. In my opinion, he is certainly entitled to the costs which Friedman has put him to, and the churchwardens are now willing to allow these amounts. The defendant's legal adviser was called upon to furnish a bill of these costs, and after a considerable amount of correspondence a bill of costs was made against Friedman for the sum of £32 17s. 2d. This was taxed by the Master, and adding 16s. for the taxing fee, he allowed £16 14s. 10d. He disallowed the sum of £16 18s. 4d. of this bill and costs as not being taxable as against Friedman. This action being brought in Friedman's name, the defendant has set off this amount of taxed bill of costs, £16 18s. 4d. The plaintiffs agree to this set off in addition to the other set off of £32. But the defendant wishes now to set up a further bill of costs made up, so far as we can gather of the items which were disallowed in the bill of costs taxed between Friedman and Shapiro. This is not an application to review the Master's taxation. There has been no amount of costs taxed against Friedman except the £16 14s. 10d., which the plaintiffs are willing to allow. Under the circumstances, I cannot allow an indefinite claim on an untaxed bill of costs as a still further set off. If Shapiro was dissatisfied with the Master's taxation, and thought that the Master has not allowed him sufficient, he might have brought the taxation in review. As the case at present stands the £16 14s. 10d. is all that can be allowed for costs. Allowing these two items there is a balance due by the defendant of £15 15s. 2d., for which the plaintiffs are entitled to judgment. As to costs, I was in favour of allowing only Magistrate's Court costs, as I agree with Dr. Greer that the claim originally had only been made for £15 5s. 2d., it might never have been contested. But there has been a contest, and this

£15 5s. 2d. has not been tendered, and it is pointed out that the parties are in different districts, which gives the plaintiff the right to come to this Court, therefore I am bound to give judgment, with costs. There is an application for costs of the provisional case, but I think the proceedings in the provisional were altogether unnecessary, and no such costs will be allowed.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

1905.
 COMMISSIONERS, ADENDORP { Feb. 15th.
 MUNICIPALITY V. KING- { " 16th.
 WELL. { " 17th.
 { Mar. 28th.
 { Apr. 17th.

Municipal regulations—Grazing rights—Illegal enclosure of commonage.

This was an action brought by the Chairman and Commissioners of the Adendorp Municipality against Alfred Kingwell, of Graaff-Reinet, to recover damages for alleged violation of the plaintiffs' rights in regard to certain grazing and other rights in the villages of Adendorp, Rouvierville, and Retreat.

The declaration stated that the plaintiffs were the Chairman and Commissioners of the Adendorp Municipality, and as such representing the erf-holders of the said Municipality. Prior to and in the year 1855 Michiel Joseph Adendorp held certain ground known as De Erf, and this, together with certain adjoining ground, became the sites of the villages of Adendorp, Rouvierville, and Retreat. The ground was sold subject to certain servitudes as to grazing and wood cutting. By successive transfers, the defendant in 1901 became the owner of a portion of the land. In the conditions of sale, it was laid down that all the erf-holders in the said villages and their successors were to be entitled to graze a certain number of cattle on certain grazing land on De Erf, and they were also to have certain rights in regard to the cutting of wood for fuel purposes.

The acts complained of by the plaintiffs were set out in paragraphs XI., XII., and XIII. of the declaration as follows: XI.—In or about March, 1901, the defendant, who had already purchased and was in possession of the said portion of De Erf and the adjoining piece of ground, which was subsequently transferred to him, proceeded wrongfully, unlawfully, and wilfully to cut down and remove all the veld bushes,

thorn trees, and other trees and shrubs of every sort growing thereon, in violation of the plaintiffs' rights thereover, as representing the erf-holders of the said Municipality, and thereby and otherwise further destroyed the grazing ground thereon, to the use of which the plaintiffs were entitled, and which the said erf-holders have used as aforesaid.

XII.—The defendant, in spite of repeated protests by the plaintiffs, persisted in the illegal acts referred to in the last preceding paragraph hereof, and continued so to damage and destroy the said grazing ground until in or about July, 1902, and he has, by reason of his said violation of the plaintiffs' rights, caused them damage to the extent of £2,500. XIII.—In or about August, 1902, the defendant wrongfully and unlawfully enclosed a certain portion of the said ground, in extent about 5 morgen, 537 square rods, being part of the grazing ground hereinbefore mentioned, and not cultivated land, with a wire fence, thereby preventing the plaintiffs from enjoying all their grazing and other rights in and over the said ground, and causing them damage to the extent of £150. The plaintiffs prayed for judgment for: (a) The sum of £2,500 as damages aforesaid in respect of the matters complained of in paragraphs XI. and XII.; (b) the sum of £150, as damages in respect of the matters complained of in paragraph XIII.; (c) that the defendant may be ordered forthwith to remove the said wire fence; (d) alternative relief; (e) costs of suit.

Defendant, in his plea, said that, subject to the said conditions of sale and rights and privileges pertaining to the said erf-holders thereunder, the vendor retained his ordinary proprietary rights in respect of the said property De Erf, not only under the common law, but also by virtue of the last clause in the respective conditions of sale, together with other clauses therein. He said that the vendor retained his legal and ordinary rights to the reasonable use and enjoyment of the said grazing lands, subject to the rights of grazing granted to erf-holders by the said conditions of sale. Defendant said that (a) he admitted that in or about March, 1901, he had purchased and was in possession of, and thereafter got transfer of, the said portion of De Erf and of the ground adjoining De Erf, and that then and thereafter he cut down and removed certain firewood on the west or right side of the said river, on the portion of ground in respect of which the erf-holders in the villages of Rouvierville and Retreat had certain rights of cutting wood, in terms of the said conditions; but he did not interfere with any lawful rights of grazing cattle on the aforesaid grazing ground as possessed by the erf-holders in the three said

villages, or in any way damage the said grazing ground, the latter, on the contrary, having been improved by what he did; (b) he further said that in August, 1902, he sold his said property, being the servient tenement here in question, to the present plaintiffs in their said capacity, who bought the same at a public sale by auction, and were now the registered owners and in possession thereof; (c) defendant hereby, in reference to paragraph 11, tendered the sum of £25, with taxed costs to date of tender, in full satisfaction of any damage which plaintiffs may have sustained in respect of the defendant's acts. Paragraph 12 was denied, save as to the admissions of tender. As to paragraph 13, defendant admitted that he enclosed with a wire fence a certain portion of his said ground, in extent about five morgen, but the said portion was situated on the east or left side of the river, and was not subject to grazing rights. He said that the plaintiff had sustained no damages, there being, in fact, no firewood or other wood on the said portion, and for a technical infringement of the plaintiffs' rights therein, he tendered the sum of £5, with costs to date of tender. Subject to the foregoing tenders of £25 and £5, together with taxed costs to date of tenders, he prayed that the plaintiffs' claim should be dismissed, with costs.

Plaintiffs, in their replication, put the defendant to proof of his assertions.

Mr. Burton (with him Mr. De Waal) for plaintiffs. Mr. Schreiner, K.C. (with him Mr. McGregor) for defendant.

Mr. Schreiner applied for leave to amend the plea in so far as the alleged enclosure by a wire fence was concerned, by withdrawing the admission that there was a right of grazing or cutting wood in the plaintiffs. He withdrew the tender of £5, and said that it could be added to the £25 tendered in the other part of the claim.

Maasdorp, J., allowed the amendment. Jan Christiaan Weitz, Town Clerk of Adendorp, gave evidence as to the former condition of things on the ground and the value which the trees on the banks of the river, cut down by defendant, were to those who held grazing rights. He also gave evidence in regard to the extent of the grazing rights of the erf-holders. The cutting of the wood by the defendant commenced, he said, in March, 1901, when martial law was in force. He saw cutting going on opposite Rouvierville; and he saw the work extend through a portion of the veld. He saw cutting going on in a belt of trees over a length of about a mile along the bank of the Sunday River. After the trees had been cut down there was no protection left for any grass which might grow during the rainy season. He did not notice any sign of fresh growth where the trees had been cut down. At that time de-

fendant was residing on erf No. 5 at Rouvierville.

Cross-examined by Mr. Schreiner: There were over 1,000 head of stock that grazed on the ground before the trees were cut down; he had no record for Municipal purposes. Stock in excess of the quantity allowed on the erven were taken to the pound. He admitted that both mules and donkeys had grazed on the ground, as well as cows and horses. He could not say whether there were more mules and donkeys on the ground than cows; he did not know whether the erf-holders generally held more mules and donkeys than cows and horses. Goats would eat from the trees.

Mr. Schreiner: A sheep will not eat from the trees?

Witness: Yes; a Cape sheep.

He had seen donkeys belonging to Mr. Jansen, formerly a commissioner, on the commonage. He did not know that of the trees cut down by the defendant the stumps had been of great use to people who could not take green wood. He could not say whether the claim for £2,500 damages for cutting the trees was a fair one; he had no knowledge. He was acquainted with the gardens, but not with the grazing ground. Of dry and wet erven, there were 127 in all; all the erf-holders had a right to graze, but they had not all rights to cut wood on the Adendorp side of the river. Since the Municipality had taken possession of most of the ground nobody could take wood in the Adendorp portion without a permit from the Municipality. At Rouvierville and Retreat the people went under the old condition that they could take wood on the bank of the river. Wood was requisitioned by the military during the war; the wood was such as was marketable.

Re-examined: Mr. Kingwell's wagons took the wood to Graaff-Reinet. The first protest was sent in on the 23rd August, 1903, signed by ten ratepayers, and the second one also signed by ratepayers was sent in on the following December, when the Council held a meeting, and refused it. And the protest was sent in in 1904, and in November a public meeting was called to discuss the case against the defendant. Twenty-four ratepayers were present, Mr. Kingwell tendered £25, £5 and costs, and it was carried by twenty-two to two not to accept the tender, and authorising the commissioners to proceed as they thought fit. In all there were fifty-six ratepayers in the Municipality. They were all ratepayers at the meeting, although he could not give the names. He would not say that Mr. Swanepoel pressed the meeting not to accept the defendant's tender.

Stephanus Swanepoel, chairman of the Adendorp Municipality, said he had lived in Adendorp for ten years. Before 1901 the commonage was in good condition, and overgrown with trees and

bushes, which were good food for stock. Trees, shrubs, and bushes were cut down by the defendant. Anything that was fit for firewood was cut, and as a consequence the veld had deteriorated, and gone back, because the greater part of the big trees was cut away. His neighbour, Bishof, had since 1901 been buying wood from Boysen, a farmer. He did not know where Bishof had previously got his wood from. He considered that the commonage had not been improved by the defendant's actions; cattle had now to be taken away which could formerly be grazed on the commonage.

Cross-examined by Mr. Schreiner: They had rain at Adendorp a few months ago, but before then years had elapsed since they had had a snowstorm or a heavy fall of rain. He had only bought three loads of wood, during the past six years; he had got dry wood from the bank of the river opposite the erf to his house, and had also used green wood from fruit trees in his garden.

Mr. Schreiner: If the Municipality are so particular about protecting trees, why did they cut down the trees along this water furrow?

Witness: Because the trees obstructed the water. The water, witness added, had been polluted by coloured people living in the neighbourhood. It was necessary to cut down the trees to stop this nuisance. Witness was friendly with Mr. Kingwell; he did not enter a protest as an erf-holder when Mr. Kingwell commenced to cut down the trees. Witness had not known until recently that there was a difference in the conditions as between Adendorp and the villages of Rouvierville and Retreat. He did not remember whether Mr. Kingwell had told him that he had not known of any difference between the conditions of sale of erven in Adendorp and the other villages. Donkeys, goats, and mules were grazed largely on the commonage.

Re-examined: Prior to the cutting down of the trees during a drought they could keep on the erven 1,000 small stock, and about 120 head of large stock; now they could only graze 500 or 600 small stock and about 25 head of cattle.

Swanepoel (recalled) stated, in reply to Mr. Burton, that the erven along the banks of the river at Rouvierville and Retreat extended between 2,500 and 3,000 yards. Stoltz had ten or eleven erven of a morgen each at Rouvierville. Stoltz was present at the meeting, and voted on the 24th November.

Cross-examined by Mr. Schreiner: He could not give a list of the people present at the meeting, but he was positive that Stoltz put up his hand. Stoltz had two homesteads on the erven, and it was witness's opinion that the tenant in the second house could also take wood.

By Maasdorp, J.: All the trees with the exception of the thorn tree were not considered as firewood.

Hendrick Jacobus Marais, a member of the Adendorp Municipality, stated that as long as he could remember he lived in the Municipality. Prior to this case he never knew of any destruction on the commonage where he had looked after his father's stock for years. In any of the previous droughts they were always able to maintain the stock without removing them. From a grazing point of view the bush veldt was four times as valuable as the Karoo bush. When Kingwell started cutting down, witness, in his presence, protested against it. It was the opinion of witness that if the defendant could cut down thorn trees he could also cut the plum trees and bushes, and witness would suffer in consequence. Subsequently, he asked the defendant to sell back the land to the Municipality, but Kingwell was not inclined to do so at that moment, stating that he was cutting down the wood, as he wanted work for his donkeys. The smaller trees and bushes were cut down, and tracks were made across the veldt for the wagons to remove the wood. All the wood capable of being used as firewood was cut down in the bush veldt. The shorter bush was good food for small as well as large stock. When rain came down grass grew under the trees, but now it did not seem to thrive. He had to feed part of his stock, and so had other people, a thing he had never known before.

Cross-examined by Mr. McGregor: He heard many years ago trees were cut down. Where the tracks were made bushes had been cut down.

Mr. Naude, a dairyman, stated that before the cutting down of trees in the present case he was allowed to take firewood, but now he had to go to a piece of ground which he hired from the Municipality of Graaff-Reinet. In his opinion the defendant cut things that were useful and some that were useless.

Cross-examined by Mr. Schreiner: The useless stuff was cut to clear the ground. Generally what the defendant cut was the useful wood.

Cornelius Swanepoel, agriculturist, living at Adendorp, stated that he was employed by the defendant to cut wood. He was employed in March, 1901, and he continued until July, 1901, during which time he cut down 114 loads.

Cross-examined by Mr. Schreiner: The defendant did not specially say to cut the large trees; he told him to cut everything right and left as he went along.

Ferdinand Myburgh, carpenter at Adendorp, stated that he was employed by the defendant for a year cutting wood. He was fairly constant at the work, and in all he cleared about a hundred and four loads. The defendant

the sick man was, and afterwards used for the trial. It does not seem to have occurred to any one present to have interrogatories, and the first proposal was to have a Commission to take evidence. The Magistrate, however, found that that would not be legal, and accordingly, when an application was subsequently made to him to adjourn his Court to the residence of the plaintiff, not for the purpose of the trial of the case, but for the purpose of taking the evidence of this man who would probably die within a very short time the defendant objected. The Magistrate, however, allowed it to be done, and notice was given to the defendant and his attorneys of the day on which the evidence would be taken. The defendant's attorneys protested that it was utterly illegal, and when the examination of the plaintiff took place, defendant refused to take any further part in the proceedings, and he refused to appear at the subsequent stage when the case was re-adjourned to the Court at Mount Ayliff. Now, the point is whether, assuming it to have been an irregularity, was it such a gross irregularity as would justify the Court now in setting aside the proceedings altogether? I am by no means satisfied that it is a gross irregularity, but the law certainly is obscure. It would appear that the law in regard to the Transkeian territories does not specifically require that a place shall be fixed where the Court is to be held in the same way as the Acts relating to the Magistrate's Courts of the Colony, but I think it is unnecessary to decide the point whether a Magistrate in the Transkeian territories has the power exercised in the present case, for the simple reason that the defendant, in my opinion, has altogether mistaken the course which he ought to have adopted. If he refused to appear at the taking of the evidence of the plaintiff, he ought at all events to have appeared at the re-adjournment, and if he considered that the evidence was illegal he ought to have objected to the admissibility of the evidence, and have given his own evidence. If then the Court, upon the whole of the evidence, had given judgment for the plaintiff, and the defendant could have shown that the evidence of the plaintiff had been illegally taken, and that without such evidence there was no case against the defendant, there might have been a good ground of appeal. But instead of taking that obvious course the defendant refused to appear at all, and now moves the Court to set aside the whole of the proceedings on the ground of gross irregularity. Without the plaintiff's evidence there was sufficient evidence to justify the Court in calling upon the defendant to support his defence by evidence. It is impossible, therefore, to hold that the irregularity—if such it was—was so gross as to invalidate the

whole of the proceedings. The application must be refused with costs.

Buchanan, J., concurred.

[Applicant's Attorneys: Zietsman and Bosman; Respondent's Attorneys: Findlay and Tait.]

PHILIPS V. NROQOZA. } 1905.
 } Feb. 13th.

Promissory note Signature —
Mark—Witnesses.

It is no valid defence to an action on a promissory note signed with his mark by the maker that the mark is attested by only one witness.

This was an appeal from a judgment of the Resident Magistrate of Willowvale in an action brought by the appellant, R. G. Philips, against the respondent to recover £34 10s., with interest from the 6th October, the amount of a promissory note made and signed by the defendant in favour of the plaintiff. Mr. Gardiner was for the appellant (Philips); there was no appearance for the respondent.

Mr. Gardiner said that in the Court below exception was taken to the summons by the respondent, on the ground that there was only one witness to the mark of the maker, and not two, as by law required. The exception was upheld, the Magistrate stating that his reason for judgment was that the mark should be attested by two witnesses. Counsel submitted that there was no law requiring two witnesses to a mark on a promissory note, and that the Magistrate was clearly wrong.

De Villiers, C.J.: The Magistrate, in my opinion, clearly erred in his judgment. The exception taken was that there is only one witness to the mark of the maker, and not two, as by law required. Then, the answer to that was that there is no law which requires two witnesses to a mark. The result would be, if the defence were allowed, that a man might for valuable consideration give a promissory note signed by himself with his undoubted mark, and yet escape liability, because it is not duly attested. Clearly such is not the law. The duty of the Magistrate was to have given the plaintiff an opportunity of proving that the mark was the mark of the defendant. If it is his mark then it is his signature by which he binds himself to pay the amount of the note. The appeal must, therefore, be allowed, with costs of appeal, and the case will be remitted to the Magistrate to be decided on its merits, and also for decision as to the costs in the Court below.

[Appellants Attorneys: Walker and Jacobsohn.]

Charles August Noser stated he sold the ground in 1902 to the Municipality. The pasturage was fairly good, but not the best. Last week he saw the ground, and noticed that where the mimosa trees had been on the river bank the young growth was very good. With all due respect to the witnesses, he did not think the ground could bear one sheep per morgen.

Cross-examined by Mr. Burton: The trees cut down in 1901 showed some signs of growing again. The military destroyed several trees along the bank of the river.

Mr. Boisson (recalled), in answer to Maasdorp, J., said that he did not think it was putting too high an average when he said that three sheep could be maintained on a morgen. He did not do it on his own farm.

Ernest Johannes Stephanus Janssen, a member of the Municipal Council for twenty years up till fourteen months ago, stated that in his father's time all the wood along the bank of the river was cut down. The wood was cut down for sale. The trees grew up after that, and there was another big cutting about 1878, and the trees had grown again. It would have been more beneficial if the trees had been cut down before Kingwell did so. A neighbouring farmer cut down the wood every eight or nine years, and the trees always grew again. He could not detect any ill effects to the grazing since the defendant cut down the trees. The last couple of years had produced the most severe drought he had ever remembered. The donkeys were more numerous now than before the defendant bought. Witnesses passed through the veldt very often, and he noticed no useless wood cut down for firewood. Witness saw no new roads formed. As regards the use of the firewood, although he had been a Commissioner for twenty years, he never knew there were any different rights of grazing, or that the Rouvierville people had greater rights than those of Adendorp. If cattle were sent away it was on account of the prickly pear over-running the place.

Cross-examined by Mr. Burton: The defendant had treated Adendorp like a good Christian; he assisted everyone in the village. Had it been his property he would have cut down the wood long ago, as it would have benefited the grazing. Witness pointed out to the Council that they had no right to the wood, and urged them to get counsel's opinion. When witness proposed that the defendant should be proceeded against, he did not mean the Council to do so without counsel's opinion.

Re-examined by Mr. Schreiner: The Council had given up the idea of trying to get rid of the prickly pear. He could not say whether he had been over the veldt when he made the proposition to proceed against the defendant;

he took his information from the report which showed that the veldt was injured.

Cornelius Erasmus stated there was not much pasturage before the rain. The cutting had given more space, and after rain there was more grass, and the mimosas came up in great numbers. There had been a terrible drought during the past couple of years.

Cross-examined by Mr. Burton: He only came to Adendorp shortly before the war. He did not sell his cattle because there was insufficient food for them to eat.

William Jacobus Voster stated that before the defendant's time he cut along the river, and also up in the veldt. During the defendant's time he did the principal part of the cutting. He only cut wood that was useful for the market. He was paid by the load, and it would take a long time to pack a load of the smaller bush.

Mr. Schreiner closed his case.

Mr. Burton submitted that the questions which were now left for decision would be very largely questions first as to the measure of damages, and, secondly, what was the actual amount of damage which has been suffered by the municipality and erf-holders of Adendorp by reason of the operations of the defendant in the cutting of the wood on the grazing land. The plaintiffs withdrew claims (b) and (c) of the declaration, feeling that, in view of the evidence, they could not press this part of the declaration. The two substantial matters now before the Court were, first of all, the claim in regard to the injury done to the rights of the erf-holders of Rouvierville and Retreat by the cutting of firewood, and, secondly, the question of the damage done to the rights of the erf-holders of the municipality in the way of their grazing rights. On the former part of the claim—i.e., as to the cutting of wood—the defendant made a tender of £30 as damages. This tender, counsel submitted, was hopelessly inadequate. On the other question, viz., of grazing rights, the defendant made no tender. Counsel proceeded at some length to review the evidence led in the course of the hearing, and submitted that it was clear that the plaintiffs had suffered substantial damages. He admitted that it was extremely difficult to say how much that damage was. The defendant had made a profit of £1,000 out of the wood that he had cut down on the land. He had overstepped his rights to a serious extent, and the erf-holders were entitled to substantial compensation.

Mr. Schreiner entered at some length into an analysis of the rights of the erf-holders in so far as De Erf was concerned as disclosed by the sets of conditions drawn up in 1855 and 1856. He was sure that the way

jugal rights, failing which, divorce, by reason of her malicious desertion.

The declaration set out that the parties were married at Mossel Bay on the 29th April, 1873, out of community of property. There were six children of the marriage surviving, two of whom were minors. The defendant maliciously deserted the plaintiff in March, 1904.

Mr. P. S. T. Jones was for the plaintiff, the defendant had been barred from pleading.

Wm. Thomas Birch, clerk in charge of the marriage registers at the Colonial Office, gave evidence as to the registration of the marriage.

Mr. Jones applied for the postponement of the case, in view of the non-arrival of an affidavit sworn by the plaintiff in support of his case.

The defendant appeared in person, and said she wished to explain that she left her husband because he did not support her, and had not supported her for five years. She had a letter from the plaintiff, in which he said he would not take her back again. Witness resided in town.

Maasdorp, J., advised the defendant to appear when the case was again called.

The case was postponed *sine die*.

HEYDENRYCH V. FRAME.

Security given by wife—*Sena'us consulum Vellejani*.

This was an action brought by Benjamin G. Heydenrych, financier, of Observatory-road, against Mrs. Frame, wife of Alexander K. Frame, of Wynberg, to whom defendant was married out of community, to recover a sum of £146 9s., with interest from the 5th February, 1896, upon a promissory note.

The declaration set out that on the 25th April, 1904, plaintiff sued the defendant in this Court upon two promissory notes for £146 9s. and £19 10s., with interest. The latter claim was settled by defendant, after issue of summons and before the hearing; but upon the former claim, the Court ordered plaintiff and defendant to go into the principal case, costs to be costs in the cause. On the 5th February, 1896, defendant was, and still is, indebted to plaintiff in the sum of £146 9s., as and for money lent and advanced to her, and on the same date he received from her the promissory note now sued upon. Defendant failed and refused to pay the said sum. Alternatively, plaintiff said that on the 5th February, 1896, defendant was indebted to him in the sum of £146 9s., and on that date she undertook to repay the said sum, with interest. She refused and neglected to pay the said sum, wherefore plaintiff claimed payment of the note, with interest from the 5th February, 1896, and costs.

Defendant, in her plea, admitted the formal allegations, except that she craved leave to refer to the annexure for the true construction of the acknowledgment of debt. Prior to the 5th February, 1896, the plaintiff had from time to time advanced to the defendant's husband Alexander Kay Frame various sums of money, against which indebtedness payments were made from time to time by the said Alex. K. Frame. Amongst the moneys so advanced is the amount of £200, advanced on the 2nd December, 1893, for which the plaintiff received from the said A. K. Frame an acknowledgment for £230, being for capital and interest. Defendant signed the same as surety for and on behalf of her said husband, and not otherwise. Defendant's husband, by payments made from time to time, reduced the amount to £146 9s., for which balance an acknowledgment of debt was given and signed by defendant as surety for her husband, and not otherwise. Defendant at no time received any consideration from and out of the said acknowledgment, and was not a public trader, and when she signed the said acknowledgment as surety for her husband as aforesaid, the meaning and effect of the benefits and exceptions which she purported therein and thereby to renounce were not explained to her by a notary or at all, nor did she understand the same, and the said exception of the *senatus consultum vellejani* was hereby opposed to plaintiff's claim as against her. On the 5th March, 1896, £300, and on the 25th March, £55 14s., were paid by her husband to plaintiff in full and complete settlement between her husband and plaintiff, and no part of the said sum of £146 9s. was due to the plaintiff.

Plaintiff, in his replication, said he denied that the sum of £200 was advanced to defendant's husband, or that she signed an acknowledgment in respect to the said sum as surety for her husband and without receiving any consideration therefor. He said that the defendant herself applied to him, through her attorney, for a sum of £200, and the said sum was advanced to her and not to her husband. He did not admit that the meaning and effect of the exceptions were not explained to defendant. As regarded the alleged settlement, plaintiff admitted that there was a settlement between himself and A. K. Frame in 1896, but he denied that the sum now in dispute was included therein.

Mr. Burton (with him Mr. Gardiner), for plaintiff; Mr. McGregor (with him Mr. Upington), for defendant.

Mr. Burton submitted that the onus lay upon the defendant to prove her case.

Mr. McGregor said he was quite prepared to take the issue, and he at once called

NETHERLANDS BANK V. MORRIS.

Mr. Van Zyl moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

MARSH AND SONS AND OTHERS V. EDELSTEIN.

Mr. Pyemont moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

CAPE TIMES, LTD. V. HERMANN AND ANOTHER.

Mr. P. S. T. Jones moved for the final adjudication of the private estates of the two defendants as insolvent.

Order granted.

BERMAN V. ZIMRI.

Mr. M. de Villiers moved for a decree of civil imprisonment upon an unsatisfied judgment for £134, with costs. Defendant had made an offer, which had been accepted, but no payment had been made.

Decree granted, execution to be suspended on payment by defendant of £5 a month for three months, afterwards £10 a month, first payment on the 28th February.

DEMPEERS AND VAN RYNEVELD V. MELMAN AND SEGALL.

Mr. Van Zyl moved for provisional sentence for £200, with interest, due on a mortgage bond, the bond having become due by reason of the non-payment of interest. Counsel also asked for property specially hypothecated to be declared executable.

Order granted.

WALSH AND WALSH V. SADLER.

Mr. Gardiner moved for provisional sentence on a mortgage bond for £7,000, with interest, the bond having become due by reason of the non-payment of interest, and for £24 for quit rent, and £32 money advanced; counsel also asked for the property specially hypothecated to be declared executable. Service was by edictal citation. There were two parties to the bond, judgment having already been obtained against the other party, Erskine.

Order granted.

ROSSOUW V. VIKTOR.

Mr. Gardiner moved for provisional sentence on a mortgage bond for £200 with interest, the bond having become due by reason of the non-payment of interest and of notice given. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

DU TOIT V. STEYN.

Dr. Greer moved for provisional sentence on a mortgage bond for £1,200, less £250 paid on account, with interest, the bond having become due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

PABOW V. COCHRANE.

Mr. Lewis moved for provisional sentence for £3,000, with interest, due on a mortgage bond, the bond having become due by reason of the non-payment of interest. Counsel also asked for property specially hypothecated to be declared executable.

Order granted.

REYNHOUD V. ZWAIGENHAFT.

Mr. Van Zyl moved for provisional sentence upon a mortgage bond for £700, with interest, the bond having become due by reason of the non-payment of interest; counsel also asked for the property specially hypothecated to be declared executable.

Defendant applied for a postponement to enable her to realise the property, or to pay the arrear interest.

Provisional sentence granted, with costs, no further execution to follow if interest due be paid within one week.

FENNELL V. GILCHRIST.

Mr. Swift moved for provisional sentence upon a mortgage bond for £150, with interest, the bond having become due by reason of the non-payment of interest; counsel also asked for the property specially hypothecated to be declared executable.

Order granted.

PERROTT AND CO. V. BRUCKMANN.

Mr. Close moved for provisional sentence on a promissory note for £250, with interest and costs.

Order granted.

CELLIERS V. MINNAAR AND ANOTHER.

Dr. Rainsford moved for provisional sentence against the maker of a promissory note for £338 5s., with interest and costs.

Order granted.

DUFFUS AND CO. V. TOBIAS.

Provisional sentence—Promissory note—Excussion of principal debtor.

Mr. Gardiner moved for provisional sentence on an acknowledgment of debt for: £58, balance upon the sale of certain horse, with interest.

Mr. Close (for the defendant) read an answering affidavit, by his client, who said that not only did he owe the plaintiffs nothing, but they owed him £16 for a mule. Counsel read supporting affidavits by Berman and Carn, to the effect that the claim had been settled.

Mr. Gardiner read a replying affidavit by D'Arcy Weaver, manager of the plaintiff's horse bazaar, who denied that the promissory note given by one De Villiers had been accepted in full settlement of the purchase price of the horse—£33 10s. De Villiers gave a promissory note, but it appeared unlikely that they would be able to secure anything on it. Berman, whose estate had since been sequestrated, was the purchaser of the horses. The defendant had already been given credit for the price of the mule. The claim had also been reduced £20 by reason of a payment.

Mr. Close, having been heard in argument on the facts,

Buchanan, J.: Two defences have been set up to the claim for provisional sentence. The first defence, which has been set up by the defendant himself, is one of fact, namely, that he has paid the debt. The second defence is one of law raised by his counsel, and is that the defendant is only a surety, and that the principal debtor has not been excused. As to the defence on the facts, it is alleged that the plaintiff accepted a promissory note signed by one De Villiers in full settlement of the debt. From the documents before me, however, I think that the plea of payment has failed. De Villiers' promissory note did not fully cover the debt, the plaintiff says he received it only as a collateral security and that it has not been paid; and the correspondence showed that plaintiff had asked defendant's instructions as to taking legal proceedings against De Villiers. Under these circumstances, I cannot accept defendant's version as against the plaintiff's, supported, as the plaintiff is, by the documents. The legal exception is taken by counsel that there has been no excussion of the principal debtor, Berman. There are

facts which might be gone into to show that excussion is not necessary under the special circumstances of this case, but at present it is a sufficient answer in law that the principal debtor has become insolvent, and has surrendered his estate. The defence on the facts and on the law having failed, provisional sentence will be granted as prayed, with costs. Of course, it is open to the parties to go into the principal case, if they chose to do so.

FIELD V. IMPEY.

This was an application for provisional sentence on a cheque for £50, signed by the defendant, Mrs. Impey.

The affidavit of Dr. Samuel P. Impey stated that he saw one Rademeyer in regard to a mare at Claremont. He did not purchase the animal, which proved to be Field's. Subsequently, the mare again came under his notice at Kannemeyer's mart, and he eventually effected a purchase on the representations of Kannemeyer and Rademeyer that the animal was sound. He found, however, that the mare lacked staying power, and appeared to tire very easily, and, in consequence of a report by a veterinary surgeon, he repudiated the sale. The cheque was made out by Mrs. Impey. Affidavits by veterinary surgeons were read to the effect that the mare was suffering from disease of the heart and deformed hocks, one of the deponents stating that he had previously examined the animal while she was in the possession of Rademeyer for a client, and that he refused to pass her as sound.

An answering affidavit by an employé of the plaintiff stated effect that the mare had been employed on trying work, and had worked well. An affidavit by Mr. Kannemeyer denied that he had guaranteed to the defendant that the horse was sound. The plaintiff, in an affidavit, denied that he had given a guarantee or authorised anyone else to give a guarantee. He drove the horse regularly for five months, and the only fault he had to find with her was that she shied at trams. An affidavit by Rademeyer, a horse dealer, stated that he was not the agent of the plaintiff in the matter of the sale. He bought the horse from the plaintiff, and received no guarantee for it.

Mr. Searle, K.C. (with him Mr. Russell) for plaintiff. Sir H. Juta, K.C., for defendant.

Sir H. Juta submitted that it was beside the mark for the plaintiff to say that Kannemeyer was not his agent. The only consideration that Mrs. Impey got for this note was the sale to her husband. He submitted that upon affidavits the Court could not decide where the truth lay.

Without calling upon Mr. Searle,

Buchanan, J.: If, as counsel argues, the sale was effected solely by Kannemeyer, it follows that he is the only person that could have given a guarantee of soundness. Kannemeyer positively denied that he ever gave such a guarantee, or that he was authorised to give such a guarantee. The horse was sold and delivered some days before the post-dated cheque was sent by defendant to plaintiff, and it was only the day before the cheque was to be presented that the defendant repudiated the sale. Under these circumstances, and in the absence of a guarantee, provisional sentence must be given, with costs. The parties, if they chose, may go into the principal case.

DUNLOP TYRE CO. V. STEYN.

Mr. P. S. T. Jones moved for provisional sentence, for £536 12s. 4d., less two sums of £493, and £50 paid on account, on a certain undertaking, with interest, and for judgment, under Rule 329d, for £5 10s., costs of summons.

Order granted.

FRIEDMAN V. PIETERS.

Dr. Greer moved for provisional sentence on an unsatisfied judgment of the Resident Magistrate's Court, for £12 15s. 9d., with taxed costs, and for certain property, to be declared executable.

Order granted.

MUNICK V. PIETERS.

Dr. Greer moved for provisional sentence on an unsatisfied judgment of the R.M.'s Court, for £12 4s. 10d., with taxed costs, and for property to be declared executable.

Order granted.

SWART V. PIETERS.

Dr. Greer moved for provisional sentence on an unsatisfied judgment of the R.M.'s Court for £21 6s. 4d., with taxed costs, and for property to be declared executable.

Order granted.

ILLIQUID ROLL.

SEARIGHT V. DIBB AND CO. } 1905.
Feb. 16th.

Mr. P. S. T. Jones moved for judgment, under Rule 329d, for £35 6s. 11d., balance of account.

Order granted.

BARROW DOWLING V. LOVEGROVE.

Mr. Sutton moved for judgment, under Rule 329d, for £50, less £5 paid on account, being rent due.

Order granted.

CARROLL AND CO. V. ARMSTRONG.

Dr. Rainsford moved for judgment, under Rule 329d, for £55 19s. 5d., balance of account, with interest *a tempore morae* and costs.

Order granted.

HEROLD AND CO. V. LANSDOWNE HOUSE ESTATE CO.

Mr. Sutton moved for judgment, under Rule 329d, for £156 8s. 3d., with interest *a tempore morae* and costs.

Buchanan, J., said he believed that the estate had been placed under liquidation, and no judgment could be granted in that event.

The matter was ordered to stand over for inquiries.

DEMPERS AND VAN RYNEVELD V. ZACKS.

Dr. Greer moved for judgment, under Rule 329d, for £28 6s. 10d., with interest and costs.

Order granted.

KALK BAY MUNICIPALITY V. EXECUTORS ESTATE BEHR AND OTHERS.

Mr. P. S. T. Jones moved for judgment, under Rule 329d, for £165 8s. 10d., less £124 1s. 9d., being owners' rates due on property at Muizenberg.

Order granted.

ESTATE ALEXANDER V. JUBB.

Mr. Alexander moved for judgment, under Rule 329d, for £60, rent due, and for a certain rule *nisi* to be made absolute.

Order granted.

JACOBS AND CO. V. MILLER AND CHIAT.

Mr. Uppington moved for judgment in default of plea, under Rule 319, for £775 15s. 9d., in terms of conditions of sale, with interest *a tempore morae* and costs.

Judgment granted, with costs, including costs of application to attach landed property sold to defendants.

GENERAL MOTIONS.

HILLIER V. HILLIER. { 1905.
Feb. 16th.

Mr. Van Zyl said that plaintiff had claimed for restitution of conjugal rights, and obtained a rule calling on the defendant to return on or before 1st January, or to show cause by the 1st February why a decree of divorce should not be granted. Personal service had been effected, and there was no appearance.

Rule made absolute.

ESTATE WEIDEMANN V. DE VILLIERS.

This was an application by a trustee for an order amending certain proof of debts. The respondent put in a preferent claim, and it was accepted by the Resident Magistrate of Richmond at a second meeting of creditors by virtue of a deed of hypothecation for £150 on a promissory note passed by the insolvent and his brother, and £46 15s. 6d. in respect of certain eight donkeys alleged to be held as security, and to remain his property until paid for. The application was to make the respondent rank as a concurrent creditor. The affidavit of Carl Paul, the sole trustee, set out that the respondent claimed £75 in respect of a certain promissory note for £150 and £46 15s. 6d. It appeared from the deed of hypothecation that the debts secured and covered were the joint debts of the insolvent and A. C. Wiedemann, but deponent denied that they were covered thereby.

The affidavit of the respondent set out that the claim for £75 was half the insolvent's liability in the joint note signed by his brother and himself. They signed the note jointly and severally. The respondent's brother bought fourteen donkeys for deponent's account, and he paid for them. He then sold the donkeys to the insolvent and his brother, and they passed the promissory note, jointly and severally, binding themselves that the donkeys would remain deponent's property until paid for. The donkeys were specially mentioned in the hypothecation, because he thought the debtors might pay for the donkeys in which case they would have to be accounted for.

Mr. Close was for the applicant, and Mr. Searle, K.C., was for the respondent.

Counsel having been heard in argument,

Buchanan, J., said it was clear that the creditor was entitled to the benefit of the deed of hypothecation. He thought that the application to strike out the preferent claim of his deed of hypothecation altogether failed. The trustee also claimed to strike out

the preferent claim over certain eight donkeys. The claim for preference over the donkeys failed, and the proof of debt must be declared as only concurrent in regard to the claim upon the promissory note, and for which the donkeys were security. There would be no order as to costs.

Ex parte COLLINS.

Mr. Uington moved for leave to withdraw the surrender value of a certain policy upon the life of her husband. The surrender value of the policy was £93 odd, after providing for the loans obtained by her husband. The application was for leave to withdraw the surrender value from the Colonial Mutual Society, without the consent of the trustees under the ante-nuptial contract, who had disappeared. The Master recommended that fresh trustees should be appointed.

Buchanan, J., said that it would be necessary to appoint a fresh trustee to give the petitioner authority to withdraw the surrender value of the policy.

Order granted, appointing Mr. W. T. Buissinne as trustee under the ante-nuptial contract, with authority to realise the policy for the beneficiaries under the ante-nuptial contract.

INHAMBANE OIL SYNDICATE V. MEARS AND FORD.

Mr. Schreiner, K.C. (with him Sir H. Juta, K.C.), moved for leave to attach certain 1,000 shares in the plaintiff company, *ad fundandam jurisdictionem*, and for leave to sue by edictal citation in an action in which the plaintiffs claimed £50,000 damages, and forfeiture of all and any rights which the defendants might have in the said shares. Defendants were resident at Johannesburg.

Leave to sue by edictal citation granted, citation to be served personally, and to be returnable on the first day of next term.

Ex parte ALLEGENSKY.

Mr. P. S. T. Jones moved for a certain rule *nisi* under the Derelict Lands Act to be made absolute.

Order granted.

Ex parte HERADIEN.

Mr. P. S. T. Jones moved for leave to have amended a certain transfer deed relating to property at Somersset East.

Order granted as prayed.

DAVIDS V. EXECUTOR ESTATE DAVIDS.

Mr. P. S. T. Jones moved for an order requiring the respondent to sign the re-

quisite papers and documents, to enable the applicant to realise and pass transfer of certain immovable property, situate in Jordaan-street, Cape Town, belonging to the estate of the petitioner and his deceased wife. A certain transfer deed had been lost.

Order granted, with costs, requiring the respondent to sign the necessary declaration, to enable petitioner to obtain a certified copy of the lost transfer deed.

CLOETE V. DIEPRAEM.

Mr. Upington moved for a certain rule nisi, restraining the defendant from disposing of certain landed property, pending an action to be made absolute, with costs.

Rule made absolute.

BASSON V. BECK.

Mr. Gardiner reported on the application for leave to defend *in forma pauperis*, and moved for a rule nisi to be issued, calling upon respondent to show cause why applicant should not have leave to defend *in forma pauperis*.

Rule nisi granted, to be returnable on Thursday next (23rd instant.)

SONDOM V. SONDOM.

Mr. J. E. R. de Villiers moved for leave for applicant to sue by edictal citation for divorce *in forma pauperis*, citation to be returnable on the 1st April, notice of trial at the Circuit Court at Aliwal North to be served at the same time as citation.

Order granted.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

TRIAL CAUSES.

McGREGOR V. MCGREGOR. { 1905.
Feb. 17th.

**Divorce—Forfeiture of benefits—
Division of joint estate.**

In actions for divorce, where the parties have been married

in community, but the plaintiff has not contributed anything to the common property, division of the joint estate and not forfeiture of benefits should be claimed.

This was an action brought by Beatrice Petronella McGregor, of Cape Town, against Alexander McGregor, butcher, Cape Town, for divorce, by reason of the defendant's adultery, for alimony, custody of the minor children, and forfeiture of the benefits of the marriage. Dr. Greer was for the plaintiff. Defendant had been barred from pleading, but Mr. Gutsche appeared for him on the question of alimony.

Beatrice Petronella McGregor (the plaintiff) said she was married to the defendant in community of property on the 1st November, 1892. There were three children of the marriage. Defendant was very intemperate from the beginning of their married life. In consequence of certain information which came to her knowledge last year, she had inquiries instituted, as a result of which she ceased to cohabit with the defendant in October last. Mr. Pinn, a jeweller, of Adderley-street, called at the house in respect of certain jewellery that Mr. McGregor had bought. Witness knew nothing about the jewellery. Her husband had been assistant manager of De Boers Cold Storage, at a salary of £50 a month. He owned landed property, and about a year ago he told witness that he was worth between £9,000 and £10,000. Witness desired to have custody of the children and maintenance from the defendant. She also desired forfeiture of the benefits of the marriage in community.

[De Villiers, C.J.: Did you bring any property to the marriage?]

Witness: No.

[De Villiers, C.J.: What is there to forfeit then?]

Dr. Greer: We claim half the property.

[De Villiers, C.J.: You don't at all; there is no prayer to that effect. You claim a forfeiture, and you brought no property into the marriage. If you had asked for a division of the joint property I could have understood.]

Dr. Greer asked for leave to substitute for the prayer for forfeiture, a prayer for the division of the joint estate.

De Villiers, C.J., assented to the amendment of the prayer accordingly.

Mr. Gutsche made an offer on behalf of the defendant.

Witness said she would prefer to have a division of property, defendant to pay the costs of the suit.

Mr. Gutsche said he was instructed that the defendant's salary at the Cold Storage had never been above £30 a

month, with a commission on the livestock landed. Defendant was at present out of employment.

A young woman named Frances Harris, of Palace Chambers, gave evidence as to the adultery.

Percy E. J. Crockett, manager of Jamieson Chambers, said that defendant and the last witness came to the Chambers and occupied a double-bedded room for a few weeks.

This concluded the case for the plaintiff.

Defendant said that he valued his property at about £3,000. He was willing to pay plaintiff £5 a month at present for the support of his children; when he was in employment, he would pay more.

Decree of divorce granted, with costs, Mr. G. W. Steytler being appointed receiver to divide the property held in community equally between the plaintiff and defendant. The Court further ordered that the plaintiff should have the custody of the children of the marriage, defendant to have access to them at all reasonable times and places; defendant to pay the sum of £3 a month for the maintenance of each child until such child reaches the age of sixteen years.

TROTT V. TROTT.

Partnership—Account—Participation in profits.

This was an action brought by Charles Trott, of Cape Town, against his brother, Robert Trott, of Johannesburg, for a declaration of rights under an alleged partnership.

From the pleadings it appeared that the plaintiff sued his brother for a declaration that they were partners in business, for an account, for debate, and for the appointment of a receiver and division of the property. It was alleged that in 1899 the plaintiff was in England, and that his brother wrote to him from this country, and said that there was business to be done here. Plaintiff came out here, and thereupon they started business together as Trott Brothers, and carried on the business for some time. No deed of partnership was entered into; they carried on the partnership and went into various transactions. The banking account in the meantime was in the name of the defendant, who had been carrying on business before the plaintiff arrived in this country, and so, for the purposes of finance, that banking account continued as it was. The plaintiff held a power of attorney from the defendant. Eventually the defendant went to Natal and entered into business, and also went to Johannesburg and entered into business there. There were a couple of cases in which the parties sued and were sued, in which the defendant, in his evidence,

admitted that he was a partner of the plaintiff as late as August, 1904. Some time during last year it appeared that the defendant, at Johannesburg, began to speculate rather heavily in scrip, which brought about unpleasantness between the two brothers, the defendant eventually taking up the position that the plaintiff was not a partner. The defendant, in his plea, denied the allegations of the plaintiff. He said that there was one transaction—the purchase of certain property—in which they were partners, and that for the rest they were not partners at all, and that the plaintiff was a salaried servant in his employ. He, on his part, claimed from the plaintiff sums of money which he had drawn, and which the defendant said that he (plaintiff) had no right to draw.

Sir H. Juta, K.C. (with him Dr. Rainsford), for plaintiff; defendant in person.

Defendant objected to the plaintiff putting in any documents. He stated that he (defendant), was served with a discovery order, and he disclosed all the documents that he had. He served a similar order on the plaintiff's attorneys, but he received no answer.

Sir H. Juta produced the record in the case of *Saachs, Chiat and Co. v. Trott Bros.* (11 C.T.R., 721), and also the summons in the case of the *Table Bay Harbour Board v. Trott Bros.*

Defendant asked if the documents had been admitted.

De Villiers, C.J., said that the records in the previous cases had been admitted.

Defendant explained that the cases were commenced by plaintiff in his absence from Cape Town.

Charles Albert Trott, the plaintiff, said he came out to this country in November, 1899, at the invitation of the defendant, to join him in the business of produce merchants. They were proposing to supply the transports. In May, 1901, they opened a store in Waterkant-street. An action was brought against them by Saachs, Chiat and Co., in respect of certain eggs, etc., supplied by the plaintiffs. The banking account was in the name of R. Trott. His brother explained that this difficulty could always be arranged by a power of attorney. They also bought a property in April, 1903, in Chiappini-street. It was transferred to the name of the defendant. His brother thought that if trouble arose afterwards, he would be able to assign or cede the property to some one else by a deed of gift.

[De Villiers, C.J.: You agreed to that arrangement?]

Witness: I had not much stake in the matter.

Did you agree to this arrangement?

Witness: Yes, he had not received any salary from the defendant. In January or February, 1903, defendant went to Natal, and entered into

partnership with one Kolter. Moneys were remitted to that business from Cape Town to the extent of about £4,000. The partnership of Kolter and Trott was dissolved, but witness had had no account. In Durban, the business was to purchase military stores, and money was frequently remitted from Cape Town. In Johannesburg they disposed of the military stores from Durban. In May last year the defendant asked for money from Cape Town several times, and kept them short of money here. Witness was at that time in Port Elizabeth. Defendant came down to Cape Town, and began to sell off the stock. He had also withdrawn the power of attorney. In the course of last year, witness, on behalf of Trott Bros., sued one Maisel in respect to a large transaction in suits. (14 570, 703). Witness's brother gave evidence in that case. Witness gave evidence in regard to other transactions, in which he said that they were carrying on a partnership.

During the hearing of the case, some question was raised as to whether a settlement could not be arrived at.

Defendant said that he had offered £1,000 to the plaintiff, to be paid when he was in a position to realise his interest in valuable properties in Johannesburg. At present, he was not in a position to pay the plaintiff anything, because as an asset the properties were not at present worth twopence to him.

Sir H. Juta said that the defendant might cede half his interest to the plaintiff.

Defendant said he had no right to enter into any agreement of cession of his interest in the Johannesburg properties at present, but he believed that in four or five years the properties would be worth a good deal of money.

Witness was cross-examined at some length by the defendant. Witness said he bought three racehorses for over £300 upon a bill, payable at 90 days. He ran the horses and backed them. The horses were afterwards taken by defendant to Johannesburg.

While the cross-examination was proceeding,

His Lordship interposed, and asked Sir H. Juta whom he would suggest as a receiver, because it seemed to him that the work would be a very onerous one.

Sir H. Juta mentioned the names of Mr. Nash, Mr. Gibson, or Mr. Close. He added that he did not think there would be any difficulty in ascertaining what were the partnership matters.

Witness was questioned in regard to a telegram that defendant said he sent from Johannesburg, asking that an advertisement should be put in the "Cape Times" as to his having discontinued business under the style of Trott Bros. Defendant put it to witness that he went to his (defendant's) wife, and snatched the telegram from her hand.

Witness: No, I did not.

By the Court: Witness did not think that there would be above £22 worth of property when he joined the business. When witness came here, the defendant was a fish dealer. He had been unable to find the letter sent to him by defendant, asking him to come out to this country. Witness had been a reader on the press in London, and had made from three to five guineas a week.

Defendant informed the Court that he used to be a member of the East End Shoe Black Society when the plaintiff was born, and that he used to have a box outside Vauxhall. He afterwards went to the United States, and was there for a good number of years. He returned to England and got married. The plaintiff, not satisfied with being his brother, married his (defendant's) wife's sister, and thus became his brother-in-law as well as his brother.

Sir H. Juta closed his case.

Wm. Elliott, of the Bank of Africa; Mr. Verster, local manager of the Federal Company, and Mr. Watermeyer, attorney, having given evidence.

Defendant said he had always traded as Trott Bros. He put in letters to show that he never received an order from or took counsel with his brother, but always told his brother what he should do, and gave him orders. He also put in letters to show that defendant had carried on business for himself. He submitted that there had never been a partnership. He declared that during his absence the plaintiff, while in charge of the Cape Town business, lost heavily and "went behind" to the tune of £7,000. Witness, while at Durban, made £16,000 or £17,000. Plaintiff never said he was a partner until the 27th August last, when he had got into difficulties with the business he had been carrying on at Plumstead. When plaintiff arrived in the Colony, witness had a balance of £175. Plaintiff has been paid £18 a month as wages, with £15 a month to meet out-of-pocket expenses.

De Villiers, C.J.: The real question to be decided is whether there has been a partnership between plaintiff and defendant in the conduct of the business of Trott Bros. In my opinion, it is clearly established that there was a partnership between the parties, and, if any doubt existed upon the point, that doubt would be dispelled by the evidence which the defendant himself gave on oath. I cannot assume that the defendant would have sworn a falsehood as to the existence of a partnership if none had existed. The defendant now says that the plaintiff was merely a salaried clerk. If that were so, I should have expected some entry in the books, which have been produced showing payments of salary to the plaintiff, but, instead of that, the plaintiff

simply appears to have drawn money as he thought fit. All the facts in the present case seem to me to support the existence of a partnership. If that be so, then the plaintiff is entitled to an account, and he is entitled to the appointment of a receiver and liquidator for the purpose of liquidating the partnership estate. At this stage, it is not necessary for the Court to decide whether the Natal business belongs to that partnership or not. That will be a matter for the receiver to inquire into. Judgment will be given as prayed, with costs, and the Court will appoint a receiver and liquidator to divide the assets of the partnership of Trott Bros. equally between plaintiff and defendant. It will then be for the receiver to ascertain what assets belong to that particular partnership. As to the appointment of a receiver, I should wish the parties to come to some agreement.

Defendant: said he did not wish to appoint a receiver. He preferred that the matter should be dealt with by his lordship. He was without means at present.

His Lordship: But are there no assets in the partnership estate?

Defendant: Absolutely none; I should not be here to conduct my own case if there had been. I have nothing, and I know my brother has a bit less, as far as that is concerned. I believe my furniture would make about £24 more than his.

Sir H. Juta: There is a syndicate share that is going to be worth £15,000 in a year or two, according to the defendant. Counsel mentioned the names of certain accountants to whom the matter could be referred.

His Lordship said that the Court would appoint Mr. Gibson as receiver failing him, Mr. Nash, and the costs must be paid by the defendant.

FIELD AND CO. V. ANNENBERG.

Mr. Gardiner, with the leave of the Court, applied for the final adjudication of the defendant's estate as insolvent. Order granted.

MCIVOR V. REYNOLDS.

1905.
Feb. 17th.
" 18th.

This was an action brought by J. McIvor, forwarding and commission agent, De Aar, against Sidney Herbert Reynolds, general dealer, of Prieska, to recover a debt of £79 1s. 4d., forwarding charges, commission, etc.

The plaintiff, in his declaration, said that the defendant was indebted to him in the sum of £96 7s. 3d, goods sold and work and labour done, money paid, and services in and about the forwarding of goods and commission. He admitted that he had received on account £17 odd,

leaving a balance due to him of £79 1s. 4d., for which sum he claimed judgment, with interest *a tempore morae* and costs.

Defendant, in his plea, said that, taking into account short deliveries, double agency fees which had been charged by plaintiff, and an agreement made between the plaintiff and defendant that the fees should be reduced from 6d. to 3d. He was not indebted to the plaintiff. Defendant set up a claim in reconviction for £204 4s. 1d., less £74 2s. 1d., in which latter sum he admitted that he was indebted to the plaintiff.

Mr. Gardiner (with him Mr. Douglas Buchanan) was for the plaintiff; Mr. Close (with him Mr. Sutton) was for the defendant.

Mr. Gardiner, having provisionally agreed to give up the disputed part of the claim in convention, viz., £4 19s. 3d.,

De Villiers, C.J., said he would lay it upon the defendant to prove his case.

Mr. Close proceeded to call evidence.

George Reynolds, senior partner in the firms of Howes and Reynolds and Reynolds and Son, carrying on business at Prieska and Britstown, gave evidence.

During the hearing of the case, a question was raised as to the reference of a number of small items in dispute to an accountant, but his lordship remarked that it seemed a pity, where there was such a comparatively small amount in dispute, to go to the expense of a reference, and bringing the matter in court again.

G. H. Reynolds, cross-examined by Mr. Gardiner, stated that the marks were not unreliable on these particular goods. He would not accuse the plaintiff of taking any sugar out of the pockets. He did not make inquiry about the fifty cases of sugar that were not delivered in July. He contended that the plaintiff failed in his duty when he did not compare the advice notes with the railway charges.

Re-examined by Mr. Close: It had taken him months to make up his account through the delay on the plaintiff's part.

Sidney Reynolds, defendant in the action, corroborated his father's evidence with regard to the dealings with McIvor.

The statements of accounts rendered by the plaintiff conveyed the impression that he had received the goods. Witness told the plaintiff there were shortages. He did not think that the plaintiff had the number of way-bills he stated.

Cross-examined by Mr. Gardiner: If his father diverted goods it would be shown in the account.

Mr. Close closed his case.

For the plaintiff, Mr. Gardiner called William Todd, partner with the plaintiff, who stated that he received 265 bags of meal in 1902, and delivered them. On August 16 he signed for a short delivery of one bag of mealies. He did not admit the receipt of 368

pockets of sugar. The tanks were originally kept back because carriers refused to load them, but ultimately they were retained as security. The railway regulations provided for payment first with the option of claiming a refund. He did not always get advice notes, and had to be guided by the railway.

Cross-examined by Mr. Close: The plaintiff would be advised if anything was short. Some of the accounts were charged at sixpence, but some of them were adjusted. There was not considerable trouble in getting the accounts out of him, and it was incorrect to say that he made mistakes. It was not impossible for his firm to lose goods.

Arthur Welch, checker in the C.G.R. at De Aar, stated it was his duty to get the receipts of goods. He could not find any receipt from McIvor for the fifty pockets of sugar.

Mr. Gardiner closed his case.

Counsel having been heard in argument on the question of the appointment of a referee,

De Villiers, C.J., granted an order as follows: That Mr. Nash, or failing him, Mr. Close, be appointed as referee to check the correctness of the accounts put in by the plaintiff of meal, mealies, sugar, and coffee received and forwarded by him, to check the items in the schedules "A" (as amended) and "B" in the claim in reconvention, to ascertain to what extent these items are accounted for by the documents put in, and to check the summaries, the costs to stand over.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

GENERAL MOTION.

In re THE ESTATE OF THE { 1905.
LATE WILLEM KEMPEN. { Feb. 17th.

Dr. Greer moved, as a matter of urgency, for an order removing an order of sequestration against the estate as the executor dative was anxious to pass transfer. The estate had been sequestrated in error jointly with that of the surviving spouse. The affidavit of Mr. Van der Byl set out that he had made a search in regard to the estate, and he could not find any sequestration during the deceased's lifetime.

Maasdorp, J., said he would grant a rule *nisi* calling on all persons interested to show cause why the order of sequestration should not be set aside, the order to be returnable on the 12th March, and to be published once in the "Government Gazette," and in a paper circulating in the Carnarvon district.

SUPREME COURT

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

ALBERTYN V. BASSON. { 1905.
{ Feb. 18th.

Sale and purchase -- Suspensive condition.

Goods sold under a suspensive condition remain the property of the seller, even if delivered to the purchaser, until the condition is fulfilled.

This was an action brought by Casparus Petrus Albertyn, of Simon's Town, against Willem Johannes Tobias Basson, of Porterville, to recover certain two mules or their value, £50.

The declaration set out that on or about the 17th February, 1903, plaintiff sold to one J. Kulman six mules for the sum of £106, it being agreed between them that the mules were to remain the property of the plaintiff until they were paid for. Kulman paid £40 in cash, and gave plaintiff a promissory note for the balance, £66, made payable on the 30th April, 1903, the condition that the said mules were to remain the property of the plaintiff until paid for being repeated on the promissory note. The mules were delivered to the said Kulman, but the latter had not paid the balance of the purchase price, and he had now disposed of the said mules, and was too poor to meet his liabilities. Two of the said mules had been traced by the plaintiff to the possession of the defendant, but he refused and neglected to give up the same. Plaintiff claimed return of the said two mules or their value, £50, interest *a tempore morae*, alternative relief, and costs of suit.

Defendant, in his plea, admitted the sale from plaintiff to Kulman, but denied that it was agreed between them that the mules should remain the property of the plaintiff until they had been paid for. He had no knowledge of the alleged promissory note, and put the plaintiff to proof of his allegations. He said further that he purchased certain two mules from Christian Basson, and that he was unaware that the plaintiff had any right in the mules. He prayed that the claim be dismissed with costs.

Mr. Van Zyl for plaintiff; Mr. J. E. R. de Villiers for defendant.

Casparus Petrus Albertyn (the plaintiff) said he went to the defendant at Porterville, and explained to him how Kulman had got hold of the mules. He asked the defendant for two mules that

he saw, and identified them as having been in his possession. Defendant said that he had bought the mules from his nephew, who had bought the animals from Kulman. Witness stated that the mules belonged to him, but Basson refused to give them up. Witness told Basson that he must not give up the animals to any one else, and that he (witness) would hold him responsible for them.

Cross-examined: He sold the mules to Kulman, while the latter was at Simon's Town, having carried on business there as a general dealer. He read over the promissory note to Kulman at the time it was signed.

[Hopley, J.: What language does Kulman speak?]

Witness: You can hardly tell what he speaks, sometimes he speaks English and sometimes Dutch. He is a Jew.

[Hopley, J.: I suppose he will speak both badly?]

Witness: Yes.

Further cross-examined: Witness found that the promissory note was not paid. He received a letter from Kulman's trustee offering him 5s. in the £. He went down to Porterville in April, 1903, just after the note was due, but he was unable to find Kulman. His intention was to fetch his mules. The first intimation that he had of Kulman's insolvency was when he received the offer of 5s. in the £ in May, 1904. He went down to Porterville during the same month in order to recover his mules. He had threatened in a letter to Kulman to sue him, but he had not actually taken proceedings. Basson told him that he had paid £60 for the pair of mules in question.

Re-examined: Witness refused to accept the offer in Kulman's insolvent estate.

Nicolaas Albertyn (son of the plaintiff) said he wrote out the promissory note (produced), and read it over to Kulman. Kulman paid £40 in cash, and signed the note. He was satisfied that Kulman understood the document, and that he knew the conditions perfectly well when he took the half dozen mules away.

[Hopley, J. (to Mr. De Villiers): There seems to be no dispute as to the identity of the mules?]

Witness: We don't know anything about that; we know nothing as to the identity of the mules.

Robert Christoffel Laurie, of Porterville, said that to his knowledge Mr. Albertyn came to Porterville to inquire about certain mules. On one occasion while witness was in Mr. Albertyn's company, Mr. Albertyn saw some mules in the street, and pointed out two that he said belonged to him. On the following morning, they went to Mr. Basson's farm, and Mr. Albertyn picked out two mules. Basson said that he had got the

mules from another Basson (Christian), who obtained them from Kulman.

Philip T. R. Hodges, law agent, Simon's Town, spoke to instructions that he received from the plaintiff as to recovering the money on the promissory note. As to the offer he received from Mr. Masterton, as trustee in the estate of Kulman, witness replied on behalf of the plaintiff that he could accept no compromise, and must require immediate compliance with the note.

Mr. Van Zyl closed his case.

Joseph Kulman, general dealer, of Porterville, said that he sold or exchanged the mules after the purchase from plaintiff. He did not understand the condition in the note that the mules were not to be sold. He had other mules at his place.

[Hopley, J.: You thought as long as you kept six mules at your place it would be all right?]

Witness: Yes. Continuing, witness said that shortly after he had returned to Porterville he exchanged two of the mules with Christian Basson for a horse and mule and some money. He went away to Namaqualand with mules, and returned to Porterville in June, going again to Namaqualand a little later. In May, 1904, witness became insolvent.

Christian Basson, stock trader, said he was not related to defendant. He spoke to the transaction with Kulman, in which he gave a horse, mule, and £27 for two very good mules that Kulman had. This was in March, 1903.

[Hopley, J.: It did not take Kulman long to make £27 out of those mules, seeing that he only got them in February.]

Witness (continuing) said he sold the mules to Willem Basson for £60.

Willem Johannes Tobias Basson (the defendant), a transport rider, of Porterville, said that he paid £60 cash for the mules. About the end of May, or the commencement of June, he was called upon by Mr. Albertyn and Mr. Laurie, and the former demanded the two mules, which witness had bought from Christian Basson. Witness told plaintiff that if the mules were his, and Christian Basson would return the purchase money, he would give up the animals. Christian Basson refused to refund the money. He still had the mules.

[Hopley, J.: I suppose if you lose this case you will come back on Christian Basson?]

Witness: I shall be obliged to.

[Hopley, J.: And he will come back on Kulman.]

Mr. De Villiers closed his case.

Mr. De Villiers, having been heard in argument on the question of the suspensive condition of the promissory note, and as to whether there had been a waiver of such condition on the part of the plaintiff. Without calling on Mr. Van Zyl.

Hopley, J.: The question raised in this case is not a new one. It has been decided in several cases, and it must be held to be established law that these conditions are valid, and that when goods are handed over by a seller to a purchaser under a suspensive condition, the goods remain in the ownership of the seller until the condition is fulfilled. The cases quoted by Mr. De Villiers, of *Quirk's Trustees v. Liddells Assignees* (3 Juta 322), and *Faasbooi v. Shaw*, to which may be added the case to which I have referred, *Wolfe v. Rogers*, in the High Court, all establish that position most clearly. What I would say is that, as a suspensive condition attached to a property which has been handed over to a purchaser opens the door to a considerable amount of fraud, assuming that the purchaser is a dishonest man, and as honest people are likely to be deceived into the idea that the goods are already the property of the purchaser—as these conveniences arise from such conditions they would have to be very clearly proved in every case, and established beyond any doubt whatever. But once they are established they seem to be perfectly valid and good, and the unfortunate person who deals with a dishonest purchaser has himself to suffer for the fact that he has dealt with a dishonest man, much the same as a man who buys property from a thief. In this case I hold that the evidence is really all one way. The promissory note shows it, and the parole evidence is to the same effect, that there was a suspensive condition when Albertyn sold these mules to Kulman. The property never passed from the plaintiff, and he is entitled to reclaim it. Under these circumstances, as far as I can see the Court has no option but to give judgment for the plaintiff. Judgment will be given as prayed for the plaintiff for the delivery of the two mules or their value, £50, defendant to pay costs of suit, including plaintiff's expenses as a necessary witness.

Ex parte WALLIS, JUN.

Dr. Rainsford moved, as a matter of urgency, for the appointment of a provisional trustee in the insolvent estate of Hirsch Braun Annenberg, general dealer, of Oudtshoorn, who was indebted to petitioner in a sum of £6,685.

Petitioner was appointed provisional trustee, with power to continue the business, pending the election of a permanent trustee.

Hopley, J., remarked that he was averse to granting orders of this kind where the stock was not perishable, but the father in this case represented the great bulk of the claims.

Ex parte GILBERT AND SHERET.

Mr. Alexander moved, as a matter of urgency, for an order compelling George Victor to give up possession of certain premises, known as the Bachelors' Club, Wynberg. Petitioners said that the sum of £320 was due as and for rent for eight months. The present lessee intended to surrender his estate.

Rule *nisi* granted, calling upon the respondent to show cause on Thursday next, the 23rd February, why he should not be ordered to give up possession of the premises, and pay costs of this application.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.) and the Hon. Mr. Justice HOPLEY.]

APPEALS.

NEL V. KLEINHANS. { 1905.
{ Feb. 20th.

Water Act, 1899—Functions of Water Court—Prescription.

In an application to a Water Court for the distribution of a stream under the 11th section of Act 40 of 1899, it was pleaded that the stream was a perennial one as far as it flowed over the respondent's land, but that they, being upper proprietors, had for upwards of thirty years continuously diverted all the water so as not to allow any to flow to the applicant's land. Evidence was taken in support of the plea, and the application was dismissed.

Held on appeal, that the Water Court was right in taking the evidence, and as the weight of the evidence supported the plea, the appeal was dismissed.

This was an appeal from a judgment of the Water Court, of Ladismith, relat-

ing to certain water rights in a stream called the Hoek River for irrigation, and other purposes.

The notice of appeal called upon the respondents to show cause why a judgment of the Water Court, given in an application made by appellants, as owners of the farm Weltevreden, should not be set aside or varied, because it did not state whether the application was dismissed on exceptions, pleas in abatement, pleas on the merits, or pleas in prescription, the reason of the appeal being that appellants, desired the order of the Water Court to be in such a form that they may know what the judgment of the Court was.

Sir H. Juta, K.C., was for the appellants (applicants in the Court below).

Mr. Schreiner, K.C. (with him Mr. M. Biset and Mr. J. E. R. de Villiers), was for the respondents.

Sir H. Juta said that the application to the Water Court was made under sections 11-14, of Act 40 of 1899, for a reasonable apportionment of the water of the perennial stream called the Hoeks River for irrigation, and other purposes. At the hearing, the respondents took the point, an important one, that the applicants could not proceed under sections 11-14, stating that the use, diversion, and appropriation of the water of the stream referred to in the application were in dispute between applicants and respondents, and that such dispute could only be completely dealt with by the Water Court, under section 15 of the Act. Section 16 provided that in the event of a dispute pending as to the use, diversion, and appropriation of water, the case could only come before the Court if both the parties had agreed to the jurisdiction. Counsel went on to say that in this case the parties had not agreed. The first point that arose was whether the Court could deal with the application, under this section, or at all inasmuch as there had been no consent to the submission to the Water Court.

[De Villiers, C.J.: Your clients were the applicants; is it in your mouth now to say that the Court had no jurisdiction?]

Sir H. Juta: The judgment is, "Application dismissed with costs." We want to know on what ground it was dismissed, because that decision may become *res judicata*, if not appealed against. Is it that the Water Court has not jurisdiction to try the case? I am inclined to think that the Court would be perfectly right if it said it had not jurisdiction. Counsel (replying to the Chief Justice) said that they had only just been supplied to the reasons for the judgment, but those reasons, to his mind, did not make one any the wiser. He went on to read the reasons for the judgment.

[De Villiers, C.J.: There seems to be no doubt as to the reason for the judgment. It appears that there was no

water to distribute, seeing that the upper proprietor is entitled to the whole of the water.]

Sir H. Juta argued that this was an exception to the jurisdiction of the Water Court, because the application could not be heard without a consent in writing from both parties.

Mr. Schreiner (answering the Chief Justice) said his contention was that the Water Board had jurisdiction under the Act to deal with this application.

[De Villiers, C.J.: Then your client was wrong in his contention in the Water Court that they had no jurisdiction?]

Quite wrong, by lord. Counsel went on to submit that the Court had jurisdiction, and that they were obliged to do as they did on the merits—dismiss the application—because there was no water that they could distribute. His learned friend asked that the order should be varied, but he had not told them in what way it should be varied.

Sir H. Juta in reply, said that he had already asked that the Court should remit the matter to the Water Court, and let them say on what grounds specifically, they dismissed the application. The Water Court had dealt in their judgment with the distribution in the very dry season of 1903, and not with the normal flow.

De Villiers, C.J.: This is the first case of an appeal from a decision of a Water Court proceedings, and I am bound to say, after a careful perusal of the proceedings, that this Water Court have conducted the proceedings in a calm, judicial, and, in every sense, satisfactory way. Some doubt was expressed at the time of the passing of the Act as to whether the Water Courts would be a success or not, and I must say that if all the Water Courts hereafter should conduct their proceedings upon the model of this Water Court there would be every reason to be satisfied. My own view was that it was a pity that the old Landdrost and Heemraden were abolished, because they worked very satisfactorily. The members were conversant with the local circumstances, and were in a far better position to do justice between the parties than a Judge trying the case hurriedly on circuit, or even the Supreme Court, hearing the case here at greater leisure. First of all, the case raised by the applicants themselves was that this stream is a perennial stream, and that the respondents are not entitled to divert water out of such stream by reason of their ownership of the farm. Then the first objection taken by the respondents was that the use, diversion, and appropriation of the water of the stream are in dispute between applicant and respondents, and such dispute can only be competently dealt with by the Water Court under section 16 of the Act.

But this point could not be decided until evidence was taken, and the nature of the evidence which would be given by the respondents themselves was indicated by the third plea, in which the respondents say "for a period of thirty years and upwards they have continually, adversely, and of right diverted the water of the stream referred to in the application, so as to use all the normal flow—that is, the whole flow of the stream, except abnormal increases from time to time caused by floods, and that by such diversion and use they have acquired a right to continue to use independently of any general riparian rights." The applicants joined issue upon this plea. They did not then withdraw their application and say, "As this question is raised, we shall now proceed under another section," but they proceeded and insisted upon their right to a distribution of the water, which they claimed to be a perennial stream. Clearly, then, it was the duty of the Water Court to inquire whether there was any water to distribute. If it were a perennial stream, there would *prima facie* be water to distribute; but if the respondents had, as they pleaded, acquired a right to the use of all the water by prescription, then there would be no water to distribute. But how was the Water Court to decide this point without evidence? It was bound to hear evidence; without evidence, it would be wholly impossible to decide the case. I take it that the application was dismissed because, in the opinion of the Water Court there was no water to distribute. The evidence is voluminous; there was evidence given on both sides, but, although there is no appeal on the merits, I am bound to say that there was very strong evidence on behalf of the respondents as to the actual diversion of the water for many years. Old residents were called, who said that they had never known the water to be taken otherwise than by the respondents. After that evidence, the Water Court, in my opinion, was quite justified in coming to the conclusion that the applicant had not proved that there was any water to distribute. That, in my opinion, is the result of that evidence. Whether that judgment can be registered or not is not a question that falls within the purview of the present case. This is an appeal against the judgment, and all we can decide is whether the judgment is correct or not. As at present advised, I should be inclined to think that as evidence was taken upon the matter, the decision would be a decision hereafter as against the applicants, to the effect that the right had been acquired. But it does not come within the purview of the present case to decide that point. In my opinion, the Water Court was quite right in holding that the respondents had acquired the right to take

away all the water, that there was no water to distribute, and consequently the appeal will be dismissed, with costs. Hopley, J., concurred.

[Appellants' Attorneys: Sauer and Standen; Respondents Attorneys: Tredgold, McIntyre, and Bisset.]

REX V. VAN NIEKERK. } 1905.
Feb. 20th.

Summons in criminal case—Description of offence.

A summons charged the defendant with cutting wattles and saplings in violation of regulations made by the Government in that behalf, but did not allege that the defendant had done so without a licence or permit from the Government. The particular regulation was not mentioned in the summons, nor was it produced at the trial, but it was produced at the hearing of the appeal, from which it appeared that a person cutting such wattles and saplings without the licence or permit provided for in section 1 of these regulations, shall be liable to the penalties of section 16 of Act 28 of 1888.

Held, that as the specific regulation was not mentioned in the summons, it was necessary that the summons should contain a full description of the offence charged.

This was an appeal from a judgment of the Resident Magistrate of Namaqualand, who had convicted the appellants of contravening section 16 (sub-section b), Act 28 of 1888, in that they cut, injured, destroyed, or removed, in violation of the regulations made by the Governor, certain wattles, saplings, or other forest produce. Mr. Gardiner was for the appellants; Mr. Howel Jones was for the Crown.

Mr. Gardiner (for the appellant) said that he wished to point out that no regulations had been made by the Governor as provided by the section.

Mr. Howel Jones (for the Crown) said that regulations were published in the "Gazette" of the 7th August, 1900, and produced a copy of the "Gazette."

Mr. Gardiner said that he had not previously been aware that such regulations had been published, but he would take the objection that the regulations

were not produced at the hearing in the Court below. Counsel read the record of evidence taken in the Court below. The appellant Van Niekerk held the land from which the saplings were said to have been cut under the lease. Counsel submitted that the summons did not disclose evidence upon which the accused could be convicted, and was otherwise vague and uncertain. Both the prosecution and accused came into court without knowing that regulations had been made relating to the subsection (b). Evidently, the Crown in the Court below relied on the conditions in the Government notices, and in the leases under which the lands were held. As regarded Van Niekerk particularly, counsel contended that there had been no evidence that he had committed an offence. Van Niekerk said he did not give Coetzee permission to cut wood for sale, nor did he (Van Niekerk) cut wood for sale. Van Niekerk certainly had risked the cancellation of his lease, but he had not committed a criminal offence. The only evidence was that Van Niekerk authorised Coetzee to cut wood for his own use merely.

Mr. Howel Jones submitted that, on the judgment given in the case of *Bez v. Adams* (10 C.T.R., 756), publication of the regulations in the "Government Gazette" was sufficient for the purposes of the prosecution. No prejudice, he contended, had accrued to the appellants. He submitted that no flaw could have been found on the summons, and that the case for the prosecution was fairly and clearly put before the accused when the summons was served upon them. With regard to Van Niekerk, he submitted that Van Niekerk himself knew that under the conditions of his lease he was prohibited from taking wood. On the question of the validity of the summons, counsel quoted the case of *Wykeham v. Beaconsfield Municipality* (5 High Court, 296). He contended that it was not necessary to give proof of the bye-laws or regulations which had been made in every prosecution that was taken.

Mr. Gardiner, in reply, submitted that the cases quoted by his learned friend did not apply to the present case. In the case of *Home* (11 Juta), it was laid down that, apart from any regulations there was no offence. The notice published in the "Gazette" set out that the regulations were in lieu of those published in Proclamation 575 of 1895. The Court did not know whether those regulations of 1895 were purely local. Again, the offence was not in the same terms as the Act. The regulations said "cutting forest produce without a permit." The summons did not mention a permit, and there was nothing to show that the accused had no permit.

De Villiers, C.J.: The ground on which this appeal was, in the first in-

stance, urged is not, in my opinion, a good one. The objection raised was that the specific regulation under which this charge was laid was not set forth in the summons, but that was not really the objection taken at the trial. But, assuming that the summons had correctly mentioned the specific regulation, it would still have been necessary in the summons to set out in distinct words the offence with which the accused was charged. Now the offence is thus stated in the summons: "That the said Van Niekerk and Coetzee did, in violation of regulations made by the Government in that behalf, cut, injure, take, destroy, or remove a quantity of wattles, saplings, or other forest produce, the property of the Crown, which they did not require for their own use." That, by itself, is not enough, because the offence described by the regulations is as follows: "(13) Any person who injures or destroys, or who cuts, takes or removes, from undemarcated forest, wattles, saplings, or forest produce, without the licence or permit provided for in section 1. of these regulations, shall be liable to the penalties of section 16 of Act 28 of 1895." Clearly, therefore, the exact offence is not stated. The omission of the words "without a licence or permit provided for in that section" is, in my opinion, fatal, because under the regulation the cutting of the wood is not an offence, but the cutting without a permit is. It may well be that if the words omitted had been inserted the burthen of proving that he had a permit would have been on the defendant. That is a question depending upon the rules of evidence, which cannot affect the general principle, that a person charged with an offence is entitled to know the precise charge made against him. In the present case the prosecutor not only omitted to mention the regulation under which the charge was made, but he omitted from his charge important words which enter into the definition of the offence given by the regulation produced in this Court on appeal. The appeal must be allowed.

Hopley, J., concurred.

[Appellant's Attorneys: Van Zyl and Buissinné.]

PINKUS V. FENSTER.

{ 1905.
{ Feb. 20th.

Sale and delivery—*Dominium*—
Rent—Sale in execution.

The claimant, a collector of rents, who was personally responsible to the lessor of certain premises for the payment of the rents thereof, purported to buy from the lessee certain

furniture in satisfaction of the rent due, but the furniture was not delivered to the claimant.

Held, that upon the attachment of the furniture in execution of a judgment obtained by a creditor against the lessee, the claimant was not entitled to claim the furniture as being his own property.

This was appeal from a judgment of the Resident Magistrate of the Cape upon an interpleader summons taken out by the present respondent, Julius Fenster, upon a writ of execution issued in a judgment against one Carn.

On the 5th July last, Pinkus obtained a judgment against Carn, and certain goods were taken in execution of that judgment. Then Fenster brought an interpleader summons against Pinkus, and alleged that the goods seized, or portion of them, were his property. It was against the decision of the Magistrate upon that interpleader summons that the appeal was brought.

From the record it appeared that Fenster's case was that the furniture taken in execution, was sold to him for £12 in satisfaction of rent due, which he (Fenster) collected on behalf of the landlord (Mr. Rayner). The judgment of the Court below was that the articles set out in the list were not liable to execution, but that the other articles be declared executable, with costs to applicant.

Dr. Greer (for the appellant) contended that the circumstances were altogether suspicious, and that, as a matter of fact, there never was any delivery from Carn to Fenster. If these extraordinary transactions were allowed there would be no security whatever to creditors.

De Villiers, C.J., said that the great case on the point was *Harris v. Buissint*. (2 Menz., 105.)

Dr. Greer said that he had been unable to find that particular case.

De Villiers, C.J.: If in this case the claimant had himself been the landlord something might have been said in favour of the judgment of the Magistrate. It might then have been argued that the landlord by virtue of the tacit hypothec for his rent had a quasi possession of the articles alleged to have been sold, and by virtue of his tacit hypothec he had a prior claim to that of the execution creditor so long, at all events, as the furniture remained in the leased premises. But it is not the landlord who is in question, but a man called Fenster, who is a collector of rents, and receives a salary and is liable to deductions for losses that might be sustained if tenants fail to pay their rents. Well, this collec-

tor of rents arranged with the debtor that for two months' rent that was due the furniture should be sold to him, not to the landlord, but there was no delivery according to the evidence, the property remained with the debtor, and apparently was to remain there as security to Fenster. Anyhow, there never was a delivery, such a delivery to Fenster as to pass the dominium to him. Accordingly, when there was an attachment of the property, the goods which still belonged to the debtor were properly attached, and the circumstances of the case do not satisfy me that it was in any sense of the word a *bona fide* sale, and delivery to Fenster. Under these circumstances, I am of opinion that the Magistrate was wrong in holding that Fenster had a good claim. The Court must, therefore, allow the appeal with costs, and declare that all the property was executable.

Hopley, J., concurred.

[Appellant's Attorney: O'Brien.]

FELTMAN V. BUIRSKI. { 1935.
{ Feb. 20th.

Magistrate's Court—Exception to summons—Vague and embarrassing.

It is a good exception to a civil summons in a Magistrate's Court which is unintelligible and does not give a sufficient indication of the case the defendant has to meet, that it is vague and embarrassing.

This was an appeal from a judgment given by the Resident Magistrate of the Cape, in an action brought by appellants against B. and I. Buirski to recover £12 1s. 6d.

At the hearing in the Court below, the defendants excepted to the summons on the ground that it was vague and embarrassing and bad in law, in so far as it disclosed no cause of action.

The Magistrate, in his reasons for judgment, said he dismissed the summons as vague and embarrassing, because it seemed that the plaintiff did not know against which of the two defendants his action lay.

Mr. Alexander (for appellant) said that the matter arose out of a debt owing by one Sousa, trading as the Raymoss Co., in Walestreet, for cake and bread supplied. Sousa had left the Colony, and Isaac Buirski had been in lawful occupation of the premises, and B. Buirski had acted as the responsible person in connection with the property. It was agreed between the plaintiffs and the

mid B. Buirski that the latter should take over the aforesaid debt, and, in consideration, they were to hold the furniture which had been left in the premises by Sousa. Isaac Buirski was really the undisclosed principal in the matter. Counsel submitted that the Magistrate was not justified in holding that the summons was vague and embarrassing. He admitted that the summons was somewhat inartistically drawn, but he urged that it clearly set out the cause of action. If anything, the plaintiffs had been somewhat redundant in setting out the facts in the summons, but no possible prejudice could have occurred to the defendants on the score that they did not know what they were brought into court upon.

Respondent in default.

De Villiers, C.J.: A summons in a civil case before a Magistrate may be good, although not artistically drawn, but it should be intelligible, and should indicate to the defendant the nature of the case which he is expected to meet. The summons now in question is wholly unintelligible without the explanation given by counsel, and even after that explanation it is by no means clear on what ground one, at all events, of the defendants was brought into Court. The Magistrate sustained the objection that the summons is vague and embarrassing, and I am not prepared to find fault with the decision. The appeal must be dismissed.

Hopley, J., concurred.

[Appellant's Attorney: J. Ayloff.]

MOTION.

Ex parte KEATING.

Mr. Struben moved, as a matter of urgency, for a temporary interdict restraining the Mother Superior and Sisters of Nazareth House, or their duly authorised agents or attorneys, from parting or otherwise dealing with a cheque for £200, pending a settlement of certain accounts between the plaintiff and the respondent Oreste Nannucci. The cheque was in connection with the contract price of certain laundry, coach-house, etc., built on behalf of the Mother Superior and Sisters of Nazareth House. Rule nisi granted, calling upon the Mother Superior and Sisters to show cause why an interdict should not be granted as prayed, rule to be returnable on Thursday next, and to act as a temporary interdict.

SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice MAASDORP.]

CIVIL APPEALS.

BOTMA V. NORTON. { 1905.
Feb. 20th.

Interrogatories—Magistrate's discretion.

Plaintiff had sued respondent in the R.M. Court of Paarl before the Acting A.R.M. The defendant applied for interrogatories on which to examine his witnesses. As the A.R.M. was about to leave the Paarl and did not consider that the interests of justice would be furthered by granting the application, he refused it.

Held on appeal, that the A.R.M. had right by exercised his judicial discretion.

This was an appeal from a decision of the A.R.M. of Paarl, in which he refused the application of the plaintiff's attorneys for interrogatories, and dismissed a case in which the plaintiff sued the defendant for £2 18s., for goods sold and delivered. The matter came before the A.R.M. of Paarl on a summons for £2 18s. for goods sold and delivered. The plaintiff's attorneys applied for interrogatories, and the defendant objected to the case being postponed for interrogatories on the ground that he was only acting temporarily as A.R.M., at the Paarl, and was about to leave to take up a permanent appointment at Fort Beaufort, and that the plaintiff had been well aware of this for some time. The plaintiff's application was refused, and as he had no evidence, the case was dismissed, with costs. The Magistrate, in his reasons, said that the defendant, who had been acting as A.R.M., at Paarl, temporarily, at the time the summons was issued, was about to leave for Fort Beaufort, and the plaintiff's attorney was well aware of this. The defendant denied the debt, and suggested that the case should be heard in Fort Beaufort. The Magistrate held that the plaintiff had plenty of time to bring his action, and the defendant would be very much inconvenienced, and the interest of justice would not be served by granting plaintiff's application.

Mr. Close (for appellant) contended that by the Magistrate's decision the plaintiff would be bound to issue another summons in another district. If he was about to leave, the decision

would amount to waiting until a man left, and then prove his case, no matter what inconvenience the plaintiff was put to. There was absolutely no evidence given as to why the case had been held over, and counsel submitted that the real test in the case was, even if a person delayed somewhat in bringing his case, whether he had brought it in the right place.

Respondent in default.

Buchanan, J.: The plaintiff, who resides at Tulbagh, sued the defendant in the Court of the R.M. of Paarl, for £2 18s. for goods sold and delivered. The defendant denied the debt, whereupon the plaintiff, instead of proceeding to prove his claim, applied for interrogatories to examine his witnesses. It is not stated what witnesses were to be examined, or where they reside, but I presume the witnesses reside at Tulbagh, where the debt was alleged to have been incurred. The Resident Magistrate heard the defendant, in reply to the application for interrogatories, and in the circumstances of the case, he exercised his discretion in refusing to grant the application. This appeal is based on the ground that the Magistrate did not exercise a judicial discretion. From the facts on the record, and the Magistrate's reasons, I do not find anything to convince me that this discretion had been improperly exercised by the Magistrate. The plaintiff does not reside at the Paarl. The defendant had been at the Paarl for three months on special duty, and the alleged debt had been incurred long before the defendant went to the Paarl. The defendant objected to the postponement of the trial as he was about to be removed to another station. The defendant was prepared to meet the claim, and the plaintiff could not go on with his action. It is suggested on the record that these proceedings were taken purposely to harass and annoy the defendant. In this matter the Magistrate had all the facts of the case before him, and he knew all the circumstances. There is nothing to show on the record that he has not exercised his discretion in a proper manner, and the appeal must be dismissed. To make the matter clear the judgment recorded in the Court below should be absolute from the instance, with costs.

Maasdorp, J., concurred.

[Appellant's Attorneys: Moore and Son.]

DIVISIONAL COUNCIL OF CLANWILLIAM V. PETERS.

Divisional Council—Negligence—
Damages—Notice—Divisional
Councils' Act.

*Respondent's wagon had met
with an accident traceable to*

*the negligence of a Divisional
Council. The Council pleaded*

*(1) Respondent had not given
notice specifying the time at
which the accident had occurred.
(2) That all the funds in
their hands available for road
repairs had been exhausted.*

*Held on appeal, that as re-
spondent had given notice
within 14 days, and as they
subsequently repaired the road
and could have obtained more
money by raising the rates,
both defences must fail.*

This was an appeal from a decision of the Court of the Resident Magistrate of Clanwilliam, in which the respondent successfully sued the Council for £5 18s. 6d. for damages sustained by reason of the defendants' negligence in not maintaining the main road in proper repair.

From the record it appeared that the plaintiff, while passing carefully with his wagon, drove into an excavation on the road, and the vehicle was overturned. Plaintiff sustained certain injuries, and the wagon was much damaged. The defendant Council pleaded contributory negligence on the part of the plaintiff, and that they had discharged their duty in keeping the road in repair to the utmost of their ability. An exception was taken to the summons on the ground that notice had not been given to the defendants within fourteen days, as required by the Act. The exception was overruled, the Magistrate holding that there was no prejudice to the defendants. Mr. P. Jones (for appellant) pointed out that the date of the accident was not given in the notice sent to the Council, and consequently they were prejudiced in not being in a position to make proper inquiries as to the state of the road on that particular date. The Magistrate found that there was no contributory negligence, and that the damage was solely attributable to the state of the road, and that the council had not done all in its power to properly maintain the road. Counsel contended, according to the Act, that the Council, having expended all the funds at its disposal, they were relieved from their liability.

Without calling on Mr. Gardiner (for respondent),

Buchanan, J.: The wagon of the plaintiff in the Court below, while travelling over the Main road on the 6th September last, fell into a dangerous hole in the middle of the road, of which hole plaintiff had no previous

knowledge. It was night time, and he did not see the hole. The wheel of the wagon was smashed. He thereupon gave notice to the Divisional Council on the 5th October of this accident. Thereupon the Council, having a road party on the road the next day, had the hole repaired. On suing in the Magistrate's Court, the defendants first objected that they did not receive the notice, which was required by the second section of the Act, specifying the time the accident occurred. The Magistrate overruled that objection, and sensibly held that as within fourteen days notice had been given, and no prejudice had resulted to the Council from the fact that the actual time of the accident was not stated in the notice, there had been a substantial compliance with the Act. It was next contended that the Divisional Council was not liable for the damage done, because they expended more money on this road than they received from the rates for road purposes. There are several answers to that, one is that they were actually mending this road, and that they had money at their disposal for that purpose, and that after they received notice of the accident they mended the hole. It was not shown what rate had been levied by the Council, and had they raised the rate they could have had plenty of money to repair the road. The foundation of all these actions is negligence on the part of the Council, as some time before the accident they had received an intimation of the existence of this danger. There was a road party on the road, and the superintendent was informed of the hole, and instead of repairing it he left it in a dangerous condition until the accident occurred, when he immediately repaired it. I think this is as strong evidence of neglect as you can wish for in a case of this kind. The £5 odd claimed seems to be a reasonable amount for damages. It is true that 30s. is for loss of time, and perhaps exception might have been taken to this item, but it is a trifling sum, and has not been objected to. I think there was negligence on the part of the Council, and the Magistrate properly gave judgment against them for the damages which resulted from such negligence. The appeal must be dismissed with costs.

Maasdorp, J., concurred.

LAFAYETTE V. BARNES AND (1905.
OTHERS. (Feb. 20th.

Magistrate's Court—Amendment of summons—Service.

The respondents carried on business as Barnes, Van Staaten and Deans. The appellant sued the firm under that name in an R.M. Court, and the summons was personally served on one of the defendants. Plaintiff's attorney had applied to defendants to disclose the full names of all members of their firm, but this request was not complied with. When the case came into Court, a power of attorney in the name of all and singular the defendants was filed. Plaintiff's attorney craved leave to amend his summons accordingly, but this leave was refused and the exceptions (1) That no proper summons had been issued; (2) That due service had not been effected were upheld.

Held on appeal, that the service was good and that the Magistrate ought to have allowed the summons to be amended.

This was an appeal from a decision of the Resident Magistrate of Aliwal North, in which he allowed certain exceptions to the plaintiff's summons, and dismissed the case. The plaintiff sued for £20 damages for breach of contract, and being unable to obtain the proper names of the defendants, the partnership was summoned, under the style of Barnes, Van Staaden, and Deane, a firm of builders and contractors. Exception was taken to the summons on two grounds: (a) that the partners of the firm should have been joined in the firm with the names of all the partners, as well as the style of the firm, and that the name of the firm was insufficient and bad in law; and (b) that the service was bad and insufficient in law, because a copy of the summons was served on one of the partners outside the place of business. An application by the plaintiff's attorney to amend the summons by inserting all the full names was refused. The plaintiff's attorney previously wrote for the names, and stated that if they were not disclosed he would make formal application for the amendment. The defendants' attorney,

in reply to that, contended that the defendants were not bound to assist the plaintiff in bringing the case before the Court in the proper form. The exceptions were sustained and the summons dismissed. The Messenger of the Court served a copy of the summons on Van Staaden only at the former's office. The Magistrate based his judgment on the fact that no proper service had been made on the defendant firm, and the evidence of the Messenger showed that the original and a copy only of the summons were handed to him.

Mr. Upington was for the appellant, and Mr. Molteno for the respondents.

Mr. Upington said the appeal was brought on the ground that the Court had never slavishly followed forms and technicalities where no injustice had been done. There was no question that the defendants knew who the summons was intended for, because they filed a power to defend the case to the final end, and not merely a power to take exception to the summons. The objection under those circumstances that the name of the firm was given, and not the names of the individuals was a sheer technicality which the Supreme Court had never favoured, and, in addition, the plaintiff made reasonable efforts to obtain the names of the parties, and the defendants refused to accord that information. Counsel quoted the 11th rule of the Magistrate's Court, which he contended met the case for the plaintiff, and submitted, further, that to allow mere technicalities such as these exceptions would be a gross injustice.

Mr. Molteno contended that the plaintiff was entirely to blame for the form of the summons. On the 15th November he gave the defendants twenty-four hours' notice to supply the names, and without waiting until the twenty-four hours were up, they issued the summons. A firm, unlike a Corporation, could only be sued through the parties to the firm. The partnership was sued, and there was not an individual mentioned in the summons. The Court would not go so far as to hold it a good summons where there were no names mentioned, as in this case, and where there might have been any number of partners. The summons simply said: "Messrs. Barnes, Van Staaden and Deane, a firm of builders and contractors," and therefore the firm was summoned, and not the individuals. If the appellant had waited the twenty-four hours, in all probability he would have got the full names.

Buchanan, J.: The plaintiff, Lafayette, a painter, entered into a contract with a firm of builders carrying on business in Aliwal North. He alleges that there had been a breach of this contract, and thereupon he wished to sue the firm for damages for this breach. His attorney, not knowing the names of the partners of the firm,

wrote to the firm asking them to supply the names of the individual partners. He gave twenty-four hours for the reply, but without waiting for the expiration of the twenty-four hours, on the same day he issued a summons in this form: "Summon Messrs. Barnes, Van Staaden and Deane, a firm of builders and contractors, the full names of the partners being unknown to the plaintiff," and the names the defendants' attorney has disinclined to disclose. When the matter came into the Court the defendants filed a power of attorney giving their full names, and describing themselves as carrying on business together as a firm. They gave authority to their agent to defend the case to the final end. When the case came on the plaintiff's attorney applied for leave to amend the summons by inserting the full names of the partners in the summons which had been personally served. It is true there was ground for a technical objection to the summons, but when the names had been disclosed, and the plaintiff applied to amend this summons, the Magistrate was clearly wrong in refusing to insert the names which for the first time had been given. The defendant's agent said he did not feel bound to aid the plaintiff in bringing his case, but when once the names were given there could be no possible prejudice to the defendants in amending the summons. The other question upon which the exception was taken was whether there was sufficient service. The summons had been served on one of the partners personally, but not upon the others. The 11th rule of the Magistrate's Court distinctly lays down if two or more persons jointly sued (they are jointly sued here) are partners in trade (they are partners in trade here) service upon either of them shall be sufficient. It is said that the service was not made at the place of business of the firm. True, it was not made at the place of business; but it was personally served on one of the partners. There is no prejudice here, because all the partners have given power to their attorney to defend the case to the final end. The defendants would not supply their full names to the plaintiff, and I do not think the plaintiff ought to be prevented vindicating his claim in Court. The Magistrate was clearly wrong in refusing this application to amend. The Magistrate was right in saying that the summons was bad until amended, but the information upon which the amendment was to be made was wholly in the knowledge of the defendant, and not in the knowledge of the plaintiff. The appeal will be allowed, the application to amend the summons by inserting the full names of the defendants allowed, and the case to be remitted to the Magistrate for hearing on its merits. The costs in

the Magistrate's Court will be within the Magistrate's discretion, but the costs of appeal will have to be paid by the respondents.

Maasdorp, J., concurred.

[Applicants' Attorneys: Reid and Nephew; Respondents' Attorneys: Not shown on record.]

SEYMOUR V. TUKISI AND ANOTHER.

Summons—Principal—Managing agent.

Though the principal of a shop is the proper person to sue and be sued, the Court will not interfere on appeal where the managing agent of a branch shop, who had previously taken legal proceedings in his principal's interest, has been sued, provided no substantial injustice is done.

This was an appeal from a decision of the R.M. of Mount Fletcher, in which he overruled an exception taken by the defendant (present appellant) that the principal of the firm should have been sued. In the original action in which one Hlubi was defendant, Daines and Seymour obtained a writ of execution for 49 goats, and then the goats were claimed by the respondents in an interpleader action. The appellant was summoned, and excepted on the ground that he was the manager of the firm. The Court considered the exception a quibble, as the defendant had received instructions to defend the action, and overruled the exception.

Mr. Sutton was for the appellant, and there was no appearance for the respondents.

Mr. Sutton having been heard in argument.

Buchanan, J.: I quite agree with Mr. Sutton that as a general principle the agent ought not to have been sued, but the principal. But in this case there are special circumstances. The firm of Daines and Seymour have a number of branch agencies in the Transkei, and one Seymour as manager of this agency took out a summons on their behalf, and got judgment against Klubi. In execution of the judgment against Klubi the messenger seized certain stock. This stock is claimed by Tukisi and the other plaintiff, and the Magistrate under the rules of Court directed a summons to be issued to Seymour, the manager of this particular branch, to show cause why the stock should not be released. The man appeared as the agent of the firm,

and this was the man who obtained the original summons. On the merits it is clear that the stock seized was not the property of Klubi, but the property of the present respondents.

I think, under the circumstances, the technical mistake of the Magistrate in directing the summons to the agent in this case ought not to upset the decision in the interpleader claim. The parties interested were before the Court to decide whether the property belonged to the claimants or to the defendant in the case. The evidence shows clearly that the property belonged to the respondents, and as it has been released, I don't think we ought now to interfere.

Maasdorp, J., concurred.

MADOLO V. MLIJIMI.

Magistrates's finding on evidence.

The Court refused, on appeal, to reverse a Magistrate's finding on the evidence, though it did not consider his reasons for judgment satisfactory.

This was an appeal from a decision of the R.M. of Victoria East, in an action brought by the plaintiff to recover a cow and calf, or their value, £15, and damages, £5.

The Magistrate, in his reasons for giving judgment for the defendant, with costs, stated that there was absolutely no evidence to prove that the cow and the calf were the plaintiff's property. In the absence of such proof, the plaintiff could not succeed, as everything went to show that the lawful owner was one Nje, and he had no alternative but to give judgment for the defendant.

Mr. Close was for the appellant, and Mr. P. Jones was for the respondent.

Mr. Close contended that the whole of the Magistrate's reasons on the evidence were incorrect. The most important fact was that Nje swore himself that the cattle were the plaintiff's property. Nje had every reason to support the defendant, and not the plaintiff.

Mr. Jones, having been heard in reply,

Buchanan, J.: The action was brought in the Court below by Madolo against Mlijimi for the recovery of a cow and calf, or £15, their value, and damages. The evidence before the Magistrate is every voluminous, and as far as one can ascertain from the record, the action arose out of loans made by the defendant, Mlijimi, to one Nje. Nje himself admits that these loans were made, and that disputes arose between him and the plaintiff in consequence. The first loan was for £3 10s., for which cer-

tain goats were alleged to have been pledged. Nje says he did not pledge goats, but pledged grain. He, however, seems to have paid that loan. Another loan of £10 was given, for which the defendant says Nje pledged his cow and calf. The defendant went to Nje, and demanded payment of the loan, and, on Nje failing to pay, defendant took the cow and calf. There is a direct conflict of testimony as to whether the cow and calf belonged to Nje or to plaintiff. The Magistrate, in his reasons, says there is absolutely no evidence to prove that the cow and the calf were the property of the plaintiff, but there is considerable evidence to show that they belonged to Nje. Now there is some evidence on the record in favour of plaintiff's claim, but I take the Magistrate to mean that, in his opinion, it was established that the cattle belonged to Nje. The only question is, whether on the evidence there should not have been absolution from the instance, but the Magistrate has gone through the whole of the case, and in the conflict of testimony he has decided for the defendant. It is useless, therefore, to send the case back, and, although the reasons given are not satisfactory, the Court is not prepared to interfere with the Magistrate's finding, seeing there is evidence to support his judgment. The record shows further a curious conflict of testimony as to what took place before the case came before the Magistrate. Plaintiff has laid his complaint before the headman, who held a council upon the claim. The headman says he found against the plaintiff, but two of the councillors say he found for the plaintiff. As the defendant is in possession of the property, it lay upon the plaintiff to prove that the cattle were his property, and the Magistrate has held that he has failed to do so. It is a question purely of fact. The appeal must, therefore, be dismissed, with costs.

Maasdorp, J., concurred.

DE WET V. JAPHTHA.

Claim in reconvention.

Whatever may be a Magistrate's opinion as to the merits of a defence, he cannot give judgment in reconvention unless the claim is specifically pleaded.

This was an appeal from a decision of the Resident Magistrate, of Engcobo, in which the plaintiff was unsuccessful in his action to recover an ox, or its value, £7 10s

The respondent in the Court below denied the debt, and the plaintiff sent in interrogatories to prove his claim. The defendant failed to pay a debt of £34 16s., and he signed a new promissory note for £30 14s., and agreed to deliver up an ox for the remainder of the debt, but failed to do so. The Magistrate, in his reasons, stated that the summons was ambiguous, and it was not clear that the defendant had not a claim in reconvention against the plaintiff. There was no explanation of the plaintiff's failure to attend, but the reason was obvious. The defendant gave his evidence in a clear manner, and he was supported by documents and receipts. It was clear from the evidence, the receipts and promissory notes that the defendant paid the plaintiff £79 16s. 6d. for four oxen, which the latter had taken away. The summons would be dismissed, and there would be judgment for the defendant in reconvention for £79 16s. 6d.

Mr. P. Jones appeared for the appellant, and there was no appearance for the respondent.

Mr. Jones, after arguing on the first claim, pointed out that the plaintiff had no notice of the claim in reconvention, and contended that that judgment could not be allowed to stand. The story told by the defendant was a most improbable one.

Buchanan, J.: The plaintiff, De Wet, sued Japhtha for £7 10s. The evidence given as regards this claim is in direct conflict. The Magistrate, believing the defendant and his witnesses' evidence, which he said had been given in a clear and candid way, had no hesitation in believing it, and gave judgment accordingly for defendant. The Magistrate must be held to be right in giving judgment, with costs, for the defendant in convention. But the Magistrate wishing to give the defendant what his evidence disclosed he was entitled to, gave judgment for the plaintiff in reconvention for the sum of £79 16s. 6d. Now the Magistrate was not justified in giving judgment on a claim which had never been pleaded, and of which the plaintiff was unaware. The judgment will be altered to judgment in the Court below for the defendant, with costs on the claim in convention, and the record amended by omitting from the judgment all reference to a claim in reconvention, with costs of appeal.

Maasdorp, J., concurred.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

TRIAL CAUSES.

ESTATES SWART AND BASSON (1905,
V. GREEFF AND WALTER. (Feb. 21st.

Negligence of administrators—
Abuse of trust.

The plaintiff's declaration set out that he resided in Prince Albert. He sued in his capacity as executor dative in the estates of his late parents. The defendants carried on business as law agents at Laingsburg. In March, 1900, the plaintiff employed the defendants to undertake the administration of the estate and to collect certain outstanding moneys in Laingsburg. Plaintiff delivered all the assets of the estate, together with the documents and papers, and the defendants thereupon proceeded to collect the debts. In April, 1900, the plaintiff paid £400 at the defendants' request, and although he had repeatedly called on the defendants to complete the administration of the estate, they had failed to do so. Plaintiff claimed that he was entitled to withdraw the agency and to recover £477 in all, paid into the estate, and £80 damages, with costs.

Mr. J. E. R. de Villiers was for the plaintiff, and the defendants were in default, having been barred from pleading.

Nicholas Swart, executor dative of his late parents, stated that after he was appointed to his office, he employed a certain Macleod to sell the movables in the estate, which realised £36 0s. 6d., and Macleod collected outstanding debts to the amount of £360. In March, 1900, he transferred the estate to the defendants, because Macleod had left Laingsburg, and he caused to be handed over to the defendants what Macleod had collected. The defendants got all the other assets in the estate. They filed an account, which the Master rejected. Since August last year he cancelled the agency of the defendants, and he had found out that the outstanding debts to the amount of £1,031 had been practically collected. Being one of the heirs, he had to pay one-third of the £1,152, the value of the immovable property. In December, 1900, the defendants said he still owed £400 to settle the whole matter. Since that time they had failed to file any accounts. He had since found as executor that there were certain heirs who had not yet been paid

out. The defendants debited the witness with £83 5s. 6d., which had not been paid out to him. Since he assumed the administration, he had filed an account, which was the same as the defendants' account, with the exception that only £25 was allowed for commission. He had suffered £80 damage through the defendants' delay in paying out the heirs, being sued twice by the Master. Certain heirs were about to sue him, and he had a deal of correspondence and attorney's expenses over the matter.

By De Villiers, C.J.: Witness saw Walters in town this morning. Walters was still carrying on business, and he did not believe the firm was insolvent. A cheque had been sent for £200 by the defendants to pay out the remaining heirs, which had been disallowed.

De Villiers, C.J.: The defendants have not appeared in this case, and I take it they practically admit the justice of the plaintiff's demand. I am bound to say that the conduct of the defendants appears to me to be extremely disreputable. They are law agents, practising at Laingsburg. They undertook to administer this estate on behalf of this poor farmer, who implicitly trusted in them. He trusted to their doing the work properly, and he himself apparently was too ignorant to carry on the administration. It clearly was their duty to assist the plaintiff in every way, and to carry on this liquidation, not only expeditiously but honestly, to account for every penny they received, and not to debit the estate for a single penny until that payment was actually made. Large sums we find debited to the estate which have never been paid, and when called upon to account to the plaintiff, the defendants simply lie by, and do not even take the trouble to appear before the Court in order to explain the position. I am not sure that the defendants by their conduct have not rendered themselves liable to a criminal prosecution. The judgment of the Court is for the plaintiff as prayed on all counts, except the last amount, for which there will be damages for £40, instead of £80. The defendants to pay the costs, including the plaintiff's expenses. Judgment against the defendants jointly and severally.

GOUS AND KOESER V. RITTER.

Sale and purchase—Weight of evidence.

This was an action brought by the plaintiffs, farmers at Malmesbury, to recover £562 10s., the price of twenty-five mules, and £50 damages, for pasturing the mules.

The declaration set out that the action arose out of the sale of certain mules,

which the plaintiff alleged the defendant entered into, and which the defendant denied. On the 2nd January the plaintiffs jointly sold twenty-five mules, to be selected by the defendant, for £22 10s. each. The mules were to be accepted within eight days from the date of sale, but the defendant failed to do so, although the plaintiffs tendered to him the selection of the mules. Plaintiffs claimed £562 10s., the price of the mules, and £50 for pasturing. The defendant, in his plea, set out that he went with one Cloete to inspect the mules for his principal, who was buying on behalf of the German Government. He merely inspected the mules, and agreed to inform Cloete whether the purchase would be completed or not. Subsequently he wired to Cloete from Caledon that the mules would not be required.

Mr. W. P. Buchanan (with him Mr. D. Buchanan) appeared for the plaintiffs; and Mr. Searle, K.C. (with him Mr. Russell) appeared for the defendant.

Jasper Gous, one of the plaintiffs in the case, stated that he was a speculator in stock. He was approached by a Mr. Cloete about the end of December or the beginning of January. At that time he had about 40 mules running on the farm. On the 2nd January, Cloete and Ritter came to Malmesbury. Ritter agreed to pay £22 10s. each for the mules delivered at the Docks, and completed the contract by accepting 25 mules at the price if the plaintiff would keep them for a few days. Ritter had not his branding iron with him, and witness objected to Cloete's suggestion to cut them on the head. It was arranged that Ritter should call on the following Friday and pay for the mules. The mules cost witness on an average £22 each. At that time there were several buyers after the mules. Witness understood that the defendant, whom he met for the first time, was going in largely for stock-buying. In the presence of his partner witness explained the position, and Koeser was satisfied, but said that another party who had made an offer must be acquainted with the sale. After that he had an offer for the mules from Mr. Gird. Later on, Cloete wired from Caledon that Ritter did not require mules. In reply, witness insisted on the sale. It took him some time to find out the address of the defendant, and when he did he caused a letter to be written to him from an attorney. The defendant, in reply, denied the sale, stating that he went to Malmesbury with Cloete to buy some mules he had for sale, and pointed out that many of them were very poor. He had suffered damages to the extent of £50 in keeping the mules from the 8th January.

Cross-examined by Mr. Searle: He made arrangements with Cloete to bring Ritter out, and Cloete was to get his commission for putting through the

sale. The defendant did not say that he was buying the animals for someone else. The defendant had hardly time to select the twenty-five mules and put them aside. The defendant pointed out that some of the mules were young and thin, but he did not say that he might be able to pick out a few; nor did he say that he would wire to Cloete whether or not he wanted the mules. Without selecting any particular mules he said he would take twenty-five. He was to come back from Caledon to select the mules. He did not know Ritter's address, otherwise he would have communicated with him when he received the wire from Cloete that the mules were not wanted.

Re-examined by Mr. Buchanan: He gave the commission to Cloete on account of the introduction.

Albert Cloete, of Bellville, who introduced the plaintiff to the defendant, stated that the defendant was told by witness that there were twenty-five mules at Malmesbury for sale, and it was arranged they should leave on Monday morning. The defendant, in witness's presence, agreed to take twenty-five mules at £22 10s. each. Ritter, not having his branding iron with him, said that he would come on Friday and pay for and mark the mules. Gous agreed to the mules staying a couple of days at the farm, and asked for a couple of days' notice to secure trucks.

Cross-examined by Mr. Searle: Ritter did not mention anything about selecting a few mules. The defendant might have told witness that he was sorry he could not find his principal.

Nicholaas Koeser, joint plaintiff, stated that he went into speculation with Gous. Witness lent his cart to take them out to the farm. Gous on his return said that Ritter had bought twenty-five mules for £22 10s. each, and witness agreed to let them run on the farm for a couple of days.

Cross-examined by Mr. Searle: Gous told witness that Ritter had no knowledge about mules, and that the defendant would bring a man to pick and brand them on Friday.

The plaintiff Koeser's driver testified to having driven out the defendant, Cloete, and Gous, and hearing a conversation to the effect that Ritter had purchased twenty-five mules at £22 10s. each. He heard Koeser saying that he would refuse the offer from the other man.

Cross-examined by Mr. Searle: Witness only heard what they said when they returned to the cart. There were many more than twenty-five mules on the farm, and the defendant pointed to a few.

Mr. Buchanan closed his case.

Chas. Wm. Ritter, defendant, stated that he was a commission agent and fancy dealer in Cape Town. In December last a friend of his came down from the German territory, and had a com-

mission to buy stock on behalf of the German Government. Witness was to get a commission for giving him assistance, and mentioned the matter to, among others, a Mr. Dreyer, who brought him in contact with Cloete. Cloete, in the presence of Dreyer, said that he had mules for sale at Malmesbury, and witness understood that he was acting on commission. Witness had already bought twenty-five mules and told Cloete that he did not think it worth while to go out. Cloete pressed witness to go out, and witness agreed to do so, but made it clear to Cloete that he would merely inspect the animals, as his principal could not go out with him. When witness got down to Malmesbury, Cloete and Gous pressed him to purchase the mules, and witness then asked Cloete if he had explained the circumstances to Mr. Gous that he was not in a position to buy. Witness asked Gous if the buyer was satisfied would he keep the mules for a few days until the vessel left, and the plaintiff said he would. Witness most emphatically denied that there was a purchase of twenty-five mules at £22 10s. each.

[De Villiers, C.J.: Was there any mention of mules when you came back?]

Witness: No, my lord.

[De Villiers, C.J.: Do you suggest that these people are conspiring against you?]

Witness: Yes, my lord.

Continuing, witness said that he bought no mules at Caledon, but he found the mules there better than those at Malmesbury. Witness bought mules provisionally on the parade, which his principal refused to pay for. Witness thought that six or seven of the Malmesbury mules would be suitable, and told Gous so. Witness arranged that he would wire to Cloete what the decision was.

Cross-examined by Mr. Buchanan: He gave Cloete the name of his principal, and explained definitely to him that he could do nothing without his principal's sanction. He did not give the full circumstances of the case when he wrote to the plaintiffs' attorney, because he thought it was a game of bluff. His principal did not arrange with the German Consul that he and witness should work in partnership. There was a good deal of buying on speculation for the German Government. Witness recognised Cloete as the party he had to deal with. He could not explain why Cloete suggested that the mules should be clipped. The mules at Caledon were very much better than those at Malmesbury.

By De Villiers, C.J.: He would not have given more than £15 for the mules, and he could not come to any arrangement until he had seen his principal. He believed the plaintiffs were conspiring against him. If the

mules were only worth £15 he could not explain why he did not say that it was useless to talk about business.

Marthinus Dreyer stated that he communicated with Cloete on what he heard from the defendant. Cloete told the defendant that the cart was hired at Malmesbury, and witness heard the defendant say that he was going to inspect the mules for his principal.

Cross-examined by Mr. Buchanan: Witness knew that Cloete had no mules, and the defendant understood that. Witness told Cloete that the defendant had an order for twenty-five mules or more, and horses and oxen.

Mr. Searle closed his case, and counsel having been heard in argument on the facts.

De Villiers, C.J.: If the evidence for the plaintiffs is correct, there can be no doubt there has been a concluded contract of sale between the parties. Plaintiffs themselves have both given their version of what occurred on the 2nd January. It was the plaintiff Gous, who, with Cloete, accompanied the defendant on the way from Malmesbury to the place where the mules were, and both he and Cloete state that after the mules had been inspected a definite contract was made between the parties, that the defendant purchased twenty-five mules, which he was to be allowed to select from the troop which was in the enclosure, that he was to pay £22 10s. per head for these mules, that they were to be selected, and branded on a subsequent date, paid for in cash, and delivery to be made within eight days at the docks. That is the definite statement not of one witness, but of all the witnesses, who were present. The driver was not present throughout the whole of the negotiations, but he says he was present after the inspection had taken place, and he heard a conversation which took place between these parties, the details of the conversation agree with the two other witnesses, and their evidence is corroborated by Mr. Croese, who did not accompany the parties to the farm, but remained at Malmesbury. It is further stated on the return of the parties from the farm there was a conversation about Croese's horse, and that he was definitely informed by his partner that the twenty-five mules had been sold at £22 10s. a piece, to be delivered at the Docks—a conversation, according to these witnesses, which was loud enough for the defendant to have heard. When that conversation took place the defendant must have heard it, and if he then did not raise any objection, and did not in any way demur, then his silence may fairly have been taken as a consent to the transaction. Against the evidence of these four witnesses, on the other hand, there is the evidence of the defendant himself. Now, the Court has never been in the habit of counting

heads in weighing evidence. The evidence of one witness may be as valuable as the evidence of fifty other witnesses, and if the evidence of one witness is clearly consistent with all the other facts, the Court would not necessarily hold with numerical preponderance. In the present case, however, it appears to me there is not only the greater number on the one side, but the probabilities seem to be on the side of the plaintiffs. The defendant on the Monday was clearly anxious to make a bargain, and when he heard there were other people after the mules, he naturally would like to clinch the bargain. If he delayed someone else would go in and snap up the mules. He had seen Cloete, and taken the trouble to go all the way to Malmesbury on the Monday. He said it was a holiday, but I have no doubt, beyond that fact there was a desire to make this bargain. He thought he might make a good thing of it by disposing of the mules to the German Government. When he met Schmerenbeck, cold water seems to have been thrown on the whole matter, Schmerenbeck thinking that a better class of mule could be bought for £23. Naturally, there would be an anxiety on the part of the defendant to get out of the bargain. I do not mean to say that Mr. Ritter intentionally came here to swear to a falsehood, but I do think he was very eager on the Monday, and no longer eager on the Wednesday, and he led himself to believe there was no bargain. I am confirmed in this view by the disingenuousness of his subsequent conduct, when he tried to show there was no one else in the matter except Cloete, and that Cloete was the man with whom he had to deal. The defendant must have known after his journey to the farm that he was no longer dealing with Cloete, and that Cloete was merely a go-between. Then, again, I was struck by a remark made by the defendant during his evidence, when he said the mules were not worth more than £15. It is impossible to conjecture why he did not at once break off the negotiations, as he could not have hoped to bring the plaintiffs down from £22 10s. to £15. The defendant seems to me to have been somewhat hasty at the time, and if by his words and his conduct he led the plaintiffs to believe that the bargain was concluded, his own feelings and intentions in the matter cannot be taken into consideration. I am of opinion that there was a sale, and the judgment will be for the plaintiffs for £562 10s., as the purchase price of twenty-five mules, on the plaintiffs' tender to allow the defendant to select twenty-five mules out of the forty still in their possession. In regard to the charge for the grazing of the mules under the contract, the plaintiffs would have been bound to keep them until the 10th, and the date

of the summons is the 25th, so that there would be fifteen days at 1s. per mule, which would make £18 15s., and there will be judgment for the plaintiffs for the further sum of £18 15s., interest *a tempore morae*, the defendant to pay the costs, including the plaintiffs' expenses.

[Plaintiff's Attorneys: Berrangé and Son; Defendant's Attorneys: Walker and Jacobsohn.]

[Before the Hon. Sir JOHN BUCHANAN.]

WAITE V. HANSEN AND	{ 1905. Feb. 21st. " 22nd. " 23rd. " 24th. " 27th.
SCHRADER.	
BRACHT V. HANSEN AND	
SCHRADER.	

Managing agent of mercantile firm—Salary—Share of profits—Agreement with principals—Goodwill.

Where the managing agents of a certain firm had considerably extended their business, and had invested considerable sums of money therein on the termination of their agreement: the Court held that the plaintiffs were entitled to a statement of account and to the percentage specified in the contract.

This was an action for a statement and debate of an account and for a declaration of rights.

The plaintiff's declaration was as follows:

1 The plaintiff resides in Port Elizabeth.

2 The defendants carry on business in partnership under the style or firm of Hansen and Schrader, at Port Elizabeth, in this Colony, and they have also offices and carry on business in London, Johannesburg, Delagoa Bay, and elsewhere.

3 In and since the year 1886 and till the end of 1903, the plaintiff was one of the managers of the defendants' business at Port Elizabeth, the other manager being Oscar Bracht, and his engagement was terminated in December, 1903, by the Act of the defendants.

4 The agreements under which the plaintiff was engaged and duly served the defendants, as aforesaid, were:

(a) An agreement for the period ending the 31st December, 1891, dated the 16th December, 1886, signed by the parties to this suit, of which the following is a true copy, to wit:

Mr. A. H. Waite, as one of the managers of Messrs. Hansen and Schrader's

Port Elizabeth business, agrees strictly to adhere to all their instructions, more especially without their sanction not to take up any constituent or supporting account, not to buy shares or landed property and not to stand security for any one.

The yearly balance-sheet shall on all occasions be prepared in strict accordance with Messrs. Hansen and Schrader's instructions.

Rent on Messrs. Hansen and Schrader's store property shall be £500 per annum, exclusive of all rates, sub-letting of parts of the building shall be to the benefit of the business.

Rent on dynamite store shall be £75 per annum, leases on Farie's and Clark's stores shall be at existing rentals.

Mr. Waite's guaranteed allowance shall be £400 per annum, and he shall be at liberty to draw monthly accordingly. Mr. Waite engages himself for a period of five years to the 31st December, 1891. However, Messrs. Hansen and Schrader shall be at liberty to terminate this agreement by giving two month's notice, in which case Messrs. Hansen and Schrader will indemnify Mr. Waite by £100 over and above the amount that he will then be entitled to according to this agreement.

At the termination of this agreement the result of all business operations from 1st January, 1887, shall be ascertained, and after the allowance and the share in any profits due to other employees, and after Mr. Waite's own allowance of £400 per annum have been deducted, Mr. Waite shall share in any net profits made to the extent of 10 per cent. (ten per cent.). Mr. Waite, however, shall not be interested and concerned in profits made on share account or on landed property.

(b) An agreement which is embodied in a letter from the defendants, dated the 22nd November, 1888, whereof the following is a true extract of the material portion, to wit:

We increase your guaranteed allowance from £400 to £600 per annum, to be reckoned from 1st January, 1889; we also increase your share in the net profits from 10 per cent. to 12½ per cent., to be reckoned from the 1st January, 1890.

(c) An agreement between the parties for the period ending the 31st December, 1894, dated the 12th September, 1890, whereof the following is a true copy, to wit:

Mr. A. H. Waite extends the agreement made with the firm of Hansen and Schrader, and dated December 16th, 1886, for a further period of three years, i.e., until 31st December, 1894, upon the following conditions:—

£600 (six hundred pounds sterling) per annum from the 1st January, 1890, such allowance to be a charge to the business as hitherto.

15 per cent. (fifteen per cent.) of the

net earnings calculated as stipulated in the agreement of 16th December, 1886.

£100 per annum for attending to Messrs. Hansen and Schrader's interests in shares and properties.

It is further agreed that Mr. Waite has the permission of Messrs. Hansen and Schrader to draw the approximate amount due to him per 31st December, 1889, as shown in the Statement of Private Accounts, dated April 7th, 1890.

(d) An agreement for the period ending 31st December, 1899, dated the 20th April, 1895, signed by the parties, whereof the following is a true copy, to wit:—

It is hereby agreed that Mr. A. H. Waite renews his agreement of December 16th, 1886, and September 12th, 1890, with Messrs. Hansen and Schrader for a period of five years, i.e., from the 1st January, 1890, to 31st December, 1899, upon the following conditions:—

1. Mr. Waite has the right to draw the amount due to him per 31st December, 1894—£3,517 12s. 10d.; as per Statement of Private Account rendered, such amount to be drawn to not greater extent than three equal amounts per annum spread over the first three years of his agreement. It is, however, specially agreed that, should the New Brighton property, in which Mr. Waite has 1-5 (one-fifth) interest, not be sold during the first two years of this agreement, Mr. Waite has to provide the 1-5 share of the cost of the said property.

2. During the first two years of this agreement Mr. Waite's share in the profits of the business and allowances shall be as provided for in the agreement of September 12th, 1890.

3. During the last three years of this agreement Mr. Waite shall receive an increased interest in the profits of the business, such increase to be arranged at the end of 1896, but is not to exceed an increase of 5 per cent. (five per cent.).

4. Mr. Waite shall share in the profits on Stand properties and Douglas Colliery, as follows:—

Stands in and near Johannesburg, 15 per cent. (fifteen per cent.)

Douglas Colliery, Johannesburg, 10 per cent. (ten per cent.).

It is, however, specially agreed that Messrs. Hansen and Schrader reserve to themselves the right to dispose of the above mentioned property and Douglas Colliery whenever they consider such advisable, should the said property and colliery not be realised when the connection between Messrs. Hansen and Schrader and Mr. Waite terminates, then in order to determine the value thereof it shall be at the option of Messrs. Hansen and Schrader either to sell the property and colliery by public auction or appoint an impartial valuator or valutors to be

mutually agreed upon, whose valuation shall be accepted by both parties to this agreement.

(5) The first clause in the agreement of December 16th, 1886, shall now read as follows:—

Mr. A. H. Waite, as one of the Managers of Messrs. Hansen and Schrader's business, agrees strictly to adhere to all their instructions and exercise due caution in taking up any constituent or supporting accounts, not to buy shares or landed property, and not to stand security for any one.

(c) An agreement for the period ending the 31st December, 1903, dated the 24th July, 1899, signed by the parties, whereof the following is a true copy, to wit:—

It is hereby agreed that Mr. A. H. Waite renews his agreement of April 20th, 1895, with Messrs. Hansen and Schrader for a period of four years, i.e., from 1st January, 1900, to 31st December, 1903, upon the following conditions:—

1. Mr. Waite has the right to draw the amount due to him per 31st December, 1898, i.e., £13,535 14s. 9d. as per statement of private accounts rendered, such amount to be drawn to not greater extent than four equal amounts per annum spread over the four years of the agreement. It is, however, specially agreed that should the New Brighton property, in which Mr. Waite has 1-5 (one-fifth) interest, not be sold during the first three years of this agreement, Mr. Waite has to provide the one-fifth share of the cost of said property. This clause is to be taken in conjunction with clause 1 of the agreement of April 20th, 1895, the amount of £3,517 12s. 10d. mentioned therein being included in the above-mentioned amount of £13,535 14s. 9d.

2. During the term of this agreement Mr. Waite's share in the profits of the several businesses of Messrs. Hansen and Schrader shall be 20 per cent (twenty per cent.).

3. Mr. Waite's share in the profits on properties and Douglas Colliery to remain as provided for in agreement of April 20th, 1895. Such properties at present consist of the following: 15 per cent. Marshall's Stands, 153, 155, 156, 154, 157, 158; 15 per cent. Height's Stands, 55/6, 110/111; 15 per cent. City and Suburban Stands, 503, 504, 505, 506, 507; 15 per cent. City and Suburban Stands, 510, 511, 512, 513; 15 per cent. Delagoa Bay property, occupied by the H. S. Company; 20 per cent. New Brighton Farm; 10 per cent. Douglas Colliery. Limited; 15 per cent. Royal Oak Tavern, Graham's Town.

It is, however, specially agreed that Messrs. Hansen and Schrader reserve to themselves the right to dispose of the above-mentioned properties and Douglas Colliery shares whenever they consider such advisable, should the said property

and colliery shares not be realised when the connection between Messrs. Hansen and Schrader and Mr. Waite terminates, then in order to determine the value thereof, it shall be at the option of Messrs. Hansen and Schrader either to sell the property and Douglas Colliery shares by public auction or appoint an impartial valuator or valutors to be mutually agreed upon whose valuations shall be accepted by both parties to this agreement.

4. Mr. Waite is at liberty to be absent from the business of Messrs. Hansen and Schrader for a period of nine months during the year 1900 at his convenience.

5. A certain clause in the original agreement of December 16th, 1886, viz.: However, H. and S. shall be at liberty to terminate this agreement by giving two months' notice, in which case Messrs. H. and S. shall indemnify Mr. Waite by £100 over and above the amount he will be then entitled to according to this agreement—is hereby cancelled.

6. The rent for "Anderson's Bond" property to be £250 (two hundred and fifty pounds sterling) from 1st January, 1899.

Dated at Johannesburg, 24th July, 1899.

HANSEN & SCHRADER.
A. H. WAITE.

Witness:

B. K. Lightfoot.
F. H. S. Corder.

5. The defendants, before December, 1903, disposed of the Delagoa Bay landed property aforesaid which included with other properties valuable concessions to the foreshore, also of the general business and the goodwill thereof, including certain valuable agencies carried on at Delagoa Bay as a branch of the Port Elizabeth business of Hansen and Schrader, and the plaintiff became and is entitled to a full disclosure, and account not only of a certain cash payment of £20,000 received by the defendants in respect of the disposal of the said landed property (which payment has been disclosed), but also of all profits and shares in any company or syndicate and other valuable consideration whatever received or to be received by the defendants in respect of the disposal of the said landed properties, of the said concession to the foreshore, and of the general business and goodwill thereof, carried on at Delagoa Bay as aforesaid, but the defendants notwithstanding lawful demand have failed and neglected to make such disclosures or render such account, or to disclose to the plaintiff the agreements entered into by them relative to such disposal.

6. In the year 1892 a certain property now of great value known as New Brighton at or near Port Elizabeth was

purchased by the plaintiff from one Sarah Berry for £2,500, and the said purchase was effected as a joint speculation on behalf of the plaintiff, the defendants, and the said Bracht in equal shares of one-fifth each, the remaining share of one-fifth being intended for one W. English who subsequently disposed of his interest to the defendants.

7. The said property was transferred to and stands registered in the names of the defendants who are entitled to three-fifths thereof in their own right, but as to one-fifth they hold the same in a fiduciary capacity as the plaintiff's representative, and the said property is the New Brighton property or New Brighton Farm referred to in the above agreement (c) set forth in paragraph 4 of this declaration.

8. The defendants have in their hands moneys belonging and due to the plaintiff far exceeding one-fifth share of the cost of the said property and all proper expenses and charges connected therewith, and all things have happened, all times have elapsed, and all conditions have been fulfilled entitling the plaintiff to demand that either one-fifth share of the said property shall be transferred to him, against payment of one-fifth of the cost and all such proper charges and expenses, or that the defendants shall agree with the plaintiff upon an impartial valuator or valutors of the said property in order to determine the value of the said property, but the defendants though they have elected not to sell the said property by public auction have wrongfully and unlawfully failed to take steps to come to an agreement with the plaintiff as to such valuator or valutors with a view to ascertaining the value of the property as aforesaid.

9. The plaintiff is further entitled to demand from the defendants in respect of the New Brighton property a true and correct disclosure and account of all the dealings of the defendants therewith, and of all income received therefrom, and that in such account shall be included a reasonable allowance of £500 per year to be paid to the plaintiff out of the joint venture for his services in managing the New Brighton property during the years 1899 to 1903 inclusive, and he is also entitled to obtain an order restraining the defendants from in any way alienating, disposing of or dealing with the said property or any part thereof, without the plaintiff's consent, until his rights shall have been satisfied in respect of the said property; but the defendants refuse to recognise the plaintiff's rights in respect of the said property, and claim to be entitled to alienate, dispose of and deal with the said property without the plaintiff's consent or concurrence.

10. The plaintiff is further entitled upon the termination of his engagement as aforesaid to receive from the defend-

ants a true and correct account showing the amount to which he is entitled under the agreements referred to in paragraph 4 of this declaration, including his share of the profits of the several businesses of Hansen and Schrader, and of the profits on the properties and Douglas Colliery, and of the proceeds or values, ascertained under the aforesaid agreement, of the said properties, and shares held by the defendants in the said Colliery, and to be credited in such amount with interest at 6 per cent. for the year 1903 on the balance due at the end of the year 1902; and he is entitled to debate such account and to be paid the balance due to him, all drawings by him being deducted and also such amount as may be determined to be his one-fifth share of the cost, expenses and charges referred to in paragraph 8 hereof.

11. The plaintiff is entitled to claim that from such account as is referred to in the last paragraph there shall be excluded certain items, whereof the defendants have, before action was brought, had full and detailed notice with particulars of the plaintiff's objections to the said items, to wit:—

I. The cost of, and any loss or charge in connection with, certain 700 shares in the South African Super-Aeration Company, Limited, purchased or acquired by defendants in London, the cost of which (£700) has been wrongfully charged to the Port Elizabeth business of Hansen and Schrader.

II. The cost of and any loss or charge in connection with certain shipments of currants to Port Elizabeth in 1900, which formed a separate and private speculation of the defendants in London, and were not ordered by or required for the business at Port Elizabeth of Hansen and Schrader, but should have been consigned thither by the defendants for disposal on their own account and profit and loss as the case may be.

III. A certain amount of £5,462 12s. 6d. representing the total of improper overcharges of interest and exchange made by the defendants against the business at Port Elizabeth due to 31st December, 1902.

IV. Certain sums amounting to £4,500 representing charges improperly made by the defendants against the business at Port Elizabeth in respect of their own services in London during the years 1900, 1901, and 1902, which charges are contrary to the theretofore established and agreed course of dealing in the said business and between the parties.

V. Certain sums amounting to £2,631 19s. 10d., being further charges improperly made by the defendants against the business at Port Elizabeth in respect of expenditure on their own account in connection with their London business during the years 1898 to 1902, which

charges are contrary to the theretofore established and agreed course of dealing in the Port Elizabeth business and between the parties.

12. And the plaintiff is further entitled to claim that in such true and correct account as aforesaid there shall be included as an asset of the business a sum of £7,736 12s., due and owing to the business at Port Elizabeth by one W. G. Stevens, but from which the defendants wrongfully and improperly, without the plaintiff's consent, released the said Stevens.

13. A part of the general business of the firm of Hansen and Schrader at Port Elizabeth, secured for the said firm in 1891 by the efforts of the said plaintiff, was the agency for the Government of the late South African Republic, and the said firm acted as such agents before, in, and after the year 1893, and the commissions or profits resulting from such agency, wherever executed, formed properly a part of the general business at Port Elizabeth.

14. In and after the year 1893, the defendants, on behalf of the said Government, specially undertook and were engaged upon a matter arising out of or in consequence of the said agency, which matter was described by them, in writing, to the firm at Port Elizabeth as a very important matter, which, if put through, would considerably benefit the business at Port Elizabeth, but which required entire secrecy and the absence of the defendants for some time at Lisbon.

15. The defendants received sums of money or other valuable consideration in respect of the services rendered by them, as aforesaid, to the said Government in connection with the said matter, but have refused to disclose the amounts or valuable consideration so received by them, which the plaintiff contends must be brought to account as part of the commissions or profits resulting from the agency obtained and introduced by him to the defendants, and carried on as aforesaid, as part of the general business of the firm at Port Elizabeth, upon which he is entitled to his percentage at that date 15 per cent. or in the alternative he claims to be entitled to such reasonable percentage as shall represent a *quantum meruit* for his obtaining and introducing the said agency as aforesaid.

Wherefore the plaintiff prays for:

1. An order compelling the defendants to disclose and bring into account with the plaintiff, and declaring the plaintiff to be entitled to 15 per cent. in respect of all profits, shares in any company or syndicate, and any other valuable consideration whatsoever received or to be received by the defendants or either of them or any other person, firm or company on their behalf in respect of the disposal of the landed properties, the

concession of the foreshore, and (or) the general business and (or) goodwill thereof carried on at Delagoa Bay and referred to in paragraph 5, and an order compelling the defendants to disclose all agreements entered into by them relative to such disposal.

2. An order declaring the plaintiff to be entitled to a one-fifth part, share and interest in the said New Brighton property, a further order compelling the defendants either to transfer to him in due and customary form of law an undivided one-fifth share of the said property upon payment by him of one-fifth of the cost of the said property and of all proper expenses or charges in connection therewith, or to agree with the plaintiff upon an impartial valuator or valutors of the said property in order to determine its value; and in either alternative a further order restraining the defendants from in any way alienating, disposing of or dealing with the said property or any part thereof without the plaintiff's consent, until his right in respect of the said property shall have been satisfied, and compelling the defendants to disclose to the plaintiff and render to him a true and correct account of all their dealings with and income derived from the said property, to debate such account and to pay to the plaintiff his one-fifth share of such income: such account to include an allowance of £500 per year in favour of the plaintiff for his services during the years 1889 to 1903, inclusive, as set forth in paragraph 9 hereof, or such other allowance as this Honourable Court may determine to be reasonable.

3. An order compelling the defendants to render to the plaintiff a true and correct account, as claimed in paragraph 10 hereof, excluding items I., II., III., IV., and V., set forth in paragraph 11 hereof, and including as an asset the sum of £7,736 12s., set forth in paragraph 12 hereof, to debate such account when rendered, and to pay over to the plaintiff the amount found due to him at foot of such account when debated:

4. An order compelling the defendants to disclose and bring up in the said account all sums of money or other valuable considerations received by them in respect of the services rendered to the Government of the late South African Republic, and referred to in paragraphs 13, 14, and 15 hereof, and declaring the plaintiff entitled to 15 per cent. thereof, or to such reasonable percentage as this Honourable court shall award:

5. A declaration of the plaintiff's rights and such orders in the premises as against the defendants in so far as this Honourable Court may deem that the claims hereinbefore set forth should be in any respect varied or modified:

And generally such further or other relief as to this Honourable Court may seem meet together with costs of suit.

To the declaration the defendants pleaded:—

1. They admit paragraph 1.

2. As to paragraph 2 they admit that they carry on business at Port Elizabeth, and that they have an office and carry on business in Johannesburg. They say that business of and for and on account of the firm has been carried on in London in premises used for that purpose and that they have ceased to carry on business at Delagoa Bay since October, 1901. Save as above they admit paragraph 2.

3. They admit paragraph 3 save that they say that the plaintiff's engagement was terminated not by their act but by effluxion of time and upon previous notice to that effect given by the plaintiff.

4. They admit paragraph 4 save that the figures £3,561 13s. 10d. in section (d) of the declaration does not appear in defendant's copy of the said agreement of December 31st, 1899, and the defendants do not admit the said figures.

5. As to paragraph 5 they admit that in or about October 1901, they disposed of the Delagoa Bay landed property and certain agencies carried on at Delagoa Bay for the sum of £20,000, but they deny that the said Delagoa Bay property included any other properties or any concessions to the on-shore or any other concessions. They admit that the plaintiff is entitled to a full disclosure of any agreements entered into relative to the said disposal and of the money received in consideration thereof and to a full account of the said money, and say that he has had such disclosure and account and has duly been credited with and received his share of the same. Save as above they deny the allegations in paragraph 5.

6. As to paragraphs 6 and 7, they admit that on the 31st December, 1892, the plaintiff obtained an option to purchase the said New Brighton property, but say that he did so for and on behalf of the defendants, who subsequently purchased the property, and deny that the said property was purchased as a joint speculation on behalf of the plaintiff, the defendants and the said Bracht. They admit that the said English disposed of his interest to the defendants, and that the said property was transferred to and stands registered in their names. As to the respective interests in and rights to the said property of the plaintiff and defendants they crave leave to refer to the terms of the agreement set forth in paragraph 4 of the declaration. They admit that the said property is the New Brighton property or farm referred to in section E, set forth in paragraph 4 of the declaration. Save as aforesaid, they deny paragraphs 6 and 7.

7. They deny that they have in their hands moneys belonging and due to the plaintiff exceeding one-fifth share of the cost of the said property, and all proper expenses and charges connected therewith. They admit that the plaintiff is entitled to demand that the defendants shall at their option either have the said property sold by public auction or have it valued in terms of the said agreements. They say that before the declaration was filed they tendered to have the said property so valued, which tender the plaintiff refused, and the defendants now claim either to sell or to value at their option upon the claim of the plaintiff being decided by this Honourable Court. Save as above they deny the allegations in paragraph 8.

8. As to paragraph 9 they admit that the plaintiff is entitled to demand a true and correct disclosure and account of their dealings with the said property, and of all income which may reasonably and legitimately be reckoned as derived therefrom, and say that they have always been ready and willing, and hereby tender to render within a reasonable time such account in accordance with the usual course of business when plaintiff was a manager. They say that the plaintiff, while in the service of the defendants, has had a true and correct disclosure, and is fully acquainted with the dealing and income derived from the said property, and they deny that the plaintiff is entitled to any further or other remuneration than as contained in his said agreements. Save as above and save that they admit that they claim that they are entitled to alienate, dispose of or deal with the said property they deny the allegations in paragraph 9.

9. While they deny that the plaintiff is legally entitled to be credited with interest for the year 1903 on the balance, if any, due at the end of the year 1902, they say that they are ready and willing to so credit him upon such balance, if any. They say further that they have always been ready and willing and have tendered and do hereby again tender to render the account claimed in the said paragraph within a reasonable time after the 31st December 1903, and in accordance with the usual course of business when plaintiff was manager. The plaintiff and the defendants have agreed upon a valuation of the properties mentioned in the said agreements, save and except the New Brighton property, the Douglas Collieries and the Royal Oak Tavern. The defendants have tendered and do hereby again tender to have the Douglas Collieries valued in terms of the said agreements, or, in case the parties are unable to agree upon a valuator or valutors, by such valuator as this Honourable Court may appoint. The

Royal Oak Tavern has been sold, and the defendants are ready and willing to bring up the purchase price thereof in the said account. They say that the allegations in paragraph 10 of the declaration are, so far as the New Brighton property is concerned, subject to the allegations in the previous paragraphs of the plea contained, and in so far as they are inconsistent therewith they are denied.

10. As to paragraph 11, they deny that the plaintiff is entitled to claim that items I, II, III, and V should be excluded from the said account. They say that the transactions set forth in items I and II were part of and were entered into for and on behalf of the defendants' business including the Port Elizabeth business, and that the plaintiff had knowledge of and consented to the said transactions, and has had the benefit thereof. They deny that the charges of interest and exchange included in item III improperly charged to the said business. They say further that the sum of £5,462 12s. 6d. does not represent all that is properly chargeable to the said business. They deny that the sum of £2,631 18s. 10d. set forth in item V includes any expenditure on their own account. They say that the said sum is expenditure for and on account of and for the benefit of and in connection with the defendants' business and of which the plaintiff has had the benefit and is properly chargeable to the Port Elizabeth business. While not admitting that the plaintiff is legally entitled to claim to have the sum of £4,500 excluded the defendants say that they have charged the same to capital account and that therefore the plaintiff's interests under his agreements are not affected thereby. Save as above they deny paragraph 11.

11. As to paragraph 12 they say that at the end of the year 1902 the said Stevens stood in the firm's books as a debtor to the said business for the sum of £7,736 12s. and say that there were questions between the defendants and the said Stevens as to the sum of about £6,500 which was due to him at the end of 1900, and as to whether he was liable for losses for the years 1901 and 1902, and as to the over charges and as the said Stevens was also entitled to maintenance for his wife and children during those two years over and above £600 in regard to which he had actually drawn moneys for living purposes and as the said Stevens was not in a flourishing financial position, the defendants with the consent of the plaintiff released Stevens from his liability if any. Save as above they deny paragraph 12.

12. Save that they deny that the said agency was secured solely by the efforts of the plaintiff they admit paragraph 13. They say that in the accounts drawn up from time to time between

the parties the plaintiff has been credited with his share in the profits resulting from the said agency.

13. They deny each and all the allegations in paragraphs 14 and 15. The defendants did in or about 1893 proceed to Lisbon with a view of obtaining certain business which business was entirely unconnected with the said agency, but they failed to obtain the said business.

Wherefore subject to the above tenders they pray that the plaintiff's claim may be dismissed with costs.

For the purposes of the hearing, these actions were consolidated. The plaintiffs were respectively Arthur Herbert Waite and Oscar Bracht, residing at Port Elizabeth, and the defendants were Hansen and Schrader, carrying on business in Port Elizabeth, Johannesburg, London (England), and elsewhere. Plaintiffs had been employed as joint managers of the Port Elizabeth business, and they brought the actions for a declaration of rights under certain contracts upon which they were employed by defendants. Mr. Schreiner, K.C. (with him Mr. Upington) was for the plaintiffs; Sir H. Juta (with him Mr. Gardner) was for the defendants.

Mr. Schreiner stated the principal points in both cases. Plaintiffs, he said, had been employed by defendants as joint managers of the business at Port Elizabeth during a period extending from the 1st January, 1887, to the 31st December, 1903. A number of contracts were entered into between plaintiffs and defendants from time to time. There were certain differences between the cases of the two plaintiffs, but in the main the points in dispute were identical. One of the main points was as to the construction of Bracht's agreement, dating from the 1st January, 1900, to the 31st December, 1903. There was no definite formal agreement entered into, but certain correspondence took place. Mr. Bracht had been dissatisfied with the terms of his engagement, because he found that he was placed in an inferior position, so far as remuneration was concerned, to Mr. Waite. Mr. White and others, working at Johannesburg and elsewhere, were getting better terms, and Bracht was aiming at getting an agreement which would equalise his interests all round as Waite's interests were. Bracht had had a salary of not less than £600 a year and a 40 per cent. share of the profits on wool. Then the defendants wrote a letter of the 31st July, 1899, of which it would be for the Court to determine the construction. Bracht said that he was entitled to receive 10 per cent. in relation not only to the merchandise business, in which he was getting a certain percentage formerly, but he claimed that he was entitled to read that letter in connection with his immediately cur-

rent contract, and that it extended to the Douglas Colliery and the defendants' landed properties in Johannesburg and Delagoa Bay. The defendants said, however, that he was only entitled to get 10 per cent. on the merchandise and so forth, that he would still get his 40 per cent. on wool, but said that they split up the 10 per cent. which they agreed upon, and that he would only get 5 per cent. on the Douglas Colliery and the Johannesburg and Delagoa Bay properties. The question between the parties on this part of the case was whether Bracht was entitled to 10 per cent. or only 5 per cent. in relation to the Douglas Colliery and the Johannesburg and Delagoa Bay properties. This was really a great case, and he (counsel) had only reached one branch.

[Buchanan, J.: There are sufficient complications already.]

Sir H. Juta: I would like to know, from my learned friend, whether he intends to go into the accounts.

Mr. Schreiner: I won't go into the accounts at this moment, but I shall reach them in due course. Continuing, counsel called attention to paragraph 5 of the declaration, which stated that before 31st December, 1903, defendants disposed of the Delagoa Bay property, which included a concession of the foreshore, also the general business and the goodwill thereof, including valuable agencies. The plaintiffs said they were entitled to a full disclosure of account not only of a certain payment of £20,000 received by the defendants in respect of the disposal of the landed property at Delagoa Bay—a company having been floated with a capital of £20,000—but of the important agencies carried on there under the control of the Port Elizabeth business, and there was also the foreshore concession. Defendants said that there was nothing about £20,000, and that they could disclose nothing. Plaintiffs wanted to know more particularly what became of the foreshore concession, and they also said that the landed property at Delagoa Bay had been disposed of for £20,000. Paragraphs 6, 7, and 8 of the declaration raised an issue of prime importance for the Court to determine in any event, viz., what were the rights of Bracht and also of Waite in relation to certain New Brighton property? In 1892 the property was purchased from Mrs. Berry under an option that she gave to Mr. Waite for £2,500. This property, if worth a penny to-day, was worth £150,000 to £200,000. The person who first of all got the option was one English, who was also in the employ of Hansen and Schrader. Waite had made several investments, notwithstanding the fact that his contract with the defendants said he should not make investments, and he exercised this option in writing. Hansen and Schrader held three-fifths (having come in at the purchase with a share

each, so that the position was that Hansen and Schrader held three-fifths (having secured the fifth that English had failed to pay for), Waite one-fifth, and Bracht one-fifth. Waite entered into a contract with defendants, which placed him, so far as this property was concerned, in a different position from Bracht. Bracht claimed as a legal right that which ought to have been done long ago, viz., that this property should be transferred out of the names of Hansen and Schrader, in whose names it had stood from the original transaction, and put in the names of the persons who were really interested in it, according to the law of the land. Mr. Waite agreed to certain things in consideration of his being allowed to withdraw a certain sum of £135,534 14s. within a certain period, but it was specially agreed that, should the New Brighton property, in which Mr. Waite has one-fifth interest, not be sold during the first three years of the agreement he was to provide one-fifth share of cost of said property. The agreement was important, because it enabled the defendants to dispose of Waite's share in the New Brighton farm, as it was called, at their option, either by public auction or under a valuator. Bracht, however, had never prejudiced himself by entering into such an agreement. In the case of Bracht, the claim was for an order declaring him entitled to one-fifth part or share in the property, requiring defendants to pass transfer of such share, and restraining them from disposing of, alienating, or dealing with such property, also for a true and proper account, debate, and payment of such moneys as may be found to be due. Waite asked for a declaration that he was entitled to one-fifth share of the property, or that defendants should agree with plaintiffs upon an impartial valuator in order to determine the value of his share and to restrain the defendants from alienating, disposing of, or dealing in any way with the said property until his rights had been satisfied. The defendants admitted that the option was obtained by Waite, but said he did so for and on behalf of the defendants, and that the property was purchased as a joint speculation on behalf of Waite and defendants. They said they had always been ready and willing, and hereby tendered to render within a reasonable time an account as to the property. They also said that plaintiffs, while in their employ, had had a true and correct account. In Waite's cases, defendants and plaintiffs were entitled to demand that defendants should at their option either have the property sold by auction, or have it valued, but said that, before the declaration was filed, they tendered to have the said property so valued, and they now claimed either to sell or to value at their option upon the claim of the plaintiffs be-

ing decided by this Court. Plaintiffs said defendants could not possibly now go to sale by public auction without the rights of the plaintiffs being declared, but if his lordship appointed—as he (counsel) should be glad if he would, so far as Waite was concerned—a proper person to value and determine his right, then they could ascertain what he was entitled to in cash. Coming to what he described as the next branch of the case, counsel said plaintiffs were entitled upon the termination of their engagements to have from the defendants a true and correct account, showing the amounts to which plaintiffs were entitled. They said they were entitled to debate of such account and payment of such moneys as may be found due to them. On the 20th August, 1904, long after the action was brought, accounts were rendered by defendants to Bracht and Waite, and these accounts had been subjected to a very careful and diligent scrutiny at Port Elizabeth by Mr. Gibson, who had been engaged as plaintiffs' accountant adviser. These accounts were wholly away from the basis of accounts taken between the parties during the long period from 1887 to 1903. For instance, an extraordinary amount had been shown as against the plaintiffs' accounts in the way of bad debts. Counsel (proceeding) said that the plaintiffs were practically advertised out of the defendants' employ on the 18th December, 1903, although their agreements would not have come to a close until the 31st December, 1903. The plaintiffs were advertised as having no longer the firm's power, although they had been with Hansen and Schrader for nearly 20 years. The plaintiffs also claimed that a certain sum of £700 debited to the Port Elizabeth business, certain Supererotation Company shares, was wrongly charged to the business. It appeared that in 1900 Hansen and Schrader, in London, thought that currants were a fine thing for the future, and they went in for a speculation in currants on their own account, but they did not pay, they did not answer, the defendants sent over a ship load to Port Elizabeth, and a loss occurred. The plaintiffs, as managers of the Port Elizabeth business, said that that loss should not be debited against the business. Now came a very important point as to a charge for interest and exchanges made from London over against the Port Elizabeth business. Moneys were advanced from time to time in London by the partners over against the Port Elizabeth business, but from the very outset they did not render proper accounts of the interest, and they put in a lump sum for interest, but this was protested against, and eventually the partners told the Port Elizabeth people to write up the accounts on the proper basis. This was done, and it appeared that there had been an over-charge against the Port Elizabeth busi-

ness of £5,462 on the item of interest and exchanges. Plaintiffs said that must be struck out. Then in the fourth paragraph plaintiffs said that certain sums amounting to £4,500, representing charges improperly made by the defendants, had been made against the Port Elizabeth business for their own services in London at the rate of £1,500 a year. That, however, had now been abandoned, and Mr. Waite had, in consequence, abandoned a claim for £500 a year that he had made in respect of the management of the New Brighton property. The next item was certain sums amounting to £2,631 19s. 10d., charges improperly made by defendants against the Port Elizabeth business in respect to expenditure on their own account in connection with the London business from 1886 to 1902. This was mainly composed of a room in Mr. Hansen's office, and the salary of Mr. Hansen's private secretary, Mr. Toque. The plaintiffs also said there was included a sum of £7,736 12s., a withdrawal, in favour of W. G. Stevens, for which the defendants wrongfully released the said Stevens. Defendants said that the plaintiffs consented, but plaintiffs denied this. They did not, however, propose to go particularly into that item. It referred to an employee of defendants at Johannesburg, the release probably having been given by defendants in a spirit of generosity towards a man who had long served the firm up there. They now reached a part of the case which was of a different character. Part of the general business of Hansen and Schrader, secured through the services of Waite, was an agency for the Government of the late South African Republic, and in and after 1893 defendants, on behalf of the said Government, undertook and engaged in a matter arising out of the agency, which matter was described by them in writing as very important and requiring entire secrecy. Defendants received certain sums of money, and other valuable consideration in respect of services rendered to the South African Republic, but they had refused to disclose the amount. This special service was brought into the Port Elizabeth business, whatever the service was, and involved the defendants, one or more of them, going to Lisbon, and working there in the interests of the South African Republic. Plaintiffs did not know what defendants had received, and they said it was part of the Port Elizabeth business of Hansen and Schrader, which ought to be brought into the account. Defendants denied that they specially undertook or were engaged upon the matter, or that it was in consequence of the agency. They said that they proceeded to Lisbon to obtain certain business, but denied that it was in connection with the Port Elizabeth business. There was a document that the defendants had referred to, and which plaintiffs

had not seen. They said they did not wish the plaintiffs to see the document, but they were willing that his lordship should see it. If his lordship, after seeing the document, thought it completely disposed of their case, then plaintiffs were willing that it should be left in his lordship's hands. Furthermore, the defendants said that the plaintiffs' engagements were terminated, not by their act, but by effluxion of time.

Evidence was then called in support of the plaintiffs' case.

Oscar Bracht (one of the plaintiffs) gave evidence bearing out counsel's opening statement. In regard to the Delagoa Bay property, he said he found that the transfer of the land represented £6,000, and the balance of £14,000 was represented by the goodwill and agencies.

Cross-examined by Sir H. Juta: Hansen and Schrader were in Johannesburg in 1903.

Sir H. Juta: By what authority did you and Waite, without consulting the partners, draw several thousand of pounds in the middle of December, 1903?

Witness: I drew £2,000 on the strength of the last distribution.

What did Waite draw?—I don't know exactly.

You were a manager?—He drew £6,000.

And you drew these amounts without any consultation with Hansen and without letting him know a word about it?—Yes, that is so.

Answering further questions, witness said he simply drew money which stood to his credit, and to which he was fully entitled. There was nothing in his agreements to prevent him doing so. He supposed that it was because of this incident that the firm withdrew the general powers of attorney held by himself and Waite in the middle of December. In regard to the shares in the Supereration Company, he admitted having signed a letter agreeing to take 700 shares in consideration of the firm having the South African agency for the Supereration. In regard to the shipment of currants sent by Hansen and Schrader from London, he admitted he was not a partner in the firm, and that it was not for him to say what the partners should try on the market.

Sir H. Juta: If the partners chose to send out a thousand cases of currants, what have you got to do with it.

Witness: Well, we might have thought they were mad.

But you could not dictate to them how they were to carry on their business?—No, I could not dictate.

If they chose to send out currants to sell at Port Elizabeth you could not object?—No answer.

The fact is, you and Waite were getting a little bit too big for your boots,

and were wanting to dictate to the partners how they should carry on their business?—No answer.

These currants were sent out to the firm and dealt with by the firm?—Yes.

Then what on earth is your case in regard to the currants?—No answer.

In further cross-examination, Sir H. Juta put it to witness that when he applied to Hansen and Schrader for better terms, and asked for an interest of 20 per cent. all round, he did not mean the properties.

Mr. Schreiner objected that the question was not admissible, and said that the correspondence furnished the best answer to the question.

Buchanan, J., ruled that the question was admissible.

Witness replied that he did not mean the properties.

Witness had the management of the Douglas Colliery. He went to the colliery in 1896, but he did not go again between 1896 and 1903. As to the Delagoa Bay interests of the firm, witness fixed the profits on the Lourenco Marques Boating Company at £750 a year. Hansen and Schrader also held certain insurance agencies, and the Milner Safe Agency; he thought the profits from these sources would be £400 or £500 a year. As to the so-called foreshore concession, he admitted that defendants were only granted a sub-lease of the foreshore. He was not aware that the conditions of the lease prohibited subletting and erection of buildings. He still thought there was a value in the lease. The company, to whom the foreshore had now been transferred, were carrying on a business, and it was evidently of some value to them. There was also the forwarding agency through Delagoa Bay to Johannesburg. As to the overcharge of £5,462 for interest and exchanges, witness considered that that amount had been improperly charged against the Port Elizabeth business by Hansen and Schrader in London. Witness's last agreement was made in 1899. The interest and overcharges extended over 12 years. There was a good deal of business done by the partners in London; that used to be done without clerical assistance. He objected to the charge made by the partners because it was too high. As to the New Brighton property, witness claimed that he was a joint-purchaser in 1892. He was not present at the purchase, but it was arranged in the office that he should have a fifth share. At the beginning of 1892 it was agreed that a joint purchase should be made; he did not know who was present at the time. He agreed with Waite and English that he should have a fifth share. He saw the letter sent by Waite to Mrs. Berry taking up the option, and asking that the property

be registered in the names of Hansen and Schrader, "for whose account" (Waite added) "I have bought." He admitted having heard of a letter sent by Mr. Schrader to Hansen and Schrader at Dresden. This was after the letter had gone. He afterwards went to see Waite.

Sir H. Juta said that the letter stated that an exception would be made in regard to this property, and that Waite would be admitted to an interest to the extent of 15 per cent, English 15 cent., and Bracht 4 per cent.

[Buchanan, J.: You see, they were not bound to admit you to this transaction at all. Waite could not purchase landed property at all under his agreement with the firm.]

Witness, further cross-examined, said he founded his claim to a share in the New Brighton property on the agreement he made with Waite. Schrader subsequently told him that his interest in the property was to be 20 per cent, instead of 4 per cent. He agreed to that. He based his claim to co-ownership upon a subsequent agreement that he should leave sufficient funds in the firm to cover one-fifth share of the property. This was in March, 1896.

Sir H. Juta: When do you say you made your purchase?

Witness: I suppose the correct date would be when the money was paid, that was on the 3rd January, 1892.

Cross-examination continued, nearly £10,000 had been put into the New Brighton property for development purposes. This was paid out of the revenue from the property. He did not think there had been a debit in Hansen and Schrader's books of £12,000 against the property. He made a request in 1902 for his share to be transferred in his name. He did not see the draft scheme when it was proposed to float the business of Hansen and Schrader as a limited company. He believed a proposal was discussed to float the New Brighton property. He did not remember the draft scheme (produced), which was in Mr. Chabaud's writing. Part of the property had been sold; the transfers were all from Hansen and Schrader, who had undertaken certain obligations, for instance, with regard to the maintenance of the railway to the dynamite stores. All the agreements referred to Hansen and Schrader as representing the owners of the property. He admitted it would be very difficult to take away a fifth of the property; that was why he asked for a fifth undivided share. He believed that last year Mr. Hansen suggested that the property could be cut up into fifths. Witness did not know how it could be done; he did not say that it was impossible.

Mr. Schreiner (interposing): We are not asking for a partition of the estate.

[Buchanan, J.: The Court may on this evidence have to appoint a receiver to sell this property.]

Cross-examination continued: Witness remembered the law suit between Hansen and Schrader, and the Government in regard to certain portion of this land. He was not aware that at the trial English said he supposed his share had lapsed to the other partners. He abided by the value put by the experts on the Douglas Colliery shares, viz., 15s. per share. He knew there was a liability against the shares.

By Buchanan, J.: The shares were mostly fully paid up. Hansen and Schrader held 70,000 shares.

Witness (further cross-examined) said that the colliery had not made sixpence directly during the fourteen years that it had been working. It had, however, brought other business. It stood indebted to the firm in the books at £12,000. There were 7,000 uncalled shares. There was an overdraft of £10,000, and also a liability to the Netherlands Railway of £6,700. He was not aware that the Netherlands Railway had commenced an action against Hansen and Schrader. The shares had not been put on the market. He believed 17,000 were bought by the Oceana Company at par.

Sir H. Juta: Would you be surprised to hear that the Oceana bought at 4s. per share.

Witness: Yes.

By Buchanan, J.: In 1902 the firm's books showed a credit in his favour of £5,000 odd, and in 1903 he drew about £3,000. He had seen the accounts for the 31st December, 1903, showing a balance in his favour of £1,272.

Mr. Schreiner: But Hansen and Schrader, in their account, show a loss of £41,000 for 1903, which they say will have to be set off against the balance.

Buchanan, J., suggested to counsel that they should discuss between themselves the question of whom they should appoint to go into the accounts.

Re-examined by Mr. Schreiner: Witness said that although they did not consult the partners, when they drew money from the firm in December, 1903, they consulted the attorney, Mr. Chibaud. Their arrangements were coming to an end at that time, and they thought they were doing what they had a right to do. As to the current, the accounts showed a loss of £185 on that transaction. He had never seen the document of lease between Hansen and Schrader, and the Delagoa Bay Agency Company.

Mr. Schreiner demanded from the plaintiffs production of the document in question.

Sir H. Juta handed a document to his learned friend.

Mr. Schreiner said he was supplied with a copy of a resolution passed by the Agency Company in December, 1903.

Sir H. Juta: That is all we have. There is no other document.

Witness (further re-examined) said he should have said that the New Brighton property was bought to joint account in January, 1893, not January, 1892. He should say that there was over 600 acres of land at New Brighton still unsold; there was only a bagatelle, relatively, that had been sold. About 36 acres had been sold up to the present. As to the Douglas Colliery, witness considered that he should be paid his share of the value. Both sides had appointed valuers already, but Hansen and Schrader would not agree to the appointment of a referee to fix a price. In 1898 Hansen and Schrader said that the Oceana Company bought the shares in the Colliery at par. The Colliery now had a contract for the supply of 24,000 tons of coal to the C.S.A.R.

By the Court: The accounts between witness and Hansen and Schrader were agreed upon up to the end of 1901. The London office acted as agent for the Port Elizabeth business, and charged nothing for agency.

Buchanan, J., remarked that he was surprised witness, as a manager, should contend that the partners were not entitled to send out what they liked to the Port Elizabeth business.

Arthur Herbert Waite said he had made out a profit and loss account of the business between 1887 and 1901. This showed interest paid on capital £96,000, and net profits, roughly speaking, of £137,000, averaging about £9,000 a year. As to the New Brighton Estate, it was entirely through English that the purchase was made. He did not understand that his agreement debarred him from making purchases of landed property. In 1891 he had actually let a rough goods store to Hansen and Schrader. Witness, Bracht, and English conferred as to the New Brighton property, and they afterwards decided to ask Schrader to stand in with two fifth shares for his firm. At the end of 1903 there was a credit in the books to the New Brighton property of £1,200. He claimed that, so far as his interest was concerned, he should have an impartial valuation of the property. Witness was also examined as to other aspects of the case. In regard to the accounts for 1903, furnished by defendants, witness said he was dissatisfied with what was shown there. The firm showed a loss of £41,000 odd, Mr. Gibson, who had been through the various items with witness showed a profit of £7,000 to witness. As to the Port Elizabeth business alone, defendants showed a loss of £9,532, while Mr. Gibson found a profit of £16,900. On the Johannesburg business defendants showed a loss which was £22,000 odd more than Mr. Gibson found. Witness observed that defendants had in making the accounts written down the stock below cost, and carried

to suspense account outstandings, a considerable portion of which was good, and for which they had security.

Sir H. Juta objected to these statements going before the public, seeing that an arbitrator was to be appointed. He thought there could only be one object in putting out these statements.

Mr. Schreiner thought the objection was uncalled for.

[Buchanan, J.: I think this evidence is altogether unnecessary, as I shall not go into the accounts.]

He spoke as to the New Brighton property and the Delagoa interests of the defendants. He said that roughly speaking the clear profits from the Delagoa Bay agencies were about £1,500 a year. Defendants were carrying on business at Delagoa Bay as the Hansen, Schrader Co. The Company went into liquidation. He considered that £20,000 would be a fair value for the land, with the store formerly held by defendants at Lourenco Marques, although the transfer price was £6,000. As to the foreshore concession, he knew nothing in regard to this except what appeared in the correspondence. He had asked for, but had not been supplied with particulars as to how the foreshore concession was dealt with by the Hansen, Schrader Co. in disposing of it to the Delagoa Bay Agency Company. In the course of further evidence witness said that he did not want to take shares for his interest in the Douglas Colliery; he wanted to be paid his value.

[Buchanan, J.: That shows how little the shares are worth.]

Witness (further examined) said that the Douglas Company was principally dominated by Hansen and Schrader, and the Oceana Company, and he, as the holder of a small parcel of shares, would be placed in an unfavourable position.

Buchanan, J., remarked that the Court would adopt an effective means of ascertaining the value of the shares.

Witness (continuing his evidence) said that in the account furnished in August last year defendants set down a large item of outstandings under "suspense account."

Buchanan, J., said that any objections that witness had to the account could be urged before the arbitrator, to whom the account would be referred. The great fight seemed to him to be over the account.

Mr. Schreiner: Yes, and the New Brighton property.

Cross-examined: Witness and Bracht drew out certain moneys in the middle of December, 1903, without consulting the partners because he thought they were entitled to the money under the distribution.

[Buchanan, J.: I may say at once that their is nothing at all surprising

that their powers of attorney were summarily cancelled.]

Mr. Schreiner said that that remark was very serious from the plaintiffs' point of view. His Lordship had not yet heard the evidence of Mr. Chabaud, the attorney.

[Buchanan, J.: It is outside the case altogether, and I am surprised that it has been brought in.]

Mr. Schreiner said that he had purposely refrained from examining the plaintiffs on this point, because he thought it was outside the case. It had, however, now been brought in, and it was only right that he should ask Mr. Waite why this money was drawn.

[Buchanan, J.: There was every reason to cancel the powers of attorney, because they never communicated with their principals. I am surprised at your bringing it in the case at all.]

Mr. Schreiner: Defendants brought it in.

[Buchanan, J.: It is in your declaration. As far as the case stands at present, I did not see that it is necessary for the Court to express any opinion.]

Further cross-examined, witness said that, with regard to the Douglas Colliery, he knew there was an obligation upon defendants. There was £7,000 for unpaid calls. He knew that defendants were liable for the overdraft, whatever it was, to the extent of £10,000. They also had a liability to the Netherlands Railway of £6,000. No profits had been returned from the colliery because the large profits made were withdrawn and spent upon developments. He did not believe that the transaction with the Oceana Company in Douglas Colliery shares at 4s. per share was a sale at all. Witness was being cross-examined in reference to the lease of Mr. Stevens, who had been employed at Johannesburg by defendants, from certain debts amounting to £7,736, when

Mr. Schreiner interposed, and said that plaintiffs did not press this part of their claim.

Sir H. Juta proceeded to cross-examine the witness in reference to a claim that he had originally put in for salary for management of the New Brighton property.

Mr. Schreiner again interposed, and said that he had taken special care to shorten his case as much as possible, while his learned friend now introduced matters which had, as a matter of fact, been abandoned.

Buchanan, J., said he did not want evidence upon any claim that he was not to adjudicate upon.

Sir H. Juta next called witness's attention to what was described as the "Lisbon matter," and asked him if he knew that nothing whatever was made out of it.

Witness said he did not.

Cross-examination continued: Witness understood that there was a document showing what was the transaction between the late Transvaal Government and Hansen and Schrader. He was responsible for the agency obtained for the firm from the Republican Government, and he considered that if anything was made from the transaction the Port Elizabeth business should be credited with it.

John Anthony Chabaud, attorney, Port Elizabeth, was also called, and examined in reference to a certain draft document.

Mr. Schreiner closed his case.

Viggo Hansen, a member of the defendant firm, detailed the negotiations which took place between plaintiffs and himself with regard to preparing an account. In 1904 he arrived in Port Elizabeth from Johannesburg. On looking into the business he found the books very much behindhand, and he found further that the bookkeeper, who had been entrusted to carry on the books, had not properly closed the books for years. A gentleman, whom he had engaged as joint-manager, suddenly broke his engagement, and left the firm. The bookkeeper also broke his engagement, and left the firm. Witness was therefore placed in a very embarrassed position. He appealed to Waite and Bracht for certain information. Bracht could not give any information, not only generally, but also as to business matters which were under his direct supervision. Waite flatly and rudely, in a letter, declined to have any intercourse with him whatsoever. Witness engaged an experienced accountant to go into the books. He could not close the accounts any sooner than he did, and owing to the backward condition of the books, he could not render his accounts until August of last year. It was not until the day before the trial commenced that he received notice of objection from the plaintiffs. In the agreements with his employees he always constituted himself arbiter as to how his balance-sheets should be made up. He maintained that they had always treated their employees liberally and equitably upon their agreements. Dealing with the Delagoa Bay interests, witness said that he received no consideration in money from the Delagoa Bay Agency Co. for the foreshore concession. It all went in as part of the £20,000. His firm was as a matter of fact a sub-tenant of the Agency Company. As to the Lisbon matter, his partner went to Lisbon to try and get something. He was willing that his lordship should see the document on which the Court could declare whether plaintiff was justified in his assertions. He swore they got nothing out of the matter; they had expected to get something, but did not.

Buchanan, J., said he could not look at the document unless Mr. Schreiner saw it.

Witness volunteered to allow Mr. Schreiner to see the document privately.

Mr. Schreiner said he did not like to see any document that his client could not inspect.

Witness (in further evidence) said that the document was not relevant to the case. He had thought it was not in existence, but it had been found in Europe.

Mr. Schreiner said he was willing that his lordship should look at the document, and decide as to its relevancy.

Buchanan, J., perused the document, and observed: This document affords me more amusement than anything else; but for the names mentioned, it is absolutely outside the case. It does not bear on the case at all. I might describe it in a few words, but I think it best not to do. It might enlighten you as to how far ambitions can soar.

Witness (in further evidence) said that in the Douglas Colliery Co. there were 66,750 fully paid-up shares, and there was a liability of 12s. a share upon 11,250 shares. His firm were liable for an overdraft up to £10,000; the Netherlands Railway were claiming between £6,000 and £7,000 against the Douglass Colliery, Hansen and Schrader and the Oceana Company. The cost of the colliery was debited in the firm's books at £12,600. There was also a liability for calls amounting to about £7,000. The shares in the Douglas Company sold to the Oceana Company were transferred at 4s. per share. Witness considered that 4s. per share would be a fair value. That was the book value of the shares. He did not object to the shares being sold by auction. Witness also gave evidence in reference to the New Brighton property, and the advances made by his firm towards its development. He thought it was utterly impracticable to partition the property.

Viggo Hansen, a member of the defendant firm, said he had not written to Waite objecting to his making private purchases of property. He considered that Waite's agreement in 1892 debarred him from private purchases of property. He did not say that he raised specific objections to any purchases made by Waite, but he did not like it.

[Buchanan, J.: You did not want your managers to go speculating in property?]

Witness: That is so, my lord.

[Buchanan, J.: Quite right. That you are legally entitled to do.]

Mr. Schreiner was continuing his cross-examination upon certain negotiations that took place between witness and plaintiffs, after the latter had left the firm, when

Buchanan, J., interposed, and asked

counsel what these things had to do with the issues the Court had to try.

Mr. Schreiner said the points were raised by witness in his examination-in-chief.

Proceeding with his cross-examination, Mr. Schreiner asked witness whether he thought that to advertise out in the newspapers of Port Elizabeth two men who had been with the firm, one 20 years and the other 17 years, until he heard their explanation, was the right thing to do?

Witness: Sir, I had for two years been subject to provocation, hostility, and offensive correspondence, which no chief in this world would have put up with for a moment from these people. Then they wrongfully and illegally withdrew money from the business which they knew they were not entitled to. That filled up my cup. They screened themselves behind the solicitor. I said these people don't deserve the generous treatment I have given them all these years they have been in the business.

Mr. Schreiner: That is pretty candid, but it is not quite consistent with your attitude towards Waite in a letter you sent him.

[Buchanan, J. (to Mr. Schreiner): Do you wish me to give any decision on that point?]

Mr. Schreiner: I ask you for nothing that is not in the pleadings, my lord.

[Buchanan, J.: Then why cross-examine on something that is not in the pleadings?]

Mr. Schreiner: Because the witness has taken a line that is not in the pleadings. Why did my learned friend examine on it?

[Buchanan, J.: I stopped him from going into it.]

Mr. Schreiner: Not on this point. It was a small speech made by Mr. Hansen at the outset of the evidence.

[Buchanan, J.: You say distinctly this is not a matter that is in the pleadings, and yet you bring it out here.]

Mr. Schreiner: I am very sorry that it was led up to by my learned friend in the examination of witness.

[Buchanan, J.: My impression is that it was introduced by yourself in stating the declaration, and I tried to stop you.]

In further cross-examination, Mr. Schreiner took the witness to what has come to be known as the "Lisbon matter," in which it is alleged the late South African Republic had an interest.

[Buchanan, J. (to Mr. Schreiner): I am sorry you did not see the agreement submitted to me by witness yesterday, or you would not ask any questions. I may say that it would have done credit to the most brilliant Elizabethan mercantile adventurer. Had there been a result it would have been a thing that the wide world would have known.]

Mr. Schreiner informed witness that he did not want him to reveal any confidences.

[Buchanan, J.: The principal objection is the names that are mentioned in the document.]

Mr. Schreiner (to witness): Do you object to letting us on this side know who drew up that document?

Witness: I will let you know personally. I object to disclosing anything that is in this document, except to you privately. It has nothing whatever to do with the case.

Mr. Schreiner: It was a matter in which you were going to Lisbon on behalf of the late Transvaal Government?

Witness: No, you are totally wrong.

[Buchanan, J. (to Mr. Schreiner): It has nothing to do with the Transvaal Government. If it had referred to the Republican Government it might have been relevant to the case, but it has nothing to do with the firm's agency of the Transvaal Government.]

Mr. Schreiner asked witness whether he was paid his expenses of going and staying in Lisbon.

Witness: I am not going to make any disclosure on that point. I decline to answer the question.

Mr. Schreiner pressed his question, but his lordship ruled that it was not obligatory on witness to answer.

Mr. Schreiner formally applied for the question to be noted.

Buchanan, J., said he would make a note.

Witness (replying to further questions) said there was certain correspondence in regard to the Lisbon matter in December, 1893. The matter, he admitted, had something to do with Delagoa Bay. He received no profit whatever from it; there was no result whatever.

Buchanan, J., expressed his surprise at the line taken by counsel, seeing that the document was submitted to him by consent, and he had ruled that it was not relevant to the case. "In future," he added, "I shall exercise my own discretion as to how far I shall take the contents of counsel."

Mr. Schreiner said that he had not been cross-examining so much in regard to the document as with reference to the matter itself.

Witness was next cross-examined in reference to the Douglas Colliery in Pretoria district. He stated that he would be willing to accept 7s. 6d. per share for their holding in the company. He considered that plaintiffs' valuation of 15s. was excessive, and, in fact, he thought that the difference between that estimate and their own of 4s., viz., 9s. 6d. per share, would be too high a value. Asked in regard to the charges he had made against the Port Elizabeth business for expenses incurred in London, witness maintained that he had debited the business with very reasonable charges.

Sir H. Juta closed his case.

Mr. Upington read certain evidence

taken on commission in Johannesburg. Gustave A. Troye, mining engineer, stated that he valued the shares in the Douglas Colliery at 18s. per share. The plant, he found, was out of date, and he considered that the mine should be re-equipped to a great extent. He thought that in the past the company had been spoiling a good asset. He considered that £20,000 would be sufficient to re-equip the mine. William Frederick Morris, colliery manager in the Middelburg district, Transvaal, gave evidence as to the market for Colonial coal. Wm. English, now of Johannesburg, formerly employed by defendants as joint manager, had also been examined for plaintiffs.

Mr. Gardiner next read the evidence of Thomas Douglas, chartered accountant, Johannesburg, who valued the shares in the Douglas Colliery at 4s.; Charles R. Arburrow, civil engineer, Johannesburg; and Mr. Eggars.

Mr. Upington then read the evidence of Henry Adams Rogers, of the Witbank Collieries, and Mr. Gascoigne, mining engineer, formerly superintendent of the Douglas Colliery, the latter of whom said that if the colliery were in his hands he could make £400,000 to £500,000 before it was worked out.

Mr. Gardiner read the evidence of Arthur Crosby, the present manager of the Douglas Colliery, and Mr. McCallum, chairman of the Douglas Company, who said he would not give £50,000 for the property.

Mr. Schreiner, in argument, dealt with the question of whether Bracht should be paid 10 or 5 per cent. in relation to landed property. During further argument, he took up the matter of the New Brighton property, and submitted that it was not impracticable to partition the estate, developments, such as the railway servitudes, and so forth, notwithstanding. Bracht should, he contended, get his one-fifth undivided share in the property. Waite was entitled to a declaration of rights, and he should be paid out on a valuation of the estate. The defendants were not entitled to alienate this valuable property until they had satisfied Waite's rights. The whole correspondence, he submitted, showed that defendants had not got a separate right to deal as they pleased with New Brighton. Referring to the proposed reference of account to an arbitrator, counsel suggested that, as the points in dispute were large and important, each side should nominate a suitable person, say an accountant, and the Court should appoint a counsel of standing to decide the quasi legal questions. As to the Douglas Colliery shares, he should suggest that if the Court had any difficulty on the evidence on commission in deciding their value, a separate valuator should be appointed.

Buchanan, J., said he would first have to hear counsel for defendants on that point.

Mr. Schreiner went on to refer to the values of the Delagoa Bay property, which had been held by Hansen and Schrader. He urged that the foreshore concession should be treated as a definite asset of the Hansen, Schrader Co. Counsel also contended that defendants had no right to debit against the Port Elizabeth business, upon which plaintiffs claimed a percentage of profit, the Supererogation shares. As to the currents, he did not press that point very much, though he thought defendants should bear the loss if they sent an over-shipment of currents. He admitted that plaintiffs would be liable to a certain proportion of Mr. Hansen's private secretary's salary to be debited against their claims.

Sir H. Juta argued that the Colliery and Johannesburg and Delagoa Bay properties were not included in the agreement to allow 10 per cent. to Bracht, where "general business" was merely spoken of, and that Bracht was to have only 5 per cent. on the colliery shares or landed properties, though he had 10 per cent. on the general business. It was clear from the correspondence that it was intended that the term "general business," as used in the agreement, meant wool, produce, and feathers, and did not embrace the colliery shares and landed properties. As to the New Brighton property, he submitted that Bracht had not proved his claim that he was a joint purchaser. It was clear that that property was bought on behalf of Hansen and Schrader by Waite, and that the contract was as between the seller (Mrs. Berry) and Hansen and Schrader. He could not understand how defendants could be said to be acting in a *fiduciary* capacity for plaintiffs. Defendants must either have been buying for themselves or as agents. There was nothing whatever to show agency on the part of Hansen and Schrader. Afterwards the partners distributed percentages of interest to plaintiffs, who never were co-owners. That Waite bought on behalf of the firm was supported by the agreement between Waite and defendants, under which the former, as general manager, was debarred from purchasing property on his own account. With regard to the Delagoa Bay business, counsel contended that the plaintiffs had no right to any interest in the foreshore concession, as it went to defendants when plaintiffs had no right to any Delagoa Bay interests of defendants. As to the Colliery shares, his clients were prepared to offer 5s. 9d. to plaintiffs for their shares, otherwise the shares would be sold by public auction, in which case they would see whether plaintiff's valuation of 15s. per share was justified. In regard to the account, he

suggested that Mr. Syfret be appointed for the reference.

Postea (February 27th).

Buchanan, J., after giving judgment, ordered: That the defendant disclose and bring into account with the plaintiff, and the plaintiff is declared to be entitled to, Waite 15 per cent., and Bracht 10 per cent., in respect of all profits, shares in any company or syndicate, and any other valuable consideration received, or to be received by the defendants, or on their behalf in respect of the disposal of the landed property, and the general business and goodwill formerly carried on at Delagoa Bay; the plaintiff (in both cases) is declared entitled to one-fifth shares, and interest in the New Brighton property, and the defendants ordered to render true and correct account of all their dealings with and income derived from the said property, and to debate such account and pay the plaintiff his share thereof, and also pay to the plaintiff his fifth share of the value of the said property on the 31st December, 1903; that the defendants render a true and correct account of their dealings with the Douglas Colliery, and pay to the plaintiff 10 per cent. of the profits, if any, of the venture, and of the value of the said property or of the shares held therein; that the cost of or any loss or charge for certain shares in the South African Supererogation Company, Ltd., and in the shipment of certain currents referred to in clause 11 (sections 1 and 2) of plaintiffs' declaration is chargeable to the business carried on at Port Elizabeth, and that the sums of money mentioned in sections 3 and 5 of the said clause 11 of the declaration be referred for the settlement of the special referee hereinafter mentioned; that the value of the sub-lease, if any, held by the defendants' Johannesburg business before the 31st December, 1903, from the Delagoa Bay Agency Company, Limited, be brought into account; that the value of the New Brighton property and of the Douglas Colliery be ascertained in each case by an arbitrator to be agreed upon by the parties; that the said several accounts, when rendered, shall be referred to a special referee, who shall try and determine all questions arising thereon under section 21, Act 29, 1896; that failing an agreement by the parties upon the said arbitrators and the said special referee within one month, any of the parties to these suits shall be at liberty to move the Court for the appointment of such arbitrators and such special referee, or either of them, or for such other order to ascertain the values of any of the said properties, as the Court shall determine; that the accounts rendered by defendants be accepted as the accounts to be debated; by consent of parties, Mr. E. R. Syfret be appointed special referee; costs of action to be paid by defendants; as to costs of commission, no order, wasted

costs; all costs of reference to be dealt with by special referee; Mr. Bracht to be allowed witness's expenses.

[Plaintiffs' Attorneys: Van Zyl and Buisinné; Defendants' Attorneys: Reid and Nephew.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

GENERAL MOTIONS.

Ex parte JACOBS. { 1905.
Feb. 22nd.

Mr. Struben said that this matter had previously been before the Hon. Sir John Buchanan, and it was ordered to stand over for a further affidavit as to the disposal of certain land in the estate of the petitioner's wife. An affidavit was read from the auctioneer, which set out that the sale was well advertised, and the price, £1 3s. 6d. per morgen, he thought, was a very fair one. Petitioner purchased the property as executor dative in the joint estate of his late wife and himself, and he asked for an order authorising transfer of the landed property to himself in his individual capacity.

Order as prayed.

Ex parte THE GRAND JUNCTION RAILWAY, LTD.

Mr. Searle, K.C., moved for the confirmation of the liquidator's report, and for the fixing of a period within which all claims should be filed.

Report confirmed, and all other claims to be filed within two months from the present date.

CELLIERS V. HEINTJES.

Mr. J. E. R. de Villiers moved to make absolute a rule *nisi* calling on the respondent to show cause why he should not be interdicted from removing certain goods until the applicant was paid for rent in arrear.

Rule made absolute.

KING V. JOOSTE.

Mr. P. Jones moved for an order attaching certain ground, to found jurisdiction, pending an action for the recovery of £33 12s. 10d., for goods sold and delivered. The defendant was the owner of two blocks at East London, and he had left for Potchefstroom without paying his debts. The lots were valued at £2,000.

[Hopley, J.: I suppose one block would be sufficient for £33 12s. 10d.?]

Yes, my lord, we will take block 20.

[Hopley, J.: Isn't it usual to sue by edict in a case of this sort?]

Yes, my lord. I was going to ask for that.

Hopley, J., said there were sufficient facts set forth on which the Court would grant leave to sue by edict, and granted an order that lot 20 be attached. Leave granted to sue the respondent by edictal citation, and notice to be served personally, returnable 15th April.

Ex parte MOOS.

Mr. W. P. Buchanan moved for an order authorising the Registrar of Deeds to amend a certain plan and pass transfer of a road as land to one Arans, who had purchased the ground from the petitioner. A private road was shown on the sub-divided plan, and to meet the requirements of the Registrar, Arans and the petitioner had agreed to waive their right to that road.

A rule was granted calling on any person concerned to show cause by the 15th March why the Registrar of Deeds should not be authorised to pass transfer of the land shown in the general plan as a road to the said Arans, as land free of any burden or servitude as a road, one publication in the "Cape Times" and the "South African News."

Ex parte THE EXECUTOR OF THE ESTATE BANKS.

Mr. P. Jones moved for an order cancelling a certain bond for £1,100 on the estates of the late James Banks and Clara Banks. The petitioner sued in his capacity as executor dative in the estate of the late James Banks. The late James Banks and his predeceased spouse made a joint will, by which the estate was left to the two male heirs. During his lifetime James Banks passed a mortgage bond on the estate for £1,100, and afterwards he surrendered his estate, but there was no mention of the bond at the meeting of creditors. The bond was to be repaid in 1869, and it was after that Banks went insolvent, and the bond appeared to have been paid at some time or other.

[Hopley, J.: There seems to have been nothing heard of this bond since 1869, but don't you think there should be publication?]

Mr. Jones: I think so, my lord.

Hopley, J., granted a rule calling on all persons by the 15th April to show cause why the Registrar of Deeds should not be authorised to cancel the said bond, one publication in the "Graham's Town Journal" and one in the "Penny Mail."

Ex parte THE TRUSTEE IN THE
ESTATE MCCABE.

Mr. Close moved for an order expunging a certain claim in the insolvent estate of James McCabe, of Queen's Town, in which the petitioner was sole trustee. The insolvent put in a claim by his son for £98 10s. 4d., and on examination of the books, it was found that the claim had been entered up at a subsequent date. The insolvent was called on to give an explanation, but failed to do so. There was a dividend out of the claim for £65, and petitioner prayed that the amount should be devoted to: (a) payment of costs of this petition; (b) payment of all other costs incurred in connection with the matter; and (c) a division among the creditors *pro rata*. The trustee had repeatedly made efforts to find the insolvent, but failed to do so.

A rule *nisi* was granted calling on James William McCabe to show cause by the 15th April why a certain proof of debt filed by him in the estate of the insolvent should not be expunged, and on due proof that it is impossible to serve personally, one publication in a Queen's Town paper.

Ex parte THE EXECUTOR IN THE
ESTATE MOSTERT.

Mr. J. E. R. de Villiers moved for a rule *nisi* for the cancellation of a certain bond on the estate of the late Hercules Mostert, in which the petitioner was executor *dativo*. The deceased purchased certain land in the Cape Division in 1862, and passed a bond for £300 on the property. The deceased and the bond holder died shortly afterwards, and there was no trace of any interest having been paid, and the deed of transfer could not be found. By the will of the deceased his sister was appointed as sole heir, and she had signified her intention of selling the lots, but the bond would have to be cancelled before the sale could go through.

A rule *nisi* granted, calling on any persons concerned to show cause by the 15th April why the bond should not be cancelled, one publication in "Ons Land," "South African News," and the "Cape Times."

Ex parte MACCALLIUM.

Mr. P. Jones moved on behalf of the petitioner, Wm. Alexander Maccallum, sen., who was the father and natural guardian of Wm. Alexander Maccallum, jun., a minor son of ten years of age, for leave to dispose of certain property in Alice, which he had donated to his son. The property consisted of five acres of ground at Alice, with all

buildings and erections thereon, and it was bequeathed subject to the condition that the petitioner should have a usufruct during his lifetime. On the property there were certain licensed premises, known as the Royal Hotel, and the petitioner, holding adverse views to the liquor trade, had great objections to derive any profits from the sale of liquor. The premises were at present let at the monthly rent of £25. The petitioner had made repeated efforts to obtain a higher rent without success. A sworn appraiser had valued the hotel property at £2,270. Petitioner prayed for an order authorising him to dispose of the property and reinvest the money in good and sound security, or on first mortgage. The father of the petitioner made an affidavit giving his approval, but the Registrar of Deeds would not allow transfer, as the interests of a minor were concerned. The Master reported that, as the donor had signified his consent to the sale, he saw no objection to the application being granted.

[Hopley, J.: There is £300 a year coming from this property. How are you going to get £300 a year out of £2,270?]

Mr. Jones: I don't know, my lord. It may be that they are not prepared to accept that price.

[Hopley, J.: Here we have a minor interested in property bringing in £300 a year, and which will always bring in that income. You want to sell that for something else, because the father seems adverse to that class of property?]

Mr. Jones: If the £2,270 were put out on bond, there would not be rates and taxes to pay.

[Hopley, J.: They don't say they are paying rates and taxes now. Notwithstanding their conscientious scruples, I think the hotel property the more valuable.]

Mr. Jones: If there is to be any reduction in the income from any other property, the petitioner would be the sufferer during his lifetime.

[Hopley, J.: He would have the consolation of a good conscience. When the son comes of age, he may probably have very different views of the liquor trade.]

Mr. Jones: But the father now has the opportunity of shaping his mind.

[Hopley, J.: I think you might ascertain what they could get for this property. They say vaguely there is a good purchaser. I do not say that the applicant is a fanatic, but he holds very strong views. I think, in the interests of the minor, the Court should see that he gets a fair price. You can get a supplementary affidavit, and set forth what you can get for it. Why should the minor part with this good property? The old grandfather apparently had no scruples.]

Mr. Jones: Your lordship would not leave that matter to the Master?

Hopley, J.: You may mention this matter again. Let them put forth the supplementary affidavit to say what the ready purchaser will give for the property, as I shall be glad to know that before I give a decision in a matter of this sort.

VAN DRIEL V. VENTER AND NIEBERG.

Mr. D. Buchanan was for the applicant, and Mr. Close for the respondent. Mr. Buchanan said that the matter was standing over from November 2 last year, when a rule *nisi* was granted, calling on the respondents to show cause by the 14th November why the plaintiff should not be allowed to sue in *forma pauperis* for certain sums of money for extra work done and material supplied and damages. On the 14th November, the return day, counsel was present in Court to oppose this application, which had been standing over ever since. Now counsel moved that the rule be made absolute.

Mr. Close put in an affidavit by the respondents setting forth that the applicant was engaged to construct a bridge at Hope Town. The claim put forward was frivolous and vexatious, as they were in possession of a document of acquittance.

Hopley, J. said he did not think that the applicant could be allowed to sue in *forma pauperis* on such scanty information.

Mr. Buchanan: Would your lordship allow the matter to stand over for further information?

Hopley, J.: The matter may be mentioned again on satisfactory information being forthcoming by the 11th May, affidavits of such information to be supplied to the other side by May 9.

Ex parte KING BROS.

This was an application to have a rule made absolute declaring the petitioners entitled to certain lots of ground at Durbanville, which they and their predecessors in title had held in uninterrupted possession for upwards of thirty years.

This was the return day of a rule *nisi* calling on all persons concerned to show cause why these lots should not be transferred to the applicants. The petitioners were the registered owners of the farm Johannesfontein, of 162 morgen, which they acquired from a Mrs. Lawrenceson, who, in turn, acquired it from the insolvent estate of one Rowan. For upwards of thirty years no claim had been put in, and the petitioners and their predecessors in title had used it without hindrance from anyone, and paid the rates. The petition was supported by the evi-

dence of witnesses, who had lived at Durbanville for a considerable number of years. The municipal valuation of the farm Johannesfontein included the plots in question.

The affidavit of Rowan, one of the previous owners of the farm, set out that he was aware at the time that the lots, although he used them, did not belong to him. He ascertained this when he attempted to have an amended title of the farm.

The affidavit of the executor dative in the Estate Myburg, set out that he believed the lots marked blue belonged to Myburg, who twenty-five years ago left this colony, and went insane. A curator was not appointed to look after his affairs.

Mr. Searle, K.C., was for the applicants, Mr. M. de Villiers was for the Estate Wassefall, and Mr. J. E. R. de Villiers was for the estate of Meld van der Spuy Myburgh.

Hopley, J. said, as regards the Estate Myburg, the rule must be discharged with costs. With regard to the other land, the rule will be made absolute, but as regards the claims by the Estate Wassefall, the rule will be discharged, the costs to abide the action to be brought by the applicants. If they do not bring their action before next term, then they will have to pay the costs of this application.

REX V. JAN THOMAS.

Mr. Nightingale, moved, as a matter of urgency, and convenience, to have this matter tried at the Beaufort West Circuit Court.

Granted.

SUPREME COURT

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

ADMISSIONS.

{ 1905.

{ Feb. 23rd.

Mr. Uppington moved for the admission of Ernest Frederick Watermeyer as an advocate.

Application granted and oath administered.

Mr. W. P. Buchanan moved for the admission of Roderick N. R. Buchanan as an attorney and notary.

Application granted and oaths administered.

PROVISIONAL ROLL.

ALLEN, SHAW AND OTHERS V. COCHRANE AND FITT.

Mr. Sutton moved for the final adjudication of the defendants' estate as insolvent.
Granted.

SCHOLTZ V. VENTER.

Mr. Swift moved for the final adjudication of the defendant's estate as insolvent.
Granted.

B. LAWRENCE AND CO., LTD., V. GIBSON.

Mr. Russell moved for the final adjudication of the defendant's estate as insolvent.
Granted.

STAFFORD AND CO. V. DAVIS.

Mr. Gutsche moved for the final adjudication of the defendant's estate as insolvent.
Granted.

FRIEDLANDER AND DU TOIT V. GLASGOW.

Dr. Greer moved for provisional sentence on a mortgage bond for £100, with 6 per cent. interest from July, 1904, and that the property specially hypothecated be declared executable.
Granted.

GOVEY AND CO. V. LEVENSON.

Mr. M. Bisset moved for provisional sentence for £142 1s. 3d., with interest from 30th January, 1905, on a bill of exchange.
Granted.

GREEFF AND WALTER V. DU PLESSIS.

Mr. W. P. Buchanan, for the plaintiff, moved for provisional sentence for £300, less £174 paid on account, on a certain promissory note.

Mr. Close put in the affidavit of the defendant in which he denied that he was indebted to the plaintiffs in that sum, but on a temporary renewal note he was indebted to the plaintiffs to the extent of £85 10s. as a surety to a promissory note.

Maasdorp, J., said the documents put before the Court by the plaintiff were not altogether satisfactory, and provisional sentence would be refused with costs.

DUNN AND CO. V. TAYLOR AND STERNER.

Mr. Russell moved for the final adjudication of the partnership and private estates of the defendants.
Granted.

HAYWARD V. BROWNE.

Mr. Close moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment for £65 9s. 8d., with costs.

The defendant appeared and said he was unable to pay. He had no means until his estate was wound up, and then he would meet the account. The estate, he thought, would realise at least £2,000, but he was unable to raise any money at present.

Order granted, execution suspended until this day fortnight.

DE WET V. KALTWASSER.

Dr. Greer moved for provisional sentence for £300 on three mortgage bonds, with interest and costs, and that the property specially hypothecated be declared executable.
Granted.

ESTATE FOSTER V. SOLOMON.

Mr. Sutton moved for provisional sentence for £800 on a mortgage bond, with interest, less £12 10s. and £12 4s. paid on account, and that the property specially hypothecated be declared executable.
Granted.

MACLEOD V. WERTH.

Mr. W. P. Buchanan moved for judgment for £50 on a mortgage bond, with interest, and that the property specially hypothecated be declared executable.
Granted.

TURNBULL AND BIGGOTT V. MULLER.

Mr. Sutton moved for a provisional order of sequestration granted in this matter to be discharged.
Granted.

PHILPOT V. HOLZRICHTER.

Mr. W. P. Buchanan moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment. The defendant was previously before the Court, and counsel now put in an affidavit of the applicant that the defendant was employed at the Thatched Tavern at a salary of £1 15s. a week and his food. Since then the defendant had gone through the form of mar-

riage with the applicant's wife, who was divorced on account of the defendant, who was co-defendant, and against whom £200 damages was granted.

The defendant went into the box, and swore that he had no means excepting £1 15s. a week, which he received from "Ye Olde Thatched Tavern" as a billiard marker. He received his food there, and paid 15s. a week for his lodgings.

Examined by Mr. Buchanan: His wife had been sick for the past six weeks. The 15s. included rent for his wife. Before the case came on he had a good deal of money, which he spent freely. He thought his wife would be ill again, although she was at work that day. His employer was good enough to advance him money when his wife was sick. If he could possibly do it, he would make both ends meet, and keep his wife on 25s. a week.

Order granted, and execution suspended so long as the defendant pays £1 a month, first payment on the 1st March.

ILLIQUID ROLL.

PRIZE V. AREND. { 1905
{ Feb. 23rd.

Mr. P. Jones moved for judgment under Rule 329d, for an order of transfer which had now been passed, and counsel asked for costs.

Granted.

WIENER AND CO., LTD. V. FRIEDMAN.

Mr. Sutton moved for judgment under Rule 329d, for goods sold and delivered, with costs.

Granted.

COLONIAL GOVERNMENT V. BOWLING.

Mr. P. Jones moved for judgment, under Rule 329d, for £15, rent due on certain refreshment rooms, with costs of suit.

Granted.

RIPLEY V. GIBBONS.

Mr. P. Jones moved for judgment, under Rule 329d, for £240, being the purchase price of 15 mules bought by the defendant.

Granted.

STARK AND CRIBBIN V. BLACK.

Mr. Swift moved for judgment, under Rule 329d, for £76 10s. 2d. and £92 16s. for work done, and £15 2s. 6d for extras, with interest and costs.

Granted.

ESTATE MARTIENSSEN V. WHITMORE.

Mr. Sutton moved for judgment, under Rule 319, the defendant having been barred from pleading, for £40 for rent, with interest and costs.

Granted.

PRICE V. FARMERS' CO-OPERATIVE COMPANY.

Mr. Van Zyl moved, under Rule 329d, for judgment for £150, balance of account for goods sold and delivered, with interest and costs.

Granted.

PRICE V. DOWELL.

Mr. Burton moved for judgment on a promissory note for £62 17s. 5d. for board and lodging for the defendant and his friends.

Mr. Close, for the defendant, put in an affidavit in which the defendant admitted his signature, but denied that this amount was owing to the plaintiff. The promissory note was for board and lodging for himself and friends. Thereafter the plaintiff unlawfully compelled them to leave the hotel, and detained deponent's personal goods.

Mr. Burton put in a further affidavit by the plaintiff, in which she denied that she ordered the defendant to leave the hotel. He and his friends left voluntarily on the 16th January. She was detaining the goods on an agreement with the defendant.

Maasdorp, J., granted provisional sentence for the amount claimed, less £9 in consideration of board and lodging the defendant did not obtain, with costs.

GENERAL MOTIONS.

ESTATE NYMAN V. BECKETT. { 1905.
{ Feb. 23rd.

Mr. Close, for the defendant, moved, in terms of a consent paper, for removal of the trial to the Oudtshoorn Circuit Court.

Granted.

WILSON AND CATHCART V. YOUNG.

Mr. P. Jones asked leave to mention this matter, which was down for March 2, and moved to have it removed from the roll to the reference of an architect on a consent paper. The parties could not agree on an architect, and counsel suggested Mr. John Parker.

Order granted in terms of consent, Mr. Parker appointed architect, the question of costs to stand over.

Ex parte MILLER.

Mr. P. Jones moved to have a rule nisi granted under the Derelict Lands Act. made absolute.
Rule made absolute.

Ex parte DOYLE.

Mr. Swift moved to have a rule nisi granted under the Derelict Lands Act. made absolute.
Rule made absolute.

Ex parte SNODGRASS.

Mr. P. Jones moved to make absolute a rule nisi granted under the Derelict Lands Act. made absolute.
Rule made absolute.

PICKARD V. THE S. A. TRADE PROTECTION SOCIETY AND ANOTHER. { 1905.
Feb. 23rd.
" 25th.

Label—Privilege—Legal malice—Damages.

The defendants had, without express malice, falsely stated in a paper privately circulating among some 3,000 subscribers, that a judgment had been obtained against the plaintiff in a certain R.M. Court. They pleaded the absence of malice and privilege.

Held, that as they had been guilty of legal malice and as the statement in their paper was not privileged; the plaintiff was entitled to recover substantial damages, even though he had not proved special damage.

This was an action brought to recover £1,000 damages for defamation of character by reason of a statement made by the defendants in the "South African Mercantile Gazette."

The declaration set out that the plaintiff was a contractor and hotel-keeper of Oudtshoorn, the first-named defendant a duly incorporated company, and the second defendants printers, carrying on business in Cape Town. On the 26th March, 1904, the "South African Mercantile Gazette" wrongfully, falsely, and maliciously caused to be written, and the second defendants wrongfully printed, that a provisional judgment had been obtained against the plaintiff by one F. W. Nunn for £41 17s., whereas the matter was referred to arbitration.

The plea set out that the paper was not sold or available to the public. It was only given to business men on condition that the information would be regarded as private and confidential.

The words were printed by error and published without malice. An apology was published in the next issue. If the plaintiff was pressed for his accounts it was not through the paragraph in question.

Mr. McGregor (with him Mr. Bisset) was for the plaintiff, and Mr. Searle, K.C. (with him Mr. W. P. Buchanan) was for the defendants.

Wm. Henry Pickard, proprietor of the Imperial Hotel at Oudtshoorn, stated that in March, 1904, he had a contract for the building of the Standard Bank, and since then he had taken contracts. In a paper it appeared that in March, 1904, he was sued for certain money, but that was not so, as the case was referred to arbitration. The other side had to pay costs, witness only paying £32 out of a claim for £41. There was no tender, as witness did not get a specified account. The plaintiff was asked for a specified account, but he did not supply it. He heard first of all from the Standard Bank that there was a provisional judgment against him. The manager of the bank had a letter which came from the general manager's office. At that time witness had an overdraft at the bank. Witness then got a copy of the paper, and he was positive that the statement did him an immense amount of harm, as several people wanted to get paid at once. Witness instanced a couple of firms that changed their style of business. Instead of thirty or sixty days one firm drew at sight, which was not in accordance with the usual custom of dealing. A firm at Mossel Bay absolutely refused to assist him without the cash.

Cross-examined by Mr. Searle: He might have had financial assistance from his son-in-law in May. In one case a firm drew on him because his account was outstanding for some months. He had no particular reason of not mentioning in his affidavit that Parker, Wood and Co. were pressing him. At that time money was very tight, the bank being anxious to get in their money. Only on two occasions, once before and once since this action, had he paid on a legal demand. It was because a young attorney wished to make a mark for himself that he got these letters over small amounts. During the election he asked Mr. Vincent to give him an extension. He could overdraw with the bank to the extent of £13,000. He took the manager of the bank to the attorney and explained the matter.

By the Court: If they had offered him £200 and apologised in the other papers he would have been satisfied.

Douglas Alexander Smith, of the Standard Bank, stated that his attention

was drawn to the paragraph in question, and in consequence of that the bank wrote to the Oudtshoorn branch.

Mr. Searle: I suppose you saw the apology also?—Yes.

Mr. McGregor closed his case.

Thus, J. Kannemeyer stated that his firm at Oudtshoorn was the agent for the defendants. The first he heard about the matter was when the defendant society asked him if the report was correct, and witness then found out the mistake, and explained to the plaintiff how it occurred. He thought the matter had dropped until he had seen the case set down. People were being sued right and left at that time, and the banks were refusing to discount even to wealthy men. The plaintiff was somewhat dilatory in paying his accounts.

Cross-examined by Mr. McGregor: He was not the local attorney in the case.

Alfred Pocock, articleed as a clerk to the last witness, stated that he was in the habit of copying judgments for this paper. On that particular day, Mr. Archibald copied the judgment, and witness sent it off to the society's office.

Wm. Archibald stated that his principal was the agent for a gazette similar to that of the defendants. He was doing both on the week in question, and witness made a mistake in the case of the plaintiff. Unfortunately following down the list of provisional cases he put "ditto" to the case of Pickard.

Re-examined by Mr. McGregor: The same day that he copied the judgment he found out that he made a mistake, but he did not mention it to Pocock.

Alexander Gill, one of the managers of Prince, Vincent and Co., and a subscriber to the "Gazette," stated that the plaintiff was a rather difficult man to get money out of; he paid only at the last moment. As a rule the plaintiff paid after due date.

Re-examined by Mr. McGregor: He would be quite satisfied if all business men paid on a little persuasion.

Leopold Krammer, a partner in the firm of the Castle Wine and Brandy Co., stated that at the beginning of last year the plaintiff owned certain moneys, and they received £40 in May.

James Bolan, manager of the defendant society, stated that in all the copies of the publication there were the words "private and confidential," and it circulated among subscribers only. The "Gazette" was not sold at any public place.

Cross-examined by Mr. McGregor: All the subscribers signed was an ordinary form of order.

Mr. Searle closed his case.

Mr. McGregor (for the plaintiff) argued that although a full and correct report of judicial proceedings is privileged, no privilege can be claimed for a report which is admittedly false. The

rules of law as to privilege are not to be extended—*Davis v. Shephard* (55 L.J., P.C., 51). In this case it could not be contended that information (even if it had been true) given to 3,000 subscribers to a paper very few of whom had ever heard of the plaintiff, was necessary in the public interest. His financial position only concerned his actual creditors. It is a serious matter to impute an unsound financial position to a business man. Such an imputation must affect his credit and thus injure him in his business. *Odgers*, p. 29 and 87, *Shepherd v. Whittaker* (10 C.P., 502). Whether the defendants believed the truth of what they stated and acted without express malice or not are considerations which have no bearing on the issue (*Capital and Counties Bank v. Henty* (7 Ap., 787). The fact that the Bank called upon plaintiff for an explanation shows that the false statement made by the defendants was calculated to injure him. He offered to accept a reasonable apology, but that tendered by the defendants was wholly inadequate. I submit he is entitled to substantial damages.

Mr. Searle, for the defendants, cited a case against "Stubbs's Gazette" in the English Courts, where the "Gazette" had taken a minute from the judgment which was incorrect, and it was held that the communication was privileged. These societies, counsel contended, existed to prevent fraud, by protecting merchants, and to show how far the Court would go in supporting privilege, there was the case of *Thompson v. Dushwood*, in which a defamatory communication was put in a wrong envelope, and yet it was held to be privileged, although that judgment was afterwards disapproved of. Another case was that of *Waller v. Loch* (51 Q.B., 274), where the plaintiff sued a charity organisation society for having told another person that she was a person unworthy of receiving charity. The plaintiff was getting up subscriptions, and someone who knew her gave the unfavourable report, and it was held to be absolutely privileged as long as malice was disproved, quite independently of whether the statement was true or not. Counsel proceeded to quote several instances of the meaning of privileged communications, and contended that express malice must be proved. The facts were that this society existed for the purpose of protecting merchants and others—

[Maasdorp, J.: The question is whether they exist for that purpose or some other—to draw the five guineas from any number of subscribers they can get.]

Mr. Searle: It is always taken that these societies are for the protection of the mercantile community.

[Maasdorp, J.: The object of the company is to make money, I suppose? I

don't say there is any harm in that, if they do their duty.]

Mr. Searle contended that in all the cases he referred to, it was recognised that these black lists were of great assistance to the mercantile community, who could hardly get on without such societies. It might have the object of making money, but it had a public interest as well to perform. A copy of the paper containing this incorrect statement, which was made by the error of a clerk in the office, who copied the list wrongly, was shown to the plaintiff, and when he complained, the matter was set right at once. The bank did not alter its course of business with this man in any way, and on the point of damages, counsel strongly urged it was not a case for any damages whatever. The plaintiff did not call either of the gentlemen whom he alleged had altered their course of dealing with him on account of anything appearing in this periodical. The mere fact that these two persons were subscribers proved nothing, as there was a witness for the defendants, who said he was a subscriber, and never saw the statement at all. It was almost idle to discuss special damages in a case of this sort. The plaintiff got an apology, and a promise that this matter would be set right as soon as possible. It was a pure technicality on which the defendants were brought into court, and as the error was rectified before any harm was done, counsel could not help thinking that it was a trumperty and unsubstantial case.

Mr. McGregor having been heard on the question of special damages,

Maasdorp, J.: The plaintiff seeks to recover damages from the defendants by reason of a false and injurious statement contained in their paper, injuriously reflecting upon the credit of the plaintiff as a trader. The defence set up in the case is that the communication is privileged. Now, it seems to me that the statement contained in the paper was false, and injurious to the credit of the plaintiff, and consequently the action for defamation can be based upon such a false and injurious statement. It was also proved satisfactorily that the defendants, in making the publication, were not actuated by any express malice or ill will. If the defendants succeed in showing that the communication was privileged, they would be entitled to judgment, notwithstanding the fact that it was incorrect. On the other hand, if the defendants fail to prove this privilege, then upon the finding that the statement was false and injurious, legal malice will be inferred. The main question to be decided in this case is whether this was a privileged communication. It seems that the defendants published this paper, the “South African Mercantile Gazette,” for which they collect a good

deal of information in respect of the financial position and standing of traders in this colony. They issue this paper to their subscribers, and the object in collecting and publishing this information is to keep the subscribers, who may be taken also generally as traders, informed of the position of traders and other dealers throughout the country, to enable them to protect themselves against dealing with persons of doubtful credit. It seems that in this case there are 3,000 subscribers, and each subscriber pays £5 5s. per annum. The defendants published in their journal a statement which in fact amounts to an allegation that, on the day mentioned, a provisional judgment was given at Oudtshoorn in the Magistrate's Court. The most the defendants' statement would convey is the meaning suggested in the innuendo, that a trial took place upon an action for debt in the Magistrate's Court, where the defendant was in default, and judgment went against him by default. As a matter of fact, it appears that the plaintiff had been sued in the Magistrate's Court, but upon exception taken by him that the matter was beyond the jurisdiction of the Magistrate, the case was dismissed. That is a very different state of affairs from an allegation that he had judgment against him. Upon this publication being brought to the notice of the plaintiff, in April, 1904, by the manager of the Standard Bank at Oudtshoorn, he communicated with the defendants, and complained of the injury done him. Upon this communication in the newspaper being brought to the notice of the plaintiff by the bank, he communicated with the defendants, demanding reparation for damages. An answer was written on the 28th April, stating that the defendants admitted their mistake, and in the next issue of their paper, which would not be issued until 7th May, they intended inserting an apology. In the issue of the 7th May, in a foot note appearing under the column where judgments are entered, an explanation is given, and it amounts to this: “We regret through an error in our issue of 26th March, under the heading: Civil judgments, Oudtshoorn, in the matter of *F. W. Xuma v. Pickard*, for £41 7s., on account of work done, it appeared that judgment provisionally had been given for the plaintiff, with costs. This should have been an exception taken to the summons, on the ground that the amount involved was beyond the jurisdiction of the Magistrate. The exception was sustained, with costs. We make this insertion, and tender our apologies for having occasioned Mr. Pickard any inconvenience and annoyance.” The plaintiff was not satisfied with the explanation and apology, and continued to press the defendants for further amends; and in a letter of the 4th July, from the defendants to the

plaintiff, they conclude as follows: "We are of opinion that the attached slip does away with your claim, as being wilful and malicious." Thereupon proceedings were taken by the plaintiff. Now the question to be decided is whether the communication made by the defendants to the subscribers of this paper is privileged, and whether that privilege consequently grants them immunity from damages, even though it should appear that the communication was false. The general principles upon which these cases are generally decided will be found in Odgers, on page 248: "Impartial and accurate report in any proceedings in a law court is privileged, unless the Court itself has prohibited the publication, or the subject matter of the trial be unfit for publication." Further on, he says that "a report must be an impartial and accurate one, of what really occurred at the trial." Then the further principle is of most importance in this case, and upon it this case hinges. It is stated in the following words: "Where the defendant has an interest in the subject matter of communication, and the person to whom the communication is made has a corresponding interest in such case, then communication honestly made is privileged by reason of the occasion." Now the first privilege spoken of, that of communicating the proceedings in a court of law, is such as the defendant cannot now avail himself, because he did not give an accurate account of the trial. He gave an incorrect and false account. Therefore the privilege of communicating to the public proceedings of the court of law will not be available to him. Then the question arises, in how far the case comes under the other principles laid down, where there is a company interested, one party may communicate information to another, and be exempt from liability, so long as the communication is honestly made. A number of cases have been cited bearing more or less directly or indirectly on this case, but it was necessary, in order to find a case almost exactly in point, to go to the Supreme Court of New Jersey; and Mr. Searle has criticised the judgment given in that case, in which there was a difference of opinion. Even in appealing to that case, he does not appeal to the judgment of the Court, but rather to the opinion expressed by the minority of the dissenting judges. In this case also, a false communication had found its way into the paper of a society similar to that of the defendants, and the judgment of the Court was to the following effect: "The publication by a mercantile agency of a notification on a sheet which is sent to its subscribers, irrespective of their interest in the plaintiff's standing, is not a privileged communication, and the proprietors are liable for a false report of the plaintiff's actual condition in such publication."

The dissenting minority of judges held there was a sufficient interest in the subscribers to this paper to know the position of every trader throughout the whole of the United States of America, and consequently such communication would be a privileged communication. But that view was not adopted in the judgment of the Court. Even a judgment of one of the dissenting judges is in an important respect qualified at the conclusion of the judgment, in which appears these words: "In my opinion, the defendants, in furnishing information to the subscribers under the conditions imposed, are not subject to the presumption that they were moved by malice, and I therefore vote to reverse the judgment below." The conditions imposed were these: the paper was issued to subscribers only on entering into an agreement that they would not divulge the contents of it. The dissenting judges, in holding there was a common interest, thought it necessary to guard their opinion by saying it was safeguarded by a promise not to divulge. The judgment of that case, if it was adopted by this Court, would be available to the plaintiff. In this case also a communication was made to 3,000 subscribers, and it is quite clear that the vast majority of these subscribers had no special interest in the financial standing of the plaintiff. Therefore, the dissenting judges held that every trader is interested in the position of every other trader in the whole of the United States of America, but if that wide and liberal construction is allowed in a matter of privilege, I don't see why it should not be extended by holding that every member of the community may at some time or other come into contact with some trader, and be entitled to be informed of his position, and every newspaper would be entitled to inform every member of the community how every trader in the community stood. That contention cannot be upheld by the cases which have been cited by Mr. Searle, which go no way near extending the privilege, so far as it would have to be extended in order to protect the defendants in this case. I hold, therefore, that this is not a privileged communication, and in the absence of privilege it appears that a false and injurious statement was made by the defendants of the plaintiff, and consequently the Court must infer what is termed legal malice in this case. For this injury, the plaintiff would be entitled to some compensation. Now it seems to me that this is by no means a very serious case, and it is a pity it should have gone as far as it has done; but I can only attribute that to the position taken up by the defendants. They had done the plaintiff an injury, and the plaintiff demanded reparation, as is generally done, in a heavy sum of damages.

That is very often met by the defendant taking all means possible in his power, to correct the wrong impression conveyed by a false publication, by giving a correction as much publicity as possible. However, they in an obscure footnote put an explanation in their own paper that cannot be considered sufficient by the plaintiff. When the plaintiff insisted upon further amends, he received a letter from the printers, in which they stated: "We are of opinion that the attached slip does away with your client's claim, as being wilful and malicious." They simply take up the legal position, as they did not act maliciously, the plaintiff could have no case to proceed upon. The position they ought to have taken up was to make amends for the injury as far as possible, and they made no attempt to do so. Then, again, their plea is one which certainly cannot commend itself as being a position taken up by the party injuring another towards an injured party. They admit in their plea the incorrectness of the statement in their paper, but they proceed in so many words to say we were, after all, not so very far out in what we said, because, as a matter of fact, the debt was due, and in arbitration an award was made against the plaintiff. Here again I think they went much too far. They did not state the circumstances under which this took place, and consequently the plaintiff was bound, considering the attitude taken by the defendant, to come into court and seek to establish his position by a public inquiry and also recover damages if he was entitled to such. These proceedings could have been prevented by the defendants taking up a more considerate position. Notwithstanding that, I don't think any great injury has been done to the plaintiff in this case. It is quite clear that his credit as a trader was injuriously affected to some extent and the mere fact that the bank sent to him to make an explanation of his position was sufficient to show that a financial institution would have altered their course of dealings unless a satisfactory explanation was made. I am of opinion, upon the authorities which have been cited, that when a trader's credit is affected by a false statement of the nature in question that he is entitled for the injury to general damages, and even if there is no proof of any special damages the plaintiff is entitled to some damages. He has proved he was injured, but as to the exact amount there is no evidence before the Court. Under all the circumstances, if the Court awards him a sum of £20 damages in this case it will meet the justice of the case. Judgment will be given for the plaintiff for £20 with costs, with the plaintiff allowed costs as a necessary witness.

[Plaintiff's Attorneys: Tredgold, McIntyre, and Bisset; Defendants' Attorney: W. K. Baxter.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

GENERAL MOTIONS.

Ex parte THE ESTATE (1905.
HOUGAARD. (Feb. 24th.

Mr. Van Zyl moved on behalf of the petitioners, two of the largest creditors in the insolvent estate, for the appointment of a provisional trustee in order to protect the goodwill of the business, which consisted of a butcher's shop at Aliwal North.

Order granted. Mr. Nicholas Smuts, of Aliwal North, appointed as provisional trustee.

Ex parte HEFORTH, LTD.

Mr. Van Zyl moved, on behalf of the petitioning creditors, for the appointment of a provisional trustee, in order to carry on the business at the Adderley-street tea-rooms. Counsel suggested the appointment of Mr. A. T. Hennessy.

Order granted. Mr. A. T. Hennessy appointed as provisional trustee.

TRIAL CAUSE.

GIBBS V. THE B.S.A. ASPHALT COMPANY.

Sale and purchase.

This was an action to recover £130, being the purchase price of a stone-breaking machine, £18 the price of a screen, and the price of two plates sold to the defendants.

The declaration set out that the plaintiff was a mechanical engineer and proprietor of the Britannia Works at Observatory. On the 14th July the plaintiff supplied to the defendants one 12 by 7 Simplex Stone Breaking machine for £130, the terms being £65 paid at the end of July, and the balance at the end of August. About the 21st and 28th July plaintiff sold to the defendants two plates, and it was agreed that the plaintiff should order a revolving screen from England, and supply it to the defendants for £18. In the month of September plaintiff tendered the screen, but the defendants refused to accept it. Plaintiff claimed £130 for the machine, £18 for the screen and the price of the plates.

The plea admitted the formal allegations, but set out that the machine was incapable of crushing four tons of stones per hour as contracted for, and the plaintiff had failed to remedy the defective parts. The defendant company tendered the machine and, by reason of hindrance to them in contracts, they claimed in reconvention damages for £150.

Mr. McGregor (with him Mr. P. Jones), was for the plaintiff, and Mr. Upton (with him Mr. Van Zyl), was for the defendants.

John Henry Gibbs, plaintiff, stated that he was a mechanical engineer of twenty-eight years' standing, and proprietor of the Britannia Works at Observatory. The defendants saw the machine on the 13th July. It was a Standard machine, and described in the catalogue book as made by Mason and Co., of Leicester. The defendants agreed to take the machine, and asked plaintiff to put his terms in writing. The machine was not in a defective condition on the day it was delivered. Several times afterwards he saw the machine, and it worked all right. The defendants were instructed to erect the machine on a good level foundation, and the bearings must be kept tight. On the 15th July he saw the defendants' engine driver actually loosening the bearings, and witness warned him that he would ruin the machine. Subsequently he found the machine out of the level, and a small crack in the boss of the flywheel, which had been caused by one of the keys being screwed too tight. On the 4th August Mr. Allen, who bought the machine on behalf of the firm, expressed surprise that witness had not been paid. There was no complaint made to him about the machine up to the time he received the letter of demand. The machine was not equipped for granulating; witness could not say whether the defendants granulated or not. When the defendants instructed him to cable for a screen on the 21st July, there was no complaint whatever about the machine. He had disposed of similar machines to other parties, and there were no complaints. The defects would be caused by improper handling.

Cross-examined by Mr. Van Zyl: Mr. Allen did not specify any capacity that would be required for the machine; he saw it stated in the catalogue that it would crush four tons an hour.

Mr. Allen said the machine was rather small, but the witness did not guarantee that it would crush four tons an hour. Witness saw the machine started, but he took no part in working it. A new plate was sent for on the 21st July, but any machine was liable to break a plate. The shaft was bent through the defendants working the machine with the broken plate. If the machine were

put in proper condition it would do the work it was catalogued for.

Wm. Hansen, builder and contractor, said he had a smaller size of the same machine supplied by the plaintiff, and it always worked satisfactorily.

James Garvey, mechanical engineer, Woodstock, saw the machine working after it had been at work for about a week. The shaft was bent, and the crusher consequently could not turn out so much work as it otherwise would. The bearings were moving, whereas they should have been tight. The engine was a second-hand one, and had no governor.

Alexander Drassy, contractor, described the working of the machine by the engine. The engine used to race, and shook the machine all to pieces.

Alex. Grassick, who selected the machine, thought it was in perfect working order when delivered. There was special fitting for granulating work. The supply of coal was not by any means satisfactory for the engine. Now and then they got a bag of coal, and for a fortnight they might receive none.

Cross-examined by Mr. Van Zyl: He was formerly sub-contractor to the B.S.A. Co. He was not dismissed from the defendant company. He did piece-work for them under contract. The City Engineer refused to pass his work, and in consequence of that witness gave up the contract. The machine was bought on the understanding that it would do something like what was credited to it in the catalogue. The failure of the machine was principally due to the engine and the unsatisfactory nature of the foundation. Witness did not interfere with the construction of the foundation. On the 8th August he wrote complaining of the machine, but he mentioned nothing about the engine or the foundation. If he adjusted the machine to crush to a quarter of an inch he would get four tons an hour out of it.

Re-examined by Mr. McGregor: What he meant by saying that the crusher was inadequate was that it was really too small for the way in which he was instructed to carry out the contract.

Mr. McGregor closed his case.

Andrew Allen, managing director of the B.S.A. Co., stated that the purchase was made on the 12th July, and the terms fixed up afterwards. The plaintiff guaranteed that the machine would crush four tons an hour, and to convince the defendant he produced the catalogue and letters from people who had experience of the same class of machine. Witness had no special knowledge of the machine. The plaintiff was asked to be present at a trial test, but he did not seem anxious to come. The same day that the plate broke a complaint was made to the plaintiff, who sent a new one to replace the damaged one.

The plaintiff promised to put the shaft right. Shortly after the plate broke a complaint was made to him about the fly wheel. It would be hard to say whether the crack was old or not, as it had been painted over. When the fly wheel was out of order it was a dangerous thing to work the machine, and plaintiff, on witness's request, promised to supply a new wheel. Witness was determined to give the machine every chance. Witness was still prepared, if the plaintiff could prove that the machine could turn out anything like he said, to accept it. The machine was no good to them whatever. As a matter of fact, they had to hire another crusher to carry out the contract.

Cross-examined by Mr. McGregor: He did not think that it was a singular coincidence that his first complaint in writing was sent after he received the letter of demand. He did not think it necessary to make his complaints in writing, as he trusted Mr. Gibbs. He didn't know that the granulating process could only be done by special equipment. The plaintiff told him that he could use the machine for granulating in the meantime while they ordered the granulating jaws from England. It was Mr. Gibbs who should have tested the foundation. When witness purchased the machine the plaintiff agreed to see the machine in proper working order. The supply of coal, as far as he was aware, was not defective. The crack in the fly wheel he thought was due to a flaw in the casting. His attention was not drawn to the bearings of the machine being too loose.

The Secretary of the B.S.A. Co., Mr. Davies, stated had they been able to have a sufficient supply of stone the contract would have been finished before the wet weather set in.

Cross-examined by Mr. McGregor: Witness never told Mr. Gibbs that he was distinctly having the plate as a gift, but he understood from the plaintiff that he would replace the plate. Witness refused to pay for the machine on account of the defects. The plaintiff merely said that he would go to his attorney.

Irvine Thorpe, in the employ of the defendant company, stated that he had worked with stone crushers for a little time, but he had a great deal of experience of engine work. He worked the stone crusher with an engine that was in practically good condition. The engine was without governors, but that omission would not create any great damage. The plaintiff gave full instructions as to the erection of the engine. Two men and two men more could not move the machine, and the bearings were so stiff that the belt was thrown off. Witness noticed a flaw in the plate, which was not exactly broken off, but pretty near. The plaintiff said he would send a new shaft. The machine could

not give a good ten minutes' run. What she turned out was nothing near the four tons an hour. The foundation was quite satisfactory; the plaintiff never made any remark about it.

Cross-examined by Mr. McGregor: He was there when Garvey inspected the machine, and when he was there the bearings were slack. The plaintiff did not say that the foundation was to be kept level and the bearings tight. Before the plaintiff complained witness had to work on an unlevel foundation and slack bearings. A couple of days after the plate was cracked he noticed that the shaft was bent.

Harry Wm. Miller, engineer, who inspected the machine, gave it as his opinion that the machine as it stood could not crush four tons of stone in an hour. Governors on an engine were an adjunct, but not essential where there was a skilled driver. The machine was altogether too small to crush to a quarter of an inch.

Cross-examined by Mr. McGregor: If the machine could do what it was catalogued to do he would be surprised.

By the Court: It was not supposed to be a machine that should be mathematically levelled up. He did not think it a serious thing to allow the engine to run without governors.

The Superintendent of Works at the Newlands Reservoir said he had about three continuous years' experience of stone crushing, and that the machine in question could be used for granulating. That would not injure the machine. The machine he did not consider capable of putting out four tons an hour.

Cross-examined by Mr. McGregor: He had no experience of Mason's machines. An ordinary intelligent workman should be able to work the machine. It was very advisable to have governors on an engine. He would not call it careless to run without a governor.

Wm. Arthur Pallison, civil engineer, stated that he had many years' experience of working stone crushers. On several occasions he had used an engine without governors, but he preferred to have them where he had not got a thoroughly trustworthy man. The machine in question had been superseded by several other machines.

By the Court: The work of the machine was erratic, but he could not say when he saw it work whether the shaft was erratic or not.

Mr. Van Zyl closed his case, and was heard in argument on the facts. Without calling on Mr. McGregor.

De Villiers, C.J., in giving judgment for the plaintiff, with costs, said he was satisfied there was no contract on the part of the plaintiff to see to the fixing of the machine before it was started, and therefore he could not be held responsible for any defect. The defendant did not, after a reasonable time, give notice of the defects to the plain-

tiff, and the defects could be fully explained by the manner in which the machine was handled after it got into the possession of the defendant.

[Plaintiff's Attorneys: C. E. P. Hughes; Defendant's Attorneys: Van Zyl and Buisinnè.]

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

GENERAL MOTION.

Ex parte THE TRUSTEE IN { 1905.
THE INSOLVENT ESTATE OF DAVID ISRAELSON. { Feb. 25th.

Mr. Searle, K.C., moved in terms of consent for leave to have the case against Harris and Black set down for trial as soon as possible during this term, as large expenses were accruing day by day.

(Case set down provisionally for March 6th; costs to be costs in the cause.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPELEY.]

ROBERTSON V. HOLT AND { 1905.
HOLT. { Feb. 25th.
Mar. 2nd.

Traveller—Contract of service—
Travelling expenses—Medical attendance.

This was an action brought by John Robertson, commercial traveller and commission agent, of Bloemfontein, and late of Port Elizabeth, against his late employers, Holt and Holt, of Port Elizabeth, to recover the sum of £124 17s. 7d., balance of travelling expenses, etc.

Plaintiff, in his declaration, stated that he had been employed by the defendants as a traveller under an agreement which expired in April, 1904. He prayed for judgment (1) for the following sums which he said were due and owing to him by the defendants: £32 15s. 8d., balance of unpaid travelling expenses, including a sum of 12s. 6d. a day incurred by the plaintiff in the de-

fendants' business at Bloemfontein; £13 4s. hotel expenses, incurred at Heilbron; £64 6s. 8d. commission on goods sold; £14 11s. 3d., salary from the 1st to the 21st April, 1904; (2) interest *a tempore morae*; (3) alternative relief; (4) costs of suit.

Defendants, in their plea, said that from the sums claimed by plaintiff there should be deducted sums of £96 12s. 6d. hotel expenses wrongfully charged, and £13 4s. hotel expenses claimed that would not be paid, and other sums which extinguished the amount claimed by the plaintiff. They prayed that the claim might be dismissed with costs. For a claim in reconvention the defendants said that on a true and correct account between the parties, as furnished to the plaintiff, there remained a balance in their favour of £52 13s. 8d., for which sum defendants prayed judgment, with costs.

Mr. W. Porter Buchanan was for the plaintiff; Mr. Close (with him Mr. Pyemont) was for the defendants.

The plaintiff said that he came out about four years ago upon a three years' agreement entered into with the defendants in England. His salary as stipulated by the agreement was £250 a year, and by arrangement on his arrival, he was also paid a commission of 1 per cent. on cigarettes, and 2½ per cent. on soft goods. He was allowed travelling expenses except when in Port Elizabeth. The defendants' principal business was at Port Elizabeth, they also had branches at Kimberley, Johannesburg, Durban, and Cape Town. He was six months in the office and he then went on the road. While in Port Elizabeth he had £20 16s. 8d. a month, and he was allowed £2 5s. a week expenses, and a pony and trap. He was in Port Elizabeth on the road for about 15 months. He went to Bloemfontein in September, 1902. No question was raised as to a variation of the agreement on the substitution of Bloemfontein for Port Elizabeth. The defendants only once furnished him with a half-yearly account as set out in the agreement. Before he left Bloemfontein his wife and family had come out to this country. In December, 1902, witness came down to Port Elizabeth and asked Mr. Albert Holt if he thought it advisable that he should take his wife and family to Bloemfontein. Mr. Holt told him that he thought it was not advisable because they might wish to send him to Durban. In April, 1903, witness saw Mr. David Holt, and asked him a similar question. Mr. Holt told him he could please himself, and that he (Mr. Holt) did not want to be troubled with such matters. He did not agree to forego travelling expenses while he was at Bloemfontein. Witness treated himself as a traveller while at Bloemfontein, and charged expenses as such. He did not make any

special agreement with the defendants when his wife and family went to Bloemfontein in May, 1903. He paid £10 a month rent in Bloemfontein, and found that the cost of living was much higher than at Port Elizabeth. From September, 1902, to May, 1903, he always drew his hotel expenses from the firm. He had a number of expenses at Bloemfontein outside his hotel expenses. He had decided to draw his money from defendants in a lump sum, and allowed it to run on, his understanding being that he should be paid interest at the rate of 6 per cent. on the money standing with the firm. At a later date he wrote to the defendants from Kroonstad, saying that he was short of cash, and that unless he received money from them he should have to draw on his hotel account of 12s. 6d. a day. Witness was engaged in looking after the interests of his firm, and other creditors in the estate of Abrahams and Hasser, which was sequestered in Bloemfontein.

The amount eventually paid out of the estate was 18s. 6d. in the £. Witness was allowed £60 by the Master of the High Court, Bloemfontein, as remuneration for his services in the matter during a period of two months. Defendants not only received 18s. 6d. in the £ on their claims, but also the £60 witness had been allowed. After he had severed his connection with the firm he received from them a demand for £292, to be reduced, subject to their requirements in certain respects being satisfied, to £19 odd. An item in dispute was medical charges in connection with an accident he sustained while on the firm's business. He was driving in the firm's cart towards Bloemfontein, and in crossing the Caledon River the trap swerved, his samples were thrown out, and he was pitched into the river, and his head was hurt.

In cross-examination, witness said he did not acknowledge any responsibility for the bad debts and he claimed to be paid commission on those amounts because for every order that he obtained he had to make inquiries as to references, and the firm exercised their own discretion as to whether they executed the orders. He was not allowed to decide which orders should be fulfilled and which rejected. In several cases the firm did not execute orders, because they did not think the customers' credit good enough.

Re-examined: The matter of reverse commissions that the defendants now charged against him were never mentioned to him until after he had left their service. They gave him a very satisfactory testimonial when he ceased to be in their employ.

Mr. Buchanan closed his case. David Holt, a managing director of Holt and Holt, said that he saw the plaintiff in Port Elizabeth in April, 1903, when the latter came down from

Bloemfontein. The matter of plaintiff's family living in Bloemfontein was mentioned to him by plaintiff. Robertson said he should like to be permanently stationed in the Orange River Colony, and that it would be very beneficial to him. He added that it would also be very beneficial to the firm, because it would save them a large amount of expenses in regard to hotel accommodation. After further conversation, witness agreed that plaintiff's family should reside in Bloemfontein, and during the time they were there the defendants were not to pay any costs in regard to hotel expenses. Witness had pointed out to him that it was very much better for the firm that their travellers should live at the base. He did not think he should have consented to the proposal had it not been for the saving that would have been effected to the firm.

By the Court: He did not think that he had misunderstood plaintiff, and that he consented to the arrangement because it would save Robertson's expenses in the hotel in the evening. New travellers, it was recognised, had to spend something in hotels, even in Port Elizabeth, because of the business that the firm did with hotel keepers. He did not consider that there was a great difference in the cost of living between Port Elizabeth and Bloemfontein.

Cross-examined: Mr. Robertson's wife and family returned to Port Elizabeth in January, 1904, and the firm then allowed him hotel expenses from that date to the termination of the agreement. Witness was not in Port Elizabeth at the time plaintiff's family returned, or he thought he should have raised some objection to the payment of these expenses. Witness had left for Johannesburg in the interval.

Sydney James Davidson stated that he was partner in and secretary to the defendant company. Mr. Robertson came out here in 1901. His base was fixed here at Port Elizabeth. In April, 1903, Mr. Robertson asked to be fixed permanently at Bloemfontein, and stated, as an inducement, that if he were fixed at that place, he would set up his private establishment there, and thus save hotel expenses. Witness said that he, himself, could not decide the matter, and Mr. David Holt being at the office, the matter was referred to him. Witness did not attend the interview, but was subsequently told by Mr. Robertson that the matter had been arranged. Witness had never heard of any arrangement by which 12s. 6d. per diem was to be allowed to Mr. Robertson as expenses at Bloemfontein, and left to accumulate at 6 per cent. It was on March 5 that witness first heard of the £96, supposed to be 155 days' expenses. The letter of February 22 contained no reference to the amount. Witness had thought that this letter had been lost, but, on a wire being sent to

Port Elizabeth, it had been discovered. It contained merely a request that plaintiff's commission account for November, December, and January should be forwarded to his wife. As this was not done, witness communicated with Robertson to the effect that the firm had refused to settle the commission until their claim for a portion of bad debts incurred had been allowed. When Robertson went outside to obtain orders, he was informed that he was out on the same basis as any other traveller, and that it was his duty to ascertain particulars as to each customer's financial position. In the event of bad debts being incurred, he would be responsible for a portion of the same.

Hopley, J., said that during a bad time a traveller might not make anything per annum.

Mr. Close said this was not so. There had been an agreed salary of £250 per annum, and an arrangement by which the total amount of salary and commission should never go below £350.

Witness (continuing) said it was usual to make a fine for bad debts.

Hopley, J., asked where this fine or penalty appeared in the agreement.

Mr. Close said it was not contained in the agreement, but it was the custom of the firm.

Continuing, the witness stated that the commission was one per cent. on business in town, and 2½ per cent. for country business. All the items were shown in a detailed statement, which was rendered in April, 1904. The commission was paid upon the balance, after deducting the amount of bad debts and penalties from the amount of business which had been done. Witness had never heard about an accident befalling Mr. Robertson until the present case came on. However, witness's firm admitted no liability with regard to accidents. The firm had never paid medical expenses in connection with any accidents its travellers might have had. No agreement was entered into by the firm to pay Robertson 6 per cent. on any balance of commission due.

Cross-examined by Mr. Buchanan: Witness had told his attorneys, both at Port Elizabeth and here, as to the commission in different cases. Witness specifically told Robertson that he would have to pay a penalty the same as other travellers. The amount of the penalty on bad debts in town accounts was 6½ per cent. Witness gave plaintiff particulars of all these bad debts. It was difficult to give amounts of bad debts every month; that was why nothing had been said about the penalty until the present time.

[Hopley, J.: How many times do you charge Mr. Thomas, another of your travellers, with these penalties?]

Once a year, my lord. I sent it to both of them at the same time.

Mr. Buchanan: You said just now that

the commission on bad debts was 2 per cent.

No; 6½ per cent. on town bad debts and 2 per cent. on bad debts in the country.

Witness (continuing) said that he did not endorse the specification as to the commission on the agreement, because it was quite an understood thing. Witness had paid Robertson's hotel expenses at Bloemfontein on one particular occasion, as a matter of grace, because the firm knew that Robertson's wife had left Bloemfontein for Port Elizabeth, and that he (Robertson) could not, therefore, have had a private house there.

Ernest Gillespie stated that he was cashier to the defendant company. He had been with the firm for about two years at Port Elizabeth. He knew of no arrangement under which Mr. Robertson was to receive six per cent. on any balance of commission held by the firm. Witness knew that it was the custom of Hoyt and Hoyt to charge their travellers penalties for bad debts, but could not say if Mr. Robertson had been charged penalties.

Mr. Close closed his case.

Counsel having been heard in argument on the facts,

Hopley, J.: In this case the plaintiff sues the defendant for the sum of £124 17s. 7d. on various items of account, extending over a considerable period, for services entered upon for the defendant firm. This amount must be reduced by £5 7s. 7d. for an item brought to the notice of the plaintiff in the defendants' plea and their letters. That leaves the amount of his claim at £119 12s. The largest item is £96 17s. 6d., for alleged allowance for hotel expenses, or house allowance, for 155 days at Bloemfontein, which had not previously been charged by the plaintiff. The circumstances are that the plaintiff engaged with the defendants to come to this country at a minimum salary of £350 per annum, and such commission as he could earn as a commercial traveller for their firm. Port Elizabeth was to be his base, and he had a right, when away from the base, to have his hotel and travelling expenses paid. In Port Elizabeth he had his wife and family, and while there, he was allowed 45s. per week for what were called incidental expenses, which included the amount of his train fare to Uitenhage, which place he seems to have visited on business once a week. After a little while he was moved to Bloemfontein, and, being then away from his proper base, he was allowed all his hotel expenses, as well as incidental expenses. His actual hotel expenses were 12s. 6d. per diem, we are told, and this appears to be a reasonable figure. He appears to have done fairly well while there, and it seemed to be understood that he was treated as prac-

Ex parte MILLER.

Mr. P. Jones moved to have a rule *nisi* granted under the Derelict Lands Act, made absolute.

Rule made absolute.

Ex parte DOYLE.

Mr. Swift moved to have a rule *nisi* granted under the Derelict Lands Act, made absolute.

Rule made absolute.

Ex parte SNODGRASS.

Mr. P. Jones moved to make absolute a rule *nisi* granted under the Derelict Lands Act.

Rule made absolute.

PICKARD V. THE S. A. TRADE PROTECTION SOCIETY AND ANOTHER. { 1905.
Feb. 23rd.
" 25th.

Libel—Privilege—Legal malice—Damages.

The defendants had, without express malice, falsely stated in a paper privately circulating among some 3,000 subscribers, that a judgment had been obtained against the plaintiff in a certain R.M. Court. They pleaded the absence of malice and privilege.

Held, that as they had been guilty of legal malice and as the statement in their paper was not privileged; the plaintiff was entitled to recover substantial damages, even though he had not proved special damage.

This was an action brought to recover £1,000 damages for defamation of character by reason of a statement made by the defendants in the "South African Mercantile Gazette."

The declaration set out that the plaintiff was a contractor and hotel-keeper of Oudtshoorn, the first-named defendant a duly incorporated company, and the second defendants printers, carrying on business in Cape Town. On the 26th March, 1904, the "South African Mercantile Gazette" wrongfully, falsely, and maliciously caused to be written, and the second defendants wrongfully printed, that a provisional judgment had been obtained against the plaintiff by one F. W. Nuns for £41 17s., whereas the matter was referred to arbitration.

The plea set out that the paper was not sold or available to the public. It was only given to business men on condition that the information would be regarded as private and confidential.

The words were printed by error and published without malice. An apology was published in the next issue. If the plaintiff was pressed for his accounts it was not through the paragraph in question.

Mr. McGregor (with him Mr. Bisset) was for the plaintiff, and Mr. Searle, K.C. (with him Mr. W. P. Buchanan) was for the defendants.

Wm. Henry Pickard, proprietor of the Imperial Hotel at Oudtshoorn, stated that in March, 1904, he had a contract for the building of the Standard Bank, and since then he had taken contracts. In a paper it appeared that in March, 1904, he was sued for certain money, but that was not so, as the case was referred to arbitration. The other side had to pay costs, witness only paying £32 out of a claim for £41. There was no tender, as witness did not get a specified account. The plaintiff was asked for a specified account, but he did not supply it. He heard first of all from the Standard Bank that there was a provisional judgment against him. The manager of the bank had a letter which came from the general manager's office. At that time witness had an overdraft at the bank. Witness then got a copy of the paper, and he was positive that the statement did him an immense amount of harm, as several people wanted to get paid at once. Witness instanced a couple of firms that changed their style of business. Instead of thirty or sixty days one firm drew at sight, which was not in accordance with the usual custom of dealing. A firm at Mossel Bay absolutely refused to assist him without the cash.

Cross-examined by Mr. Searle: He might have had financial assistance from his son-in-law in May. In one case a firm drew on him because his account was outstanding for some months. He had no particular reason of not mentioning in his affidavit that Parker, Wood and Co. were pressing him. At that time money was very tight, the bank being anxious to get in their money. Only on two occasions, once before and once since this action, had he paid on a legal demand. It was because a young attorney wished to make a mark for himself that he got these letters over small amounts. During the election he asked Mr. Vincent to give him an extension. He could overdraw with the bank to the extent of £13,000. He took the manager of the bank to the attorney and explained the matter.

By the Court: If they had offered him £200 and apologised in the other papers he would have been satisfied.

Douglas Alexander Smith, of the Standard Bank, stated that his attention

which, they say, they have a right to charge against the plaintiff. Now, unfortunately, the parties chose to vary the original agreement, instead of adhering to it. At the end of every month the defendants paid the plaintiff commission, or allowed it to him, and, it seems to me, they cannot come here after they have got into a law suit, and say: "We can revise these claims and readjust them," and that, except in the case of fraudulent concealment, they cannot re-open these matters, and reverse the commission. They say that the plaintiff was told it was the practice of the firm, when there were bad debts, to penalise the traveller concerned, and to charge him a penalty of one or two-and-a-half per cent. The question of whether the plaintiff was so informed rests on the evidence of one witness; and the whole thing is absolutely denied by the plaintiff. I am not satisfied that this was told to the plaintiff, or even that it was the practice of the firm at all; but what we do know is, that there never was a penalty charged to the plaintiff, and we only hear of the penalties practically after this case had been started. So, I cannot find that the plaintiff ever agreed to pay such penalties. Therefore, as regards the penalties and commissions, the defendants must fail. As regards the suggestion that certain items should be referred to the investigation of an accountant, I do not think it advisable to allow this case to remain open any longer. It is regrettable that the parties did not adopt that course, before coming into court, or even settle the matter entirely out of court. The result of it all is that there is the sum of £3 10s. 6d. due to the plaintiff. The plaintiff has failed in a large portion of his claim; and the defendants have failed in their claim, although they have succeeded in reducing the plaintiff's claim to a large extent. As regards costs, it seems to me, in the circumstances—though I do not expect it will please either party—that the only thing to say is that there shall be judgment for the plaintiff for the sum of £3 10s. 6d., and no order as to costs.

[Plaintiffs Attorneys: Van Zyl and Buissinné; Defendants Attorneys: Syfret, Godlonton and Low.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice HOPLEY.]

REED V. PORT ELIZABETH TOWN COUNCIL. { 1935.
Feb. 27th.
Mar. 6th.

Municipal Regulations — Powers of Council — Demolition of buildings — Measure of damages.

Certain Municipal Regulations provided that "where a building is considered by the Council to be ruinous or so far dilapidated as thereby to have become and to be unfit for use or occupation," the Council may, on failure by the owner to obey an order for its demolition, proceed to demolish the building and claim the cost from the owner.

Held, in an action by the Council for the cost of the demolition of certain cottages of the defendant, that the Council had no power under such regulations to demolish buildings which were structurally fit for use and occupation, although from a sanitary point of view, they were not so fit.

In ordering the demolition, the Council acted bona fide and in the interest of the inhabitants of the town at a time when the plague was raging there, and the defendant was proved to have been generally neglectful of his duties as landlord.

Held, in the defendant's claim in reconvention for damages, that, in the absence of any circumstances of aggravation, the measure of damages which should be applied was the diminution in the selling price of the land by reason of the unlawful act of the Council.

This matter originally came before the Eastern Districts Court in the

form of an action brought by the Town Council against Reed for two sums of money, £75 and £37 10s. 3d. The claim for £75 was amicably settled. The claim for £37 10s. 3d. was alleged to be due for work and labour done and expenses incurred by the Council on the defendant's behalf in pulling down certain buildings in Port Elizabeth belonging to Reed, after a notice had been sent to the respondent that the buildings were dilapidated and unfit for use and habitation. There were two sets of buildings, the upper and lower red barracks. The defendant admitted that the lower buildings should be pulled down, and the upper alone remained in dispute. The defendant took up a position that the upper buildings should not be pulled down by the Council according to law, and he claimed £3,000, the value of the buildings, and £1,085 rent at £35 a month from February, 1902.

Mr. Searle, K.C. (with him Mr. P. Jones), was for the appellants, and Mr. Burton (with him Mr. J. E. R. de Villiers) was for the respondent Reed, who had lodged a cross-appeal.

[De Villiers, C.J.: On the other side the appeal will be on the question of damages and the consequent order as to costs.]

Mr. Burton: Yes, my lord.

Mr. Searle read Reg. 37, under which the Town Council purported to act, and on the latter part of which, he said, the main argument hinged. It would be no answer for the defendants to say that the buildings were not dangerous and absolutely ruinous. Dilapidated and ruinous did not exactly mean the same thing, and counsel submitted the evidence showed the buildings were dilapidated.

[De Villiers, C.J.: Were the buildings so far dilapidated as to have become unfit for use?]

Mr. Searle: I submit they were so dilapidated. Proceeding, counsel drew attention to the evidence of one of the witnesses for Reed, who calculated that it would be twenty per cent. cheaper to repair the buildings than to have them pulled down. The buildings were like the Irishman's gun—without lock, stock, and barrel. One of the witnesses said he valued the buildings merely from the purchase of the old stuff, but if the buildings were worth anything, surely Reed would have had substantial damages in his claim in re-convention. There was evidence that Reed, drawing large rentals for eight years, had not been near the place, which was inhabited by a low class of people, and as a member of the Council he submitted Reed's conduct was disgraceful. Although the premises were closed on account of the plague, the respondent did not make any efforts to get the keys from the Plague Board in order to put the

buildings in repair. He submitted that these buildings were so far dilapidated as to become unfit for use, and that the only defence that Reed could raise was that he was willing to make the repairs and unable to do so.

De Villiers, C.J., said that the Court at present wished to hear counsel for the respondent and cross-appellant on the question of damages.

Mr. Burton said that with due submission to the Court below an inaccurate basis had been taken on the ground of damages, £15 damages was allowed because of the evidence of Winter, about whose valuation it was difficult to see which property he referred to. He said that he thought the ground without the buildings will carry a better price than with the buildings. Because Winter said that the Court had come to the conclusion that no appreciable damage had occurred to the defendant. It was clear that Winter's basis was given on the assumption that the place would be used for store purposes. George Reed himself said that prior to the closing of the buildings he was getting an average rental of £20 a month.

[De Villiers, C.J.: I don't think that is a fair test. The buildings were in a very unsanitary condition. A better test would be what would the property fetch.]

Mr. Burton submitted that a person who committed a wrongful act could not say that by some chance he had improved the property.

[De Villiers, C.J.: Is it not a case in which there is no vindictive damages, but rather a case in which we have to deal with the hard facts. The hard facts are these: The ground with the buildings would not be worth more than the ground without the buildings. The difference in value therefore is nil, and therefore no damages are sustained.]

Mr. Burton said he had no doubt the Town Council acted with *bona fides* in the matter, but still the Court, he thought, would take into consideration the question of the rent. Counsel submitted if the highest sum quoted, £600, was used, the premises could be made fit for the habitation of white people. Counsel quoted a case from "Sedgwick on Damages" to show that a person could not say because he pulled down premises and improved them, that damages could not be claimed. It would be a very dangerous principle to apply the marketable value against the rent, and counsel submitted it should be applied with great strictness and great care. In this case he contended that the basis was not a proper one, and that the defendant was entitled to greater damages.

Mr. Searle said that the Judge-President said he had found that £15 was the invasion of the plaintiff's right, and Justice Sheil said the plaintiff was only en-

titled to nominal damages. Apparently very little attention was paid to the evidence of the other builders, who no doubt owned rookeries of the same kind. The evidence of the Principal Medical Officer of Health said that in his opinion the premises could not be again used for the same purpose, and counsel thought the plaintiff was extremely fortunate to get £15 damages.

Mr. Burton said if their lordships found that the damages should not be increased it was very questionable whether the defendant should not have been allowed his costs. With regard to the costs of appeal he would say that his client's appeal was in consequence of the action of the other side.

De Villiers, C.J., said that if it should be necessary to hear Mr. Burton on the original appeal, notice would be given to the parties before giving judgment. The Court would wait for the answer from the Registrar as to the correctness of a paragraph on the copy of the record.

Mr. Searle said the defendant had prosecuted the appeal, and was as much an appellant as his clients.

Cur. Adr. Full.

Postea (March 6th).

De Villiers, C.J.: In this case there is an appeal, as well as a cross-appeal, against a judgment of the Eastern Districts Court. The question which arises on the appeal is whether the plaintiffs, the Town Council of Port Elizabeth, were justified in demolishing certain buildings belonging to the defendant, and known as the Upper Rod Barracks. The question which arises on the cross-appeal is whether, assuming that the plaintiffs were not justified in pulling down the buildings, the Court below applied the proper measure of damages for the injury in awarding to the defendant only the sum of £15 as damages. The decision of the first question must, to a great extent, depend upon the construction of the 37th to 39th Municipal Regulations of Port Elizabeth. The regulations are as follows: "37. Where a building or structure is considered by the Town Council to be ruinous, or so far dilapidated as thereby to have become, and to be, unfit for use or occupation, or is from neglect or otherwise, in a structural condition prejudicial to the property in, or to the inhabitants of the neighbourhood, the Town Council may issue an order requiring the owner, agent, or occupier of such building or structure referred to as a neglected building, to take down, or repair, or rebuild the neglected structure, or any part thereof, or to fence in the ground on which it stands, or any part thereof, or otherwise to put the said building or structure, or any part thereof, in a state of repair or good condition, to the satisfaction of the Town Council, within a reasonable time, to be fixed by the Town Council. If the order is not obeyed, the Superintendent of Works or

other duly-authorized officer may, with all convenient speed, enter upon the neglected structure or such ground as aforesaid, and execute the order. 38. Where the order directs the taking down of a neglected building or structure, or any part thereof, the Town Council may, in the execution of the order, direct the removal of the materials to a convenient place. 39. The Town Council may recover from the owner of such neglected building or structure all costs and expenses in connection therewith in like manner as if the same were a penalty imposed by these regulations." It was under these regulations that the Council ordered the buildings to be demolished, and claimed from the defendant the cost incurred in so doing. Due notice was given to the defendant of every step intended to be taken by the Council, and although he protested against such steps being taken, he never applied to the Courts for an interdict restraining the Council from taking action. It is unnecessary for the purpose of the appeal to recite the different proceedings taken by the Council in the matter. It appears that for the greater part of the time during which the disputes were occurring, there was a kind of dual control in Port Elizabeth in respect of the buildings of the town. The plague having broken out, a Plague Board was established, and on the 16th of September, 1901, the chairman of that Board gave notice to the defendant's agent prohibiting the use or habitation of the dwelling-houses in question. On the occupiers vacating the premises, the secretary of the Board obtained and kept possession of the keys thereof. On the 5th of February, 1902, the Town Council passed a resolution giving the defendant two months to put his premises in a fit state to be inhabited, subject to the approval of the Municipal Health Officer and Town Engineer. In pursuance of this resolution, the defendant obtained specifications from competent contractors for carrying out the required work. On the 17th of February, 1902, the contractors wrote to the secretary of the Plague Board asking for the keys of the buildings, so as to enable the defendant to comply with the decision of the Municipal Council, but the answer was that it would be necessary for the defendant himself to communicate with the Board. This was a most extraordinary answer to give, but the Town Council was not responsible for it. The defendant also demanded the keys from the Council, but, as the keys were not in the possession of the Council, the demand was not complied with. It is clear from the evidence of the secretary of the Plague Board that the Board was determined that the repairs should not be effected to the premises. It is equally clear that the premises were not past repair, and that with the proposed expenditure they might have been placed in a fairly habitable condition.

The repairs were not, however, effected, and on the 31st of March, 1903, a notice was served by the Town Clerk on the defendant calling upon him to demolish the structures, and giving him notice that unless they were removed before the 8th of April the Council would cause their demolition, and hold him responsible for the costs. He protested against such action, but the work of demolition was proceeded with, and the present suit was instituted to recover the cost thereof. The Court below held that the buildings could not fairly and reasonably be said to have been ruinous or so far dilapidated as to bring them within the meaning of section 37 of the Municipal regulations. In this view I entirely concur. The regulation constitutes a most serious infringement of the rights of property, and should not be extended by one jot or tittle beyond its legitimate scope. The buildings were certainly not ruinous, nor were they in a structural condition prejudicial to the property in or the inhabitants of the neighbourhood. They were somewhat dilapidated, but the dilapidation was of such a nature that with the expenditure of about £300—an amount which the defendant was ready and willing to expend if the Plague Board would give him the keys—the buildings would have been rendered perfectly fit for use and occupation from a sanitary point of view. From the purely structural point of view the buildings were not in any way dangerous either to those inhabiting them or to neighbours or passers-by. They were consequently not, in the words of the section, "ruinous or so far dilapidated as thereby to have become, and to be, unfit for use or occupation. The Town Council therefore was not entitled to recover the costs incurred in the demolition. The next question is whether the sum of £15 awarded to the defendant is a sufficient compensation for the injury sustained by him. This is clearly not a case in which anything like exemplary or vindictive damages would have been appropriate. The plague had broken out in the town, and the Council owed a duty to the public to leave no stone unturned to check the ravages of the disease. Its duties under the section were quasi-judicial, and full notice was given to the defendant of every step proposed to be taken in the performance of those duties. The defendant, on the other hand, was an exceedingly neglectful landlord, and admittedly allowed other premises of his to fall into such a dilapidated condition as to be past repair, and for the cost of the demolition of these premises the Council obtained judgment in the Court below for the sum of £10. The premises now in question were certainly in a very unsanitary condition, and if the Council erred in considering that this was a sufficient ground for ordering their demolition it acted in perfect

good faith, and with a sole view to the interests of the public of Port Elizabeth. If there had been bad faith on the part of the Council or indignity to the person of the defendant or any invasion of the personal rights, the Court would have been justified, according to the decision in *Dr Villiers v. Van Zyl* (Foord's Rep. 77), to take such circumstances into consideration for the purpose of assessing the compensation payable to the defendant. In the absence, however, of any circumstances of aggravation, the criterion should, in my opinion, be the diminution in the value of the land in consequence of the injury complained of. In the case first cited I am reported to have said: "In an action of trespass without any circumstances of aggravation, the plaintiff is no doubt entitled only to recover for his actual injury in respect of the trespass itself. It is clear also from Voet's remarks in the title in the Aquilian law (9, 2, 6) that in assessing the *damnum injuria datum* it is the actual depreciation in the value of the thing injured, and not the sentimental value attached to it by the owner, which should be primarily considered. The English cases which I have consulted are not quite reconcilable with each other, but according to Mayne on Damages (p. 430). "where the defendant has knocked down the plaintiff's house, built upon his land which is on lease, the proper measure is the amount by which the selling price of the premises would be reduced by the wrongful act." He cites the case of *Hoskyns v. Phillips* (3 Excheq. 182), where Parkes, J., delivering the judgment of the Court of Exchequer, said: "The proper measure is by how much less the premises would sell in consequence of the wrongful act of the defendant." In the present case the defendant claims damages under two heads, namely, loss of past rent and the value of the buildings destroyed. In regard to the loss of rent the evidence shows that even if the buildings had not been demolished, the defendant could not have had any rent from them, as the Plague Board kept the keys, and refused him permission to enter or repair the premises. As to the diminution in the value of the land by reason of the demolition of the buildings thereon, it was stated by the defendant's witness, Winter, in his evidence, that the ground without the buildings would, in his opinion, carry a better price than with the buildings. The Court below attached great weight to the evidence of this witness, who was a builder and contractor, with twenty-two years' experience. If once it is established as a fact that the demolition of the buildings has not diminished the selling value of the land, it becomes impossible to hold that, independently of every other consideration, the defendant is entitled to substantial damages for such demolition. The Court below, in the exercise of the functions of a jury, has found the fact to be estab-

lished, and I am not prepared to say that the finding is contrary to the weight of the evidence. The result is that the appeal, as well as the cross appeal, must be dismissed, and as it would be impossible to separate the costs of appeal from those of the cross-appeal, each party will be ordered to bear its own costs.

Mr. Justice Maasdorp and Mr. Justice Hopley concurred.

[Appellant's Attorneys: Walker and Jacobsohn.]

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice HOPLEY.]

AFRICA V. RHENISH MISSIONARY SOCIETY. (1905. Feb. 27th.)

Mission station — Rules — Ejectment.

This was an appeal from a decision of the Resident Magistrate of Tulbagh, in an action in which the Rhenish Missionary Society sued for the recovery of rent from the defendant and an order of ejectment. The Magistrate decided in favour of the plaintiff, and gave judgment for the rent claimed with a decree of ejectment on the ground that the defendant had infringed certain rules for the better administration of the society by starting a butcher's shop at the station at Saron. The defendant denied that he ever signed the so-called church laws, or that he knew the witness to his signature. It was contended that these church laws were *ultra vires*, and that no proper notice was given in accordance with the agreement drawn up between the parties. Dr. Greer (for the appellant) contended that the head of the Missionary Society, the trustee, should have given notice according to the law, and he had no power of substitution. Proceeding, counsel said the administration of the laws as at present were distinctly cruel, and there were instances of cruelty against Mr. Kling. The Rhenish Missionary Society really to some extent held in trust for the natives, and the land was bought by the money people who subscribed for the good of the natives and by the natives themselves, of whom the appellant was one. There was evidence that the appellant was able to write his name, and that was a strong presumption that he never put a mark on the paper to his name. The two principal witnesses for the plaintiff were not produced in court, and counsel submitted on the evidence that that contract was not such as would bind the defendant. All that the defendant sought for was a proper administration of the law, and if there was to be an ejectment that it should be according to the law. A tender had been made for the premises from which the defendant

was ejected to pay anything up to £25 on arbitration by two independent men, but as the defendant had paid £50 for the raw material the offer was not accepted.

Mr. Burton (for the respondents), on an intimation from the Court, directed his argument towards a refutation of cruelty attributed to Mr. Kling. When the case came before the Court, not a single instance was forthcoming of tyranny. The administration had become more difficult of recent years, owing to the refractory conduct of the natives since the war. The 50s. which had been obtained as damages in the Court below he would not press for, and on the tender, his clients were willing to go as far as £25 for the premises.

Maasdorp, J.: There is the clearest evidence that the notice to quit was given by Mr. Kling, who was regarded by the natives as acting on behalf of the trustees of this property, and if the question of his agency had been raised, the conduct of the parties would have been such as to show that they had treated him throughout as the agent, and at no time had questioned his authority. The plaintiff could have summarily ejected the defendant after giving a month's notice, but he proved by his conduct that he had no wish to act arbitrarily, and only took action after having been persistently defied by the defendant. Some reflections had been made on Mr. Kling's treatment, but he thought a great deal of consideration had been shown to the defendant. There was not a title of evidence of any injustice towards the defendant. The appeal will be dismissed, with costs, the claim as to the damages for 50s. will be expunged, and the respondents be ordered to pay £25, the value of the property, upon possession being given, with costs of the appeal.

Hopley, J., concurred.

[Appellant's Attorney: W. G. Coulton; Respondents' Attorneys: Walker and Jacobsohn.]

DAVIDSON V. WERDMULLER.

Mr. Alexander was for the appellant, and there was no appearance for the respondent. The appeal was from a decision of the Resident Magistrate of Colesberg, in which he upheld an exception to the summons that a claim for £7 for board and lodging, without any specified account, was vague and embarrassing in law, after he went into the merits of the case. The respondent admitted his debt, and had since paid the £7, and counsel now appealed on the ground of costs.

Maasdorp, J., said the appeal would be allowed, with costs in both Courts.

Mr. Justice Hopley, J., concurred.

GENERAL MOTION.

Ex parte WASSENBERG.

Mr. Rowson moved as a matter of urgency for an order of Court for the payment of alimony to the applicant, in order that she might prosecute an action against her husband, to whom she was married in community of property, for judicial separation, on the ground of his violent temper and intemperance.

Mr. W. P. Buchanan put in the affidavit of the respondent, which set out that the plaintiff had left him in January last, taking with her jewellery to the value of £100, household goods, valued at £10, and £10 in money. The plaintiff had received a letter of demand to hand over one of his boarding-houses in Bree-street, and the matter could be settled by consent. Affidavits were put in by both sides; on the one hand, there were accusations of cruelty, the defendant, it being alleged, going so far as to threaten the plaintiff, if she did not get out of the house, he would give her one of the best "doings" she ever got in her life, and on the other hand, the allegations were strenuously denied.

Maasdorp, J., said under the circumstances of this case the Court ought to make the usual order. The respondent would be ordered to pay to the applicant's attorneys £30 forthwith towards the suit, and £6 a month as alimony. The first payment to be made on the 7th of next month.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

In re GRAND JUNCTION RAILWAYS. { 1905.
(Feb. 28th.

Partnership — Receiver — Distribution of assets.

A provisional order of sequestration having been made against a partnership, the creditors and partners signed a consent paper that the sequestration should be discharged and that receivers should be

appointed to realise the estate and distribute the proceeds in accordance with the legal order of preference in insolvency. The Court having appointed the applicants as receivers in terms of the consent paper, the receivers proceeded to realise the assets. The respondents, who, as creditors, had signed the consent paper, proved their claim, but refused to place a value on certain securities which they held for their debt in terms of the 30th section of the Insolvent Ordinance.

Held, that the applicants were entitled to insist upon a value being placed on the security.

Mr. Schreiner, K.C., on behalf of the Receivers of the Grand Junction Railways, presented the first report for confirmation. Mr. W. P. Buchanan appeared to oppose certain recommendations on behalf of the London and Westminster Bank, and Dr. Rainsford opposed other matters on behalf of creditors in Messrs. Reunert, Von Laer and Co.

Mr. Schreiner, in presenting the report, mentioned in the first instance the recommendation that Mr. Hills, who was appointed receiver of the partnership estate in England, and who bore the brunt of the work in carrying through the actions against the Government, should be paid for his trouble and out-of-pocket expenses £3,200. The report had lain for inspection for the usual period, and the only opposition came from his learned friend's clients. Most of the debentures were held by the two banks—the A.B.C. and the London and Westminster Bank—the latter of which was represented. Both banks lodged appeals against the judgment of the Supreme Court that the debentures in the limited company were not preferent in the estate. The receivers had now drawn up a recommendation to pay the concurrent creditors 5s. in the £.

[De Villiers, C.J.: What will the ultimate result be? Will the company be solvent?]

There is no chance of our paying out 20s. in the £. Proceeding, counsel said that since the order several creditors had come in and accepted the position. Up to the present claims amounting to £475,793 7s. 2d. had been filed. It had in many instances been extremely difficult to reconcile the accounts rendered with the partnership books, and of the total claims the receivers were only able to admit £93,440 14s. There was a sum of £162,551 18s.

lished, and I am not prepared to say that the finding is contrary to the weight of the evidence. The result is that the appeal, as well as the cross appeal, must be dismissed, and as it would be impossible to separate the costs of appeal from those of the cross-appeal, each party will be ordered to bear its own costs.

Mr. Justice Maasdorp and Mr. Justice Hopley concurred.

[Appellant's Attorneys: Walker and Jacobsohn.]

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice HOPLEY.]

AFRICA V. RHENISH MISSIONARY SOCIETY. (1905. Feb. 27th.)

Mission station—Rules—Ejectment.

This was an appeal from a decision of the Resident Magistrate of Tulbagh, in an action in which the Rhenish Missionary Society sued for the recovery of rent from the defendant and an order of ejectment. The Magistrate decided in favour of the plaintiff, and gave judgment for the rent claimed with a decree of ejectment on the ground that the defendant had infringed certain rules for the better administration of the society by starting a butcher's shop at the station at Saron. The defendant denied that he ever signed the so-called church laws, or that he knew the witness to his signature. It was contended that these church laws were *ultra vires*, and that no proper notice was given in accordance with the agreement drawn up between the parties. Dr. Greer (for the appellant) contended that the head of the Missionary Society, the trustee, should have given notice according to the law, and he had no power of substitution. Proceeding, counsel said the administration of the laws as at present were distinctly cruel, and there were instances of cruelty against Mr. Kling. The Rhenish Missionary Society really to some extent held in trust for the natives, and the land was bought by the money people who subscribed for the good of the natives and by the natives themselves, of whom the appellant was one. There was evidence that the appellant was able to write his name, and that was a strong presumption that he never put a mark on the paper to his name. The two principal witnesses for the plaintiff were not produced in court, and counsel submitted on the evidence that that contract was not such as would bind the defendant. All that the defendant sought for was a proper administration of the law, and if there was to be an ejectment that it should be according to the law. A tender had been made for the premises from which the defendant

was ejected to pay anything up to £25 on arbitration by two independent men, but as the defendant had paid £50 for the raw material the offer was not accepted.

Mr. Burton (for the respondents), on an intimation from the Court, directed his argument towards a refutation of cruelty attributed to Mr. Kling. When the case came before the Court, not a single instance was forthcoming of tyranny. The administration had become more difficult of recent years, owing to the refractory conduct of the natives since the war. The 50s. which had been obtained as damages in the Court below he would not press for, and on the tender, his clients were willing to go as far as £25 for the premises.

Maasdorp, J.: There is the clearest evidence that the notice to quit was given by Mr. Kling, who was regarded by the natives as acting on behalf of the trustees of this property, and if the question of his agency had been raised, the conduct of the parties would have been such as to show that they had treated him throughout as the agent, and at no time had questioned his authority. The plaintiff could have summarily ejected the defendant after giving a month's notice, but he proved by his conduct that he had no wish to act arbitrarily, and only took action after having been persistently defied by the defendant. Some reflections had been made on Mr. Kling's treatment, but he thought a great deal of consideration had been shown to the defendant. There was not a title of evidence of any injustice towards the defendant. The appeal will be dismissed, with costs, the claim as to the damages for 50s. will be expunged, and the respondents be ordered to pay £25, the value of the property, upon possession being given, with costs of the appeal.

Hopley, J., concurred.

[Appellant's Attorney: W. G. Coulton; Respondents' Attorneys: Walker and Jacobsohn.]

DAVIDSON V. WERDMULLER.

Mr. Alexander was for the appellant, and there was no appearance for the respondent. The appeal was from a decision of the Resident Magistrate of Colesberg, in which he upheld an exception to the summons that a claim for £7 for board and lodging, without any specified account, was vague and embarrassing in law, after he went into the merits of the case. The respondent admitted his debt, and had since paid the £7, and counsel now appealed on the ground of costs.

Maasdorp, J., said the appeal would be allowed, with costs in both Courts.

Mr. Justice Hopley, J., concurred.

GENERAL MOTION.

Ex parte WASSENBERG.

Mr. Rowson moved as a matter of urgency for an order of Court for the payment of alimony to the applicant, in order that she might prosecute an action against her husband, to whom she was married in community of property, for judicial separation, on the ground of his violent temper and intemperance.

Mr. W. P. Buchanan put in the affidavit of the respondent, which set out that the plaintiff had left him in January last, taking with her jewellery to the value of £100, household goods, valued at £10, and £10 in money. The plaintiff had received a letter of demand to hand over one of his boarding-houses in Bree-street, and the matter could be settled by consent. Affidavits were put in by both sides; on the one hand, there were accusations of cruelty, the defendant, it being alleged, going so far as to threaten the plaintiff, if she did not get out of the house, he would give her one of the best "doings" she ever got in her life, and on the other hand, the allegations were strenuously denied.

Maasdorp, J., said under the circumstances of this case the Court ought to make the usual order. The respondent would be ordered to pay to the applicant's attorneys £30 forthwith towards the suit, and £6 a month as alimony, the first payment to be made on the 7th of next month.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

In re GRAND JUNCTION (1905.
RAILWAYS. (Feb. 28th.

Partnership — Receiver — Distribution of assets.

A provisional order of sequestration having been made against a partnership, the creditors and partners signed a consent paper that the sequestration should be discharged and that receivers should be

appointed to realise the estate and distribute the proceeds in accordance with the legal order of preference in insolvency. The Court having appointed the applicants as receivers in terms of the consent paper, the receivers proceeded to realise the assets. The respondents, who, as creditors, had signed the consent paper, proved their claim, but refused to place a value on certain securities which they held for their debt in terms of the 30th section of the Insolvent Ordinance.

Held, that the applicants were entitled to insist upon a value being placed on the security.

Mr. Schreiner, K.C., on behalf of the Receivers of the Grand Junction Railways, presented the first report for confirmation. Mr. W. P. Buchanan appeared to oppose certain recommendations on behalf of the London and Westminster Bank, and Dr. Rainsford opposed other matters on behalf of creditors in Messrs. Reunert, Von Laer and Co.

Mr. Schreiner, in presenting the report, mentioned in the first instance the recommendation that Mr. Hills, who was appointed receiver of the partnership estate in England, and who bore the brunt of the work in carrying through the actions against the Government, should be paid for his trouble and out-of-pocket expenses £3,200. The report had lain for inspection for the usual period, and the only opposition came from his learned friend's clients. Most of the debentures were held by the two banks—the A.B.C. and the London and Westminster Bank—the latter of which was represented. Both banks lodged appeals against the judgment of the Supreme Court that the debentures in the limited company were not preferent in the estate. The receivers had now drawn up a recommendation to pay the concurrent creditors 5s. in the £.

[De Villiers, C.J.: What will the ultimate result be? Will the company be solvent?]

There is no chance of our paying out 20s. in the £. Proceeding, counsel said that since the order several creditors had come in and accepted the position. Up to the present claims amounting to £475,793 7s. 2d. had been filed. It had in many instances been extremely difficult to reconcile the accounts rendered with the partnership books, and of the total claims the receivers were only able to admit £93,440 14s. There was a sum of £162,551 19s.

10d. available for distribution. It was proposed to pay 5s. in the £ to undisputed claimants, and that would absorb £24,763 13s. 4d. and leave £137,788 6s. 6d. in hand, which would be more than sufficient to pay a like dividend upon all claims at present in dispute, including the whole of the limited company's debenture issue, plus interest to the date of the receivers' appointment. If the London and Westminster Bank and the trustees for the debenture-holders proved successful in their appeal against the recent judgment of the Supreme Court, and the debenture-holders or the greater part of them be given a right to rank as preferent creditors on the partnership estate, the receivers would not have sufficient funds available to meet these preferent claims. The appellants had not gone on with the appeal, and counsel thought they should not be allowed to hang up the administration in a permanent way.

[De Villiers, C.J.: Would there be sufficient to pay out a dividend on the debentures?]

Mr. Schreiner: Yes, pursuant to your lordship's order. It was felt that the appellants should be put on terms as to the prosecution of the appeal. They had not yet taken the papers away, while the unhappy creditors were kept out of their dividends. Counsel then proceeded to discuss the possibility of getting security from the creditors in case the appeal was allowed, and in reply to his lordship, said there was no chance of what they had in hand meeting the claims of all of the debenture-holders. The receivers did not think themselves justified in putting aside an amount to meet the claims of the London and Westminster Bank.

[De Villiers, C.J.: The position is most unfortunate. It may take two years before the appeal is heard.]

Mr. Schreiner then went on to mention the different items on which the receivers asked the instructions of the Supreme Court. They were as follows: Witnesses' expenses in the case of *Hills v. The Colonial Government*, £201 15s. 9d., as preferent; Mr. Hills's expenses, £3,200; Mr. Tonkin's salary, £587 10s. With regard to the disputed claims, counsel asked the Court to fix a time to bring the matters to some finality, and three months was suggested. On the question of interest, it was suggested that the same procedure should be adopted as in insolvency, and as regards Messrs. John Walker and Son's claims and their objections, it was also asked that a period should be fixed by the Court for presentation. Then came the matter upon which his learned friend, Dr. Rainsford, appeared, that of the debentures held as security; and it was proposed by the receivers to follow the usual course in insolvency, and call upon these people who held debentures of the

limited company as security for their claims to place a value on their securities. The receivers' fees was another matter upon which the Court was asked for instruction.

Dr. Rainsford put in the affidavit of a partner in the firm of Messrs. Reunert, Von Laer and Co., which set out that the firm were creditors to the extent of £2,654 8s. 4d. and interest, for which they held thirty debentures of £100 each as security. Counsel submitted that the receivers were not entitled as such to call upon debenture holders to place a value upon their security, and he respectfully objected to such power being given to them.

Mr. Schreiner put in an answering affidavit by Mr. E. R. Syfret, one of the official receivers, which set out that Messrs. Fairbridge, Arderne and Lawton, on behalf of the creditors they represented, including Messrs. Reunert, Von Laer and Co., signed a consent paper.

Dr. Rainsford having been heard in argument,

Mr. Schreiner having been heard in reply,

De Villiers, C.J.: I consider it a great pity that the Court was ever induced to act upon the consent paper. Most persons interested in this estate were no doubt parties to that consent paper, but the result of these proceedings has been to show that it was a most anomalous proceeding to appoint receivers to an estate which is practically insolvent. I am quite sure that a great deal of trouble and inconvenience would have been avoided if the original sequestration had gone through, and the estate administered as an insolvent estate. The Court, of course, could not know all the facts of the case when everyone apparently interested in the matter came forward with a consent. The Court was induced to act upon the consent, but I am quite satisfied, had everything been known then which has since appeared, the order would not have been made. But the order stands, and the best must now be made of it. The Court must endeavour now as nearly as possible to administer this estate as if the sequestration had actually been carried out, and in that view the preferent claim of £1,871 16s. 6d., which is the first item to be decided, should be allowed. It is clear that nobody could in the result be prejudiced by the admission of that claim which is clearly of a preferent nature for rent and expenses of attachment, etc. The second question to be decided is whether the receivers are to be allowed to pay out a dividend of 5s. in the £1 to the creditors. That is a matter entirely for the receivers to decide upon. If they have the money they will have to pay it out, but the question is, have they money in hand to the extent of available assets for the payment of the dividend. It appears to me that so long as the

appeal case of the London and Westminster Bank, is undecided, it is impossible to say that money available is in the hands of the receivers to pay out the creditors. It is admitted, if the London and Westminster Bank should succeed in the appeal, that the amount of the preferent claims would practically exhaust the amount now proposed to be paid to the creditors. I am not prepared to take upon myself the responsibility of authorising the receivers to pay out this money until the appeal has been decided. I am quite prepared to express a strong opinion that it is the duty of the bank to proceed with all convenient speed. It goes without saying that they should do so. I do not know that any order to that effect would have any practical effect in the present case, and, therefore, I content myself at present with the expression of opinion to that effect that it is the duty of the bank to lose no time in prosecuting their appeal for the purpose of meeting this very great inconvenience to which the creditors of this company are subjected. The receivers could, of course, pay out the money upon their own responsibility, but they would have to find security, as required by the 15th section of the Charter of Justice, and then it would be competent for them to pay out the 5s. in the £ to the creditors. If this appeal should be allowed, of course, the persons giving security will then in some way or other have to satisfy the London and Westminster Bank for the amount of their security. More than that I cannot say upon this point. The next question upon which my opinion is asked is the question of the witnesses' expenses. The information upon that point is not sufficient to justify me in ordering that these witnesses' expenses shall form part of the costs of administration. It may well be at a further stage that it may be shown that the money has been legally and fairly expended by Mr. Hills, and it will then be dealt with in the same way as I propose to deal with the next item; but at present it is not perfectly clear to me that the Court would be justified in ordering the expenses of these witnesses to be treated as part of the costs of administration. With regard to Mr. Hill's expenses, that appears to be a perfectly legitimate claim. The Court is aware of the time and trouble Mr. Hill has expended in safeguarding the interests of this company, and what he has done has been entirely for the benefit of the administration after the matter had been put into the hands of the receivers, and for the trouble which he has taken in the matter, it appears to me he is entitled to payment of moneys expended by him on behalf of the estate. The Court will therefore make an order as prayed for £3,200, subject

to the production of vouchers. As to Mr. Tonkin's salary that stands on a similar footing. It was earned by him for the benefit of the administration, and the Court will allow the £587 as part of the costs of administration. The next question is as to the period to be fixed. Well, in my opinion, some period should be fixed, but the time proposed is certainly too short. I think a full twelve months ought to be allowed, and I have less hesitation in allowing that period, seeing that it seems extremely improbable that any portion of the money will be paid out within that period. The Court will therefore fix the period proposed in section 24 of the report, to make the period twelve instead of three months from the 1st January, 1905. The Court will fix a similar period, namely, twelve months, until 31st December, 1905, in respect of the matters in section 26 and 27 of the report. In regard to Mr. Walker's claim, and the objections, of course a decree of silence could have been applied for; but I am not sure if the full period of twelve months would not elapse before the decree would be made. Walker would have to be served by citation, and a very long period would elapse before the decree of perpetual silence would be made. I consider, under all the circumstances, a longer period should be allowed, so as to enable everyone interested to bring his claim. Then as to the interest, the Court will fix the rate of interest in terms of section 25 at 6 per cent. to the 14th November, 1903, and after that period no interest will be allowed. Section 28 deals with the debentures held as securities, and that deals with Dr. Rainsford's objection on behalf of Messrs. Reunert, Von Laer and Co. In my opinion, that objection cannot be sustained. It was clear from the evidence they were parties to the consent paper, on which the order of Court was made, and part of their consent was to this effect: "The receivers to have the power to sell and realise any further assets, including movable and immovable property, and the railway material attached, etc. The said receivers to frame a distribution account of all money, and to distribute the said money in accordance with the legal order of preference in insolvency." In order to do that, it is necessary that every person having a security who claims should put a value on that security. I do not see that it is any hardship on these creditors that they should place a value on these securities, and that part of the receiver's report which relates to the securities should, in my opinion, be acceded to. The Court will therefore make an order in terms of section 28. The Court will also allow the receivers' fees at the rate of 2½ per cent. As to the costs of the application, they will be paid by the Receivers, except the

costs of Messrs. Reunert, Von Laer and Co., which will be paid by the latter.

[Attorneys.—For the Receivers: Moore and Son; for the London and Westminster Bank: Findlay and Tait; for Reunert, Van Laer and Co.: Fairbridge, Arderne and Lawton.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

ADMISSION. { 1905.
 { Feb. 28th.

Mr. J. E. R. de Villiers moved for the admission of George Arthur Osler, as an attorney and notary.

Ordered to stand over, pending production of certain affidavits, as to service.

The affidavits were afterwards stated to be in order.

The application was thereupon granted, and the oaths administered.

PROVISIONAL ROLL.

GORDON MITCHELL AND CO. AND
ANOTHER V. SEGAL.

Mr. Struben moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

NURICK V. LEVENSON.

Mr. Du Toit moved for the final adjudication of defendant's estate as insolvent.

Order granted.

GOURLAY AND CO. V. VASSEY.

Mr. M. Bisset moved for the final adjudication of defendant's estate as insolvent.

Order granted.

PATE V. BLUMBERG AND SHER.

Mr. Sutton moved for the final adjudication of both private and partnership estates as insolvent.

Order granted.

MCCREADIE V. GOWIE.

Mr. W. Porter Buchanan moved for provisional sentence for £20, on an un-

satisfied judgment of the Resident Magistrate's Court, £3 7s. 6d. taxed costs, 2s. 6d. messenger's fees, and for certain ground at Wynberg and Hout Bay, to be declared executable.

Defendant, in a written statement, admitted a debt of £16 17s. He asked for stay of judgment pending result of a meeting of his creditors, which had been called for that day (Tuesday). He offered £1 a month.

Provisional sentence granted as prayed.

GREENBERG AND CO. V. ABDOL AND
RASSOL.

Mr. Lewis moved for provisional sentence on a promissory note for £20, with interest *a tempore morae* and costs.

Order granted.

ABRAHAMS V. AREND.

Mr. Swift moved for provisional sentence for £850, upon certain conditions of sale, with interest and costs.

Order granted.

SCHULTZ AND CO. V. LABAHN.

Mr. Russell moved for a decree of civil imprisonment upon an unsatisfied judgment for £65, and costs. At the last hearing, defendant set up a counterclaim, but he had taken no steps to substantiate it during the interval.

Defendant did not now appear.

Order granted.

IMPERIAL COLD STORAGE V. BROIDE.

Mr. Douglas Buchanan moved for judgment upon an unsatisfied judgment of the R.M.'s Court for £55 1s. 1d., and £2 7s. 4d. taxed costs, and for certain property at Wynberg to be declared executable.

Order granted.

VAN ZYL AND BUISSINNE V. SIEG.

Mr. W. Porter Buchanan moved for provisional sentence on a mortgage bond for £500, and for the property specially hypothecated to be declared executable.

Order granted.

W. AND G. SCOTT, LTD. V. KOHNE.

Mr. Roux moved for the final adjudication of defendant's estate as insolvent.

Order granted.

THESEN AND CO. V. DE VILLIERS.

Dr. Rainsford moved for provisional sentence for £37 3s. 3d., upon a promissory note, with interest and costs.
Order granted.

KENNER AND CO. V. GOLDBERG.

Mr. Gutsche moved for provisional sentence for £95 on a promissory note payable in Oudtshoorn, and costs.
Order granted.

CHURCHILL V. CLAIN.

Mr. Pyemont moved for provisional sentence for £2,200, less £91 9s. 3d., paid on account, on a mortgage bond, due by reason of non-payment of interest, also for the property specially hypothecated to be declared executable, and for interest and costs.
Order granted.

VAN DER SPUY V. KAISER.

Mr. Sutton moved for certain property hypothecated under a covering bond to be declared executable. Provisional sentence had been obtained under another bond for £5,500 in January, and the property declared executable. He also applied for provisional sentence on the present bond, but he did not ask for the property to be declared executable under that bond, hence the present application.

Hopley, J., at first said that the present application was unnecessary, but at a later stage an order was granted as prayed, but costs to be restricted to one summons.

WHITAKER V. HOLMES.

Mr. Alexander moved for provisional sentence on a judgment of the Resident Magistrate of Stutterheim for £18 7s. 1d., and for costs, and also for certain landed property set out in the summons to be declared executable.
Order granted.

MCLEOD V. MULLER.

Mr. Struben moved for provisional sentence for £60, balance of interest on a mortgage bond, and costs.
Order granted.

ILLIQUID ROLL.

ROBERTSON AND CO. V. FLETCHER. { 1905.
Feb. 28th.

Mr. M. Bisset moved for judgment under Rule 319, for £164 1s. 10d.,

with interest *a tempore morae* and costs, defendant having been barred from pleading.

Dr. Greer drew his lordship's attention to the fact that an application appeared in the motion list by the defendant, in which he sought to have the bar removed.

Hopley, J., said that he would first hear the motion for removal of bar.

Dr. Greer read an affidavit by defendant's attorney (Mr. A. R. O'Brien), who stated that the plea was actually filed within the period of 24 hours allowed by plaintiffs. He believed that defendant had a good defence to the claim.

Mr. Bisset read an answering affidavit by a clerk in the employ of plaintiffs' attorneys (Messrs. Reid and Nephew), who said that the plea was not filed within the period allowed. A further affidavit by Mr. McDonald, accountant of the plaintiff firm, said that he believed the defendant had not a good defence to the claim, and that he was simply trying to gain time.

Dr. Greer submitted that the notice of bar was improperly set down by plaintiffs' attorneys. Defendant believed that he had a solid ground of defence. He admitted the debt, but said there was an agreement that he should not be called upon to pay until the building had been completed, and a mortgage for £1,000 had been arranged.

Hopley, J., said that judgment would be granted as prayed under Rule 319, and the application for removal of bar would be refused, with costs.

SEELIGER V. HOFFMAN AND SAACKS.

Mr. Alexander moved for judgment for £135 17s., under Rule 319, on a declaration, for balance of account due for professional services rendered as architect, defendants having been barred.

Order granted.

PICKFORDS, LTD. V. HERMANN.

Dr. Greer moved for judgment, under Rule 329d, for £44 4s. 8d., services rendered and money paid, plaintiff tendering delivery of certain cases of furniture.

Order granted.

OHLSSON'S CAPE BREWERIES V. EMDIN AND CO.

Mr. Struben moved for judgment, under Rule 329d, for interest and costs, the capital sum having been paid since issue of summons.

Order granted.

BENNETT V. FRAME

Mr. P. S. T. Jones moved for judgment, under Rule 329d, for delivery of certain two shares in the Cape Peninsula Lands and Water Syndicate, or, in default, refund of £50, and also provisional sentence for £25. Counsel said that the matter had been standing over to enable the plaintiff to explain why, seeing that the summons was issued in August last, the case had only just been proceeded with. He read an affidavit by Mr. A. W. Steer, plaintiff's attorney, who stated that the delay had been caused through negotiations for a settlement. He asked for judgment in terms of prayer (b) for £50, and also for £25, and interest, in terms of note, and costs of suit.

[Hopley, J.: You do not ask for the shares?]

Mr. Jones: I do not think there are any such shares in existence.

Judgment in terms of prayer (b), and also for second portion, as prayed, with costs.

REHABILITATION.

Mr. Van Zyl applied for the rehabilitation of Frederick Johan Sangerhaus.

Granted.

GENERAL MOTIONS.

KROON V. KROON.

1905.
Feb. 28th.

Mr. M. Bisset moved for a decree of divorce, the defendant having failed to return to or receive the plaintiff.

Order granted for divorce, custody of the child, and costs of suit.

Ex parte CLOETE.

Mr. McGregor moved, as a matter of urgency, for the attachment of certain debts owing by persons residing in the district of Barkly East, in part satisfaction of a judgment for £621 obtained by petitioner against John Hamilton Diepraem, who resided in the Orange River Colony, and therefore beyond the jurisdiction of the Court.

Rule nisi granted, calling upon the respondent and his alleged debtors to show cause, on the 15th April, why the said monies should not be attached, and applied in satisfaction of the judgment obtained by applicant against the respondent, and further why they should not, as the various amounts fall due, be handed to the High Sheriff or his lawful deputy, why the rule should not operate

as an interdict, and why respondent should not be ordered to pay costs of this application.

ESTATE WILLIAMSON V. BERGL.

Mr. Upington moved on behalf of the trustees in the insolvent estate Williamson to have expunged a certain proof of debt for £5,077 8s. 11d., in the record of proceedings, at a meeting of creditors, before the R.M. of East London. Mr. Gardiner was for the respondent, Alexander Bergl.

The affidavit of Andrew Williamson, stated that the account filed by Henry George Drake, or Bergl's attorney, as proof of debt for £5,077 8s. 11d., was incorrect, and that the amounts referred to in annexure (b) were incorrectly debited to him (Williamson). This annexure set forth a liability upon certain promissory notes, and further stated that the respondent had security as follows: 1,000 shares Buffalo Supply and Cold Storage Company, at £1; 2,200 Orange Diamond shares at 15s.; a racehorse called Graspan, valued at £500; and two horses, valued at £50. He said that the Buffalo Company should be debited with £700 of this amount, and denied that his estate was liable for these amounts. Deponent also said that Graspan was sold by him to Bergl for £2,000, but that he agreed to refund £500 to Bergl if the horse did not realise more than £1,500. He submitted that for the horse he should be credited with £1,500, and not £500. He added that the annexure marked "C" was the correct account. That account, after deducting from the proof of debt £700 0s. 5d., that he said was owing by the Buffalo Company, and bringing up the securities at their true value, showed a balance in favour of insolvent's estate. Mr. Upington read a further affidavit by Mr. Shaun of Graham's Town (one of the trustees), who said that on April 18, 1904, the Orange Diamond shares were selling at 22s. each, and he notified to Bergl his election to take assignment of the shares, seeing that Bergl bought them up at 15s. He asked for delivery to Simkins and Adams, brokers, but the said shares had not been delivered. Counsel added that all the indebtedness was in respect of promissory notes to Bergl, except one in favour of one Tickey, which was now held by Bergl, he alleged. The total amount of debts brought up was £14,716 9s. 7d., against which £9,639 0s. 8d. was credited, leaving a balance of £5,077 8s. 11d., which Bergl alleged was partly secured by the shares and racehorse. Mr. Upington added that he thought it would be very difficult for the Court to decide this matter on motion, as affidavits had been filed by the other side, contradicting several of the statements in applicant's affidavits.

Mr. Gardiner said that respondent was very much in the hands of the Court. He would be glad if he could get a decision on motion on account of the expense of a trial.

Hopley J., said he would hear the affidavit of Mr. Bergl.

Mr. Gardiner then read Mr. Bergl's affidavit. Deponent said he filed proof of debt against the insolvent estate in October, 1903, when the Orange shares were selling at or about 15s. Up to the 18th April, 1904, he received no notice from the trustees, asking for the assignment of the shares. On the 18th April the shares were selling at 19s. 6d. In a letter he sent to the trustees on the 19th April he refused to agree to the course the trustees wished him to adopt, and stated that he required a true valuation to be made, and refused to hand over any part of his security. The proof of debt as annexed was, he declared, correct the Buffalo Company was not liable, but the estate Williamson was liable for the same. He agreed to lend to Williamson £3,000, on condition of security being given in shares in the Buffalo Company. Without his knowledge, the sum of £3,950 was advanced by his manager. He denied that he bought the racehorse Graspan, and said it was taken by his manager as security, and kept at Williamson's expense. It was raced on various occasions, but only once with success, winning about £20. The horse was subsequently sold in Cape Town for £125. As to the Buffalo shares, these were not sold to Williamson, but were deposited by him with the manager as security for moneys advanced by deponent.

Hopley, J., said that with such contradictory statements on the affidavits it was impossible to decide the matter on motion. The parties must proceed by action, costs to abide the result.

Ex parte SMITH.

Mr. P. S. T. Jones moved, on behalf of the petitioner, widow of Johan Carel Smith, for leave to temporarily break lease of occupation of Milton House, Sea Point, and for the executors to continue payment of £22 a month as provided by the will during a period of six months. Mr. Smith proposed, on account of ill-health, to pay a visit to England.

Mr. Struben, on behalf of the executors, consented to the application.

Order granted as prayed.

SEGAL V. ESTATE FINKELSTEIN BROS. AND ANOTHER.

Mr. Searle, K.C. (for defendants in the action), moved for the removal of trial to the next Circuit Court at George.

Mr. J. E. R. de Villiers, for respon-

dent (plaintiff in the action), read an affidavit by his attorney, which stated that it would be more advantageous if the case were removed to the Oudtshoorn Circuit Court.

Hopley, J., ordered the cause to be removed for trial at the next Circuit Court, at George, costs to be costs in the cause.

Ex parte TROLLIP.

Mr. Upington moved for petitioner, an attorney of this Court, for leave to cede certain articles of clerkship to Mr. James B. Cleghorn, an attorney of this Court, during the absence from the Colony of petitioner for a period of six months, such articles to be re-ceded to petitioner on his return.

Mr. Douglas Buchanan, on behalf of the Incorporated Law Society, consented to the application.

Order granted as prayed.

TRILL AND OTHERS V. CLAREMONT MUNICIPALITY.

This was an application upon notice of motion for an interdict to restrain defendants from discharging dirty water, other than stormwater, into the Kourboom River, so as to cause a nuisance. Mr. Schreiner, K.C., was for the applicants; Mr. Searle, K.C., was for the respondent Council.

Mr. Schreiner, in answer to His Lordship, said that the case originally came before Mr. Justice Buchanan in June last.

Hopley, J., said he thought it would be better if the present application came before Mr. Justice Buchanan.

The matter was, by consent, ordered to stand over.

Ex parte THE DIRECTORS CAPE TOWN BUFFALO CLUB.

Mr. Pyemont moved for an order for the winding-up of the Buffalo Club, Cape Town, and the appointment of liquidators. Petitioners said that they held a majority of the shares. The club had proved an unworkable institution, and during the past two years had resulted in a loss of £712 3s. 5d.

Winding-up order granted, Mr. T. H. Hazell to be liquidator, with the usual powers.

Ex parte CAMERON.

Mr. Douglas Buchanan moved for an order authorising the Registrar of Deeds to issue certified copy of certain mortgage bond, granted by the churchwardens of St. James's, Umtata, for £480 in favour of the petitioner. All trace of the bond had been lost.

Order granted as prayed.

***Ex parte* EXECUTRIX DATIVE ESTATE CAMPBELL.**

Mr. Alexander moved for an order authorising the Master to pay out certain money accruing to her from the estate of applicant's late minor child. The Master's report was favourable.

Order granted in terms of Master's report.

MARTIN V. MARTIN.

Mr. P. S. T. Jones moved for the removal of trial to the next Circuit Court at Mossel Bay. Respondents' attorneys, it was stated, consented.

Order granted as prayed.

***Ex parte* COOK.**

Mr. Sutton moved on behalf of petitioner, as trustee under ante-nuptial contract, for leave to raise a loan of £300 on security of surrender value, of certain policy of life insurance. The applicant (one Paradise) was the trustee of Mrs. Cook under a certain ante-nuptial contract.

Hopley, J., said that this seemed to be the only thing that could be done for the unfortunate people, and an order would be granted as prayed.

***Ex parte* ESTATE HARTEL.**

Mr. Van Zyl moved, on behalf of petitioner, the executrix testamentary, for leave to raise a mortgage bond for £700, upon certain ground at Port Elizabeth. The property had borne a bond for £650, but this had now been called up.

Order granted as prayed.

ESTATE CARY V. CARY.

Mr. J. E. R. de Villiers moved for leave to purge default of plea.

Mr. W. Porter Buchanan said that the plaintiffs applied for judgment, under Rule 329d, for several sums of money. They were, however, prepared to consent to respondent being purged from default on condition that he paid the costs up to the present. Cary left the district of Cradock, and they did not know what his movements were to be, but he afterwards returned.

Mr. J. E. R. de Villiers said the applicant thought that costs should be paid by the plaintiffs.

After hearing the affidavits and counsel in arguments on the facts.

Hopley, J., said he thought the plaintiffs had been too precipitate in barring the defendant, and that they were as much responsible as defendant for any wasted costs. Leave would be granted to purge default, costs to abide the result of the trial.

CLOETE V. DIEPRAEM.

Mr. Burton moved on behalf of Gideon Stephanus Cloete, an attorney, of Lady Grey, in the district of Aliwal North, for an order requiring Mrs. Diepraem, of the Orange River Colony, to deliver up to applicant certain promissory notes, or to make an affidavit if such notes were lost, and to grant applicant an indemnity. Respondent did not appear.

Hopley, J., ordered that respondent return the four promissory notes to the applicant upon payment to her of the balance of £45 12s., still owing, with interest, or in case they have been lost that she shall give to the applicant an indemnity in the form contained in an annexure attached to applicant's affidavit of the 17th November, 1904; that the said sum of £45 12s., with interest, may be retained by applicant, and set off against the costs of this application, and that only the balance thereof, if any, need be tendered to respondent.

He added that he thought there was a disgraceful mass of papers filed in this case, and he hoped the Taxing Master would keep this in mind when the question of costs came before him. There seemed to be an altogether unnecessary accumulation of papers.

***Ex parte* WILSON.**

Mr. Gutsche moved on behalf of petitioner, as executrix testamentary, in the estate of her husband, for leave to raise £1,000 upon certain landed property.

Order granted, subject to an account being filed with the Master on maturity of the promissory note in the estate for £1,300, the mortgage bond to be paid off as soon as possible after the amount of the promissory note has been paid off.

SUPREME COURT**FIRST DIVISION.**

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ARGUMENT ON EXCEPTIONS.

HEYDENRYCH V. FRAME. { 1905.
Mar. 1st.

Plea—Vague and embarrassing—
Exception.

It is a good exception to the form of a plea, that it does

not confess or avoid material facts alleged in the declaration, and is otherwise vague and embarrassing.

This was an argument, upon exceptions taken by the plaintiff, Benjamin G. Heydenrych, financier, Observatory-road, to the plea of the defendant, Alexander Kay Frame, of Wynberg.

The declaration set out that, on the 10th February, 1896, the parties entered into a deed of lease, whereby the plaintiff rented to the defendant certain furniture for three months, at a rental of £3 3s. a month. Under the said lease, the defendant was also to have an option, at the expiration of the lease, of purchasing the said furniture for £65 5s. The defendant had possession of the furniture, and had paid to the plaintiff £6 6s. as and for two months' rental thereof. At the expiration of the lease the defendant did not exercise his option of purchase, but requested the plaintiff to allow him to retain the use of the said furniture, upon the terms set out in the lease. This the plaintiff agreed to. The defendant had retained possession, and had since had use of the furniture. Plaintiff claimed £3 3s., being one month's rent of the furniture under the lease, and £295, being rent that subsequently accrued.

The defendant filed a plea, which was excepted to by the plaintiff.

Mr. Burton was for the plaintiff and exceptant; Mr. McGregor was for the defendant and respondent.

Mr. Burton: The plea is vague and ambiguous. It affords no indication as to what the line of defence will be.

[De Villiers, C.J.: It seems to me that the defence is, that this money was a loan, and that you can only claim the interest on the rent.]

[Mr. McGregor: Our other defence is, that there was a settlement, save as to some £50.]

There was no tender of the £50. Then as to paragraph 6, defendant admits that he has made monthly payments, but puts us to the proof that he has not paid more than £6. He also asks us to prove that he has not exercised the option of purchase. If he did exercise this option, his subsequent defence that the goods were only lent to him is wholly inconsistent.

Mr. McGregor: There is a very important allegation in paragraph 2 of the plea. That gives a new complexion to the case. Respondent's contention is that this money was a loan and that the furniture was pledged without delivery. But in all such transactions the Court will look rather to the essence of the transaction than to the actual language employed by the parties (*Lipfert v. Aries* (1 Juta, 187). We contend that the transaction was a loan. More-

over sections 7 and 8 of the plea clearly set up a good defence. In section 8 we plead that in March, 1896, there was a full settlement.

[De Villiers, C.J.: But you do not tender anything. What do you say to section 6?]

Section 6 alleges that only £6 was paid.

[De Villiers, C.J.: You ask the exceptor to prove a negative?]

Some latitude must be allowed where a plaintiff lies by till a few days before the period of prescription. We might also have pleaded insolvency. Section 9 more particularly denies any agreement as to lease, and avers that there was simply a loan. The plaintiff claims on a lease. We deny the lease, but we admit a loan. But on this loan only £50 could be claimed; since the interest may not exceed the principal. As to our not having made a tender—that can affect only the question of costs. Here the question is not: "Are the pleadings artistically drawn, but do they disclose the real points at issue?" The defence is necessarily of an unusual character, because the whole proceeding is unusual. The exceptor does not say which paragraphs of the plea should be struck out.

Mr. Burton was not called upon in reply.

Do Villiers, C.J.: This is an action for certain furniture alleged to have been let by the plaintiff to the defendant. The declaration makes

two important affirmations, viz., that the defendant duly received possession of the said furniture, in terms of the said lease, and had paid to the plaintiff £6 6s. as and for two months' rent. At the expiration of the said lease, the defendant did not exercise his option of purchasing the said furniture, but requested the plaintiff to allow him to retain the use of the said furniture upon the said terms, as in the said lease contained, to which the plaintiff agreed, and the defendant has retained possession, and has had the use thereof, and is in possession thereof at present. It is an important rule of pleading which is laid down in the Rules of Court (330c) that the defendant in his plea shall admit, deny, or confess, and avoid all the material facts alleged in the declaration of the plaintiff, and shall clearly and concisely state the material facts upon which the defendant relies. Instead of doing that, the defendant, by his plea, first of all, says he admits that he has made monthly payments, but he puts the plaintiff to proof of the allegations that since then no more was paid, and also that he has never exercised any such option of purchase as is alleged. I have never heard of such a plea. The plaintiff makes certain allegations that payments have not been made, and that an option has not been exercised. If the payments have been made and the op-

tion exercised these would be facts peculiarly within the defendant's knowledge which he would have to prove, and yet he puts the plaintiff to the proof of the negative. I could have understood such a plea of putting to the proof where the defendant has no personal knowledge of the matter, and is not prepared to admit or deny, but where the defendant is in a position to "admit or deny or confess and avoid," under the Rules of Court he is bound to do so. It is said that the Court has never required any great nicety of pleading. That is, no doubt, true. Still, the Court has required intelligible pleas, pleas which comply with the Rules of Court and pleas from which the parties may know what the defence is. It is impossible to say that this plea does that. The defences are all mixed up in such a manner that it is difficult to know which defence the defendant really relies upon. If there are separate defences each of which goes to the root of the action, then they should be pleaded as separate pleas. One defence is that the defendant has surrendered his estate, and that the furniture has been returned to the defendant's wife. If that is the plea relied upon, it should be relied upon as a separate plea, and not mixed up with the other defences in the way in which it has been. Then there is the defence of a settlement come to in March, 1896, but then, immediately afterwards, notwithstanding that settlement, it is alleged that it was really no rent at all, that there was a sale of furniture, and that that sale was not really a bona fide sale, but intended as a pledge; that it was not really rent that was payable, but interest, and the plaintiff was not entitled to more than mere interest. That is a substantial defence, and, if it were proved, I am inclined to believe that it would be a very good defence. The parties may call the transaction a lease, but if the Court, after going into the whole matter, finds that it was never intended as a lease, but it was really intended as a pledge, the Court would treat it as a pledge. But the misfortune is that this part of the defence is not in any way made perfectly fixed and certain by reason of any tender. If it be true that it was a mere loan, that it should be regarded as interest, and that that is part of the defence, there should be tender of the money. The plea is hopelessly obscure, and I do not know that it could be amended just now, or I would have suggested to the parties to make amendments at once, so as to make it a good plea. But I am bound to allow the exception, with costs, with leave to the defendant to amend his plea, so as not to have the expense of filing a fresh plea.

[Plaintiff's Attorney: Van der Byl;
Defendant's Attorneys: Van Zyl and Buissine.]

ESTATE LEWIS V. ESTATE { 1906.
JACKSON. { Mar. 1st.

Will—Construction—Children—
Child in ventre matris.

The testator bequeathed property to some of his children and to his "grandchildren, issue of his daughter by L., her husband."

Held, that the plaintiff, who was a child of the testator's daughter by L., but was born five months and three days after the testator's death, was entitled to share in the bequest.

This was a special case submitted for the decision of the Court by the parties thereto. The parties were: Arthur Fincham Chaplain, in his capacity as curator *ad litem* of Kathleen Winifred Lewis, a minor; and Richard Court Dent, Alexander David Jackson, and William Francis Marshall, in their capacity as executors testamentary of the estate of the late William Christie Jackson.

The case was stated in the following terms:

1. The plaintiff was on the 24th January, 1906, appointed by this Honourable Court as curator *ad litem* of Kathleen Winifred Lewis, minor daughter of Frederick William Lewis (who died on or about 17th February, 1904) and of Elizabeth Margaret Lewis (born Jackson), who survives, and is the daughter of the late William Christie Jackson, hereinafter called the testator, who in his lifetime resided at East London, Cape Colony.

2. The defendants are sued as the duly appointed executors testamentary of the estate of the testator, who died on the 18th April, 1900, leaving of full force and effect a will dated 16th January, 1900, with a codicil thereto dated 12th March, 1900. A copy of the said will and codicil is hereto annexed, marked A, and the parties crave leave to have it regarded as inserted herein. They wish to refer particularly to that part of the will relating to the bequest of the landed property.

3. At the time of the execution of the will and of the codicil, and at the death of testator, there were surviving five out of eight children issue of the marriage of Elizabeth Margaret Jackson with her said husband Frederick William Lewis, to wit:—William John Lewis, born 6th June, 1883; Alfred Jackson Lewis, born 21st December, 1884; Alexander Robert Lewis, born 14th January, 1890; Doris Alice Lewis, born 28th March, 1894, who died on 24th July, 1902; Myrtle May Lewis,

born 4th May, 1897. While Kathleen Winifred Lewis was born to them on the 21st September, 1900, or five months and three days after the death of testator, and is their youngest child.

4. The defendants have already duly filed three liquidation and distribution accounts in testator's estate with the Master of this Honourable Court, wherein they have included the said Kathleen Winifred Lewis as participating equally with the five abovementioned grandchildren of testator in the bequest of a fifth share of the landed property under the aforesaid will, and, the said accounts having been duly confirmed, have paid her share under such distribution, amounting to £139 14s. 9d. into the Guardian's Fund on her behalf.

The defendants are now ready to file another liquidation and distribution account and to make a further distribution, but doubts having arisen as to whether the said Kathleen Winifred Lewis is by law entitled to receive a share under the bequest relating to the landed property contained in the aforesaid will, it is desirable that such doubts may be resolved.

5. The plaintiff contends: (a) That Kathleen Winifred Lewis is under the will of testator entitled to receive an equal share with the other five grandchildren of testator abovementioned, in the bequest, contained in the will aforesaid, relating to the fifth share of the landed property; (b) that the liquidation and distribution accounts already filed and confirmed and the distribution and payments made thereunder to the said minor shall be ordered to be finally confirmed or alternatively that no order shall be given to amend or disturb same.

6. The defendants contend: (c) That Kathleen Winifred Lewis is not entitled under the will of the testator to share in the bequest made to the grandchildren the issue of the marriage of Elizabeth Margaret Jackson with Frederick William Lewis; (d) that they are entitled to a declaration that the liquidation and distribution accounts filed be amended by the exclusion therefrom of all references to Kathleen Winifred Lewis, and that the Master of this Honourable Court be ordered to repay to them the aforesaid sum of £139 14s. 9d. with interest accrued, now standing wrongly to the credit of the aforesaid minor in the Guardian's Fund.

Wherefore the parties hereto severally pray for judgment in terms of their respective contentions, and that the cost of this suit may be paid out of the estate of testator.

"A."

This is the last will and testament of me the undersigned William Christie Jackson, of East London, Master Mariner, who being in ill-health of body, but sound of mind, memory and understanding.

I hereby revoke all former wills, codicils or other documents of a testamentary nature heretofore made or executed by me. I hereby specially authorise my hereinafter appointed executors to pay unto my daughter Elizabeth Margaret (now married to Frederick William Lewis) during her lifetime interest at the rate of 4 per cent. per annum on the sum of three hundred and sixty pounds sterling left by her grandfather John Crapper and specially referred to in his will and which said sum shall on her decease be paid out of my estate, and divided and apportioned as in the said John Crapper's will mentioned.

And I further specially empower my said executors to pay out of my estate and unto my said daughter Elizabeth Margaret Lewis a total amount not exceeding one hundred pounds sterling, but in such sums however, and from time to time as in the sole discretion of my said executors may appear advisable. Unto my sister Jane Jackson I bequeath the sum of three hundred pounds sterling.

And unto my solicitor William Francis Marshall (one of my hereinafter appointed executors) I bequeath the sum of twenty-five pounds sterling, over and above any fees to be drawn by him as co-executor, and I specially desire that all legal work in connection with my estate shall pass through his office and the usual and customary fees shall be paid therefor.

And unto my children Agnes married to Richard Court Dent, Robert Boon Jackson, Alexander David Jackson, and Alice married to Clifford George Miller and my grandchildren the issue of my said daughter Elizabeth Margaret Jackson with the said Frederick William Lewis, I bequeath my landed properties, share and share alike, that is my said children the said Agnes married to Richard Court Dent, Robert Boon Jackson, Alexander David Jackson, and Alice married to Clifford George Miller each receiving one-fifth portion or share and my grandchildren the issue of the marriage of my said daughter Elizabeth Margaret Jackson with the said Frederick William Lewis receiving the remaining one-fifth portion or share between them equally.

It is however my special and distinct desire that my hereinafter appointed executors shall have a free hand to deal with the same as they or the majority of them from time to time may deem fit, and to sell all such landed properties or to retain the same or portions thereof as to them or the majority of them may appear most advisable and to act generally concerning such landed properties as in their opinion or the majority of them may appear necessary and expedient.

And as to the rest, residue and remainder of my estate and effects whether in possession, reversion expectancy or contingency I give and bequeath the same in equal portions share and share alike unto my children Agnes married to Richard Court Dent, Robert Boon Jackson, Alexander David Jackson and Alice married to Clifford George Miller.

And as I desire that no misunderstanding shall arise hereafter I hereby distinctly state that all furniture, crockery, cutlery, personal effects, jewellery, horses, traps and other effects in my residence over and above the various articles given unto my wife at the time of our marriage and in the antenuptial contract specially described are and shall be considered as part and parcel of the rest, residue and remainder of my estate and be inherited.

(Sgd.) W. C. Jackson.

As Witnesses:

(Sgd.) G. W. Bird.

((Sgd.) L. T. Impey.

as in the preceding clause mentioned.

And I specially desire that in the event of the death of any of my said children or grandchildren then the shares coming to them or any of them shall revert to their children respectively *per stirpes*.

And I will that all money legacies shall be paid within six months of my death and free from all succession duties.

I appoint the said Richard Court Dent, Alexander David Jackson and William Francis Marshall to be the executors of this my will and the administrators of my estate hereby giving unto them all such powers as are required by law especially those of assumption and substitution.

I reserve to myself the power at any time to alter or amend this will as I shall think fit.

I declare this to be my last will and testament desiring that it may have effect as such or as a codicil or otherwise according to law.

Thus done and signed at East London this 16th day of January, 1900, in the presence of the subscribing persons as witnesses all being present at the same time.

(Sgd.) W. C. JACKSON.

As Witnesses:

(Sgd.) G. W. Bird.

(Sgd.) L. T. Impey.

By virtue of the codicillary clause in my last will contained and bearing date 16th January last I hereby give and bequeath unto my son Alexander David Jackson all plant at present belonging to me and all my interest in connection with the firm of Jackson and Neale and on the following conditions, viz.:

1. He to have same as his free and

absolute property on termination of existing partnership of Jackson and Neale.

2. That my said son Alexander David Jackson shall support my sister Jane Jackson to the best of his ability, either by having her to live with him or paying unto her so much as reasonable could be expected from him either monthly, quarterly, half-yearly or yearly. My said sister having the right to elect to live with my said son or to draw the allowance as the case may be.

3. That all accounts of the said firm of Jackson and Neale shall be made upon the termination of the said partnership and the balance other than the said plant arrived at shall appertain to my general estate.

And I confirm my said will in all other respects.

Dated at East London, this 12th day of March, 1900.

(Sgd.) W. C. JACKSON.

As Witnesses:

(Sgd.) Matthew W. Troy.

(Sgd.) L. S. Impey.

Mr. Gardiner for plaintiff.

Mr. W. P. Buchanan for defendant.

Counsel having been heard in argument:—

De Villiers, C.J.: According to the case stated for the opinion of the Court, the plaintiff, Kathleen Lewis, was born five months and three days after the death of the testator. In the ordinary course of Nature, she must, therefore, have been in *utero matris* at the time of the testator's death. By his will he had bequeathed his landed properties to certain of his children, and his "grandchildren the issue of his daughter Elizabeth with Frederick Lewis." The plaintiff is the youngest daughter of Elizabeth by Frederick Lewis. Without entering into the question whether she would have been entitled to share in the bequest in case she had been born more than ten months after the date of the testator's death, I am clearly of opinion that, under the circumstances disclosed in the special case, the testator may fairly be presumed to have intended to include her among the issue of his daughter Elizabeth, whom he wished to share in the bequest. If the decision in *Bresler v. Kotz's Executors* (2 Menz. 444) is to be followed, it should not be extended to cases like the present, where circumstances exist which support the presumption mentioned by Voet (28, 5, 12) in favour of including children born after the testator's death among the objects of his bounty. The judgment of the Court must be in terms of the plaintiff's contention.

[Plaintiff's Attorney: Paul de Villiers; Defendant's Attorneys: Walker and Jacobsohn.]

AUSTIN V. MORRALL AND { 1905.
OTHERS. { Mar. 1st.

**Illegal contract — Prize fight —
Boxing prize payable to
winner.**

A prize fight is illegal, and consequently the winner would not be entitled to claim the prize from the person who offered it.

A friendly contest in boxing, not calculated to produce injury to either party, would not be illegal. A prize having been offered by the defendants to the winner in such a friendly contest, the two competitors agreed before the contest to divide the prize between them, whichever side should win. This agreement was communicated to the defendants, and they acquiesced. After the contest the defeated competitor instituted an action against the defendants for half the amount of the prize.

Held, that as the defendants' offer was to pay the winner, and as their acquiescence in the agreement between the competitors did not amount to a promise to pay the loser anything, the plaintiff was not entitled to succeed.

This was an action to recover certain moneys said to be due to the plaintiff as remuneration for entering into a certain sparring contest.

The plaintiff's declaration was as follows:

1. The plaintiff resides at Cape Town, and was until defeated, as hereinafter set forth, the recognised professional featherweight champion of South Africa in the legitimate sport or pastime of glove boxing.

2. The first defendant is the proprietor or lessee and the second defendant is the manager of certain licensed premises or house of entertainment known as the Grand Pavilion at Camp's Bay, Cape Division, where they reside, and cater for the entertainment of the public in various ways, including that of promoting and organising competitions for the exercise of skill in glove boxing or glove contests.

3. The third defendant is a company registered under the Company's Act, 1882, having its head office for the Colony in Cape Town. It is the pro-

prietor of a certain daily newspaper called the “Cape Argus,” printed and published in Cape Town. In connection with the said newspaper, and for the furtherance of its objects, the third defendant carries on a sports department, which is under the management of the fourth defendant as sports editor.

4. In or about the month of July, 1904, the first two defendants were desirous of promoting and organising a glove contest or competition in boxing between the plaintiff and one Thomas Palmer, otherwise known as Pedlar Palmer, at the aforesaid Grand Pavilion and negotiations took place between the said persons for that purpose.

5. Thereafter, on or about the 18th of July, 1904, an agreement was concluded between the aforesaid parties, whereby the plaintiff and Palmer undertook to contest for the featherweight boxing championship of South Africa for a purse or prize of £500 given by the said first two defendants, which the latter agreed to deposit with the sports editor, “Cape Argus,” Cape Town. A copy of the contract is hereto annexed, marked “A,” and plaintiff craves leave to have it regarded as inserted herein.

6. The aforesaid contract was executed and signed in the office of the fourth defendant, viz., the sports editor's office, “Cape Argus,” with the knowledge and consent of the third and fourth defendants.

7. The fourth defendant in the scope of his duty, and with the authorisation and consent of the third defendant, assented to the terms of the aforesaid contract as far as it concerned them, and consented to hold the said sum of £500 as stakeholder in his said capacity and to pay the same over to the plaintiff and Palmer at the conclusion of the contest. The plaintiff signed and executed the contract relying on this undertaking.

8. On the said 18th July, 1904, the plaintiff and Palmer also entered into the agreement, a copy of which is hereto annexed marked “B,” and which plaintiff craves leave to have regarded as inserted herein. They gave notice of this to the first, second, and fourth defendants personally, and to the third defendant through and by means of the fourth defendant, all of whom acquiesced in the said arrangement and raised no objection thereto.

9. The plaintiff thereupon relying upon the due fulfilment of the above contracts and undertaking, went into training for the contest and has incurred expense and trouble in connection therewith.

10. Thereafter by mutual consent the date specified for the competition was antedated to the 8th August, and prior thereto the said sum of £500 was paid into the hands of the fourth defendant in his capacity as sports editor aforesaid

with the knowledge and consent of the third defendant in terms of agreement "A."

"A."

CONTRACT.

Whereby Pedlar Palmer and Watty Austin agree to contest the Feather Weight Boxing Championship of South Africa for a purse of £500 (five hundred pounds) given by Mr. L. Morrall and Mr. F. Haisman.

We, Pedlar Palmer and Watty Austin, hereby agree to box for the above championship (twenty rounds of two minutes duration each) at the Grand Pavilion, Camp's Bay, on Tuesday, the 9th day of August, 1904. Further we agree to place ourselves under the management of Mr. F. Haisman, who is to act, as he may deem fit, in the best interests of both parties, and adhere strictly to the following arrangement:

(1) To enter into strict training from this date;

(2) Commit no act, either directly or indirectly, that will imperil the best interests of the donors of the purse; and

(3) That we will, when called upon, submit to medical examination, Mr. F. Haisman, reserving to himself the right to act in what way he may deem fit.

(Signed) PEDLAR PALMER.

„ W. J. AUSTIN.

Witnesses:

(Signed) Frederick Haisman.

„ Mathew Palmer.

CONTRACT.

Whereby we, Leonard Morrall and Frederick Haisman, of the Grand Pavilion, Camp's Bay, agree to put up the above purse £500 (five hundred pounds) sterling providing the afore-mentioned undertaking is faithfully carried out, and agree to deposit cash or cheque to cover the said amount on the day of contest in the hands of the Sports Editor, "Cape Argus," Cape Town.

(Signed) FRED. HAISMAN.

„ LEONARD MORRALL.

Witnesses:

(Signed) W. W. Seabrook.

„ M. A. Smith.

11. The contest or competition took place on the said day, all arrangements in regard thereto, and specially in regard to the appointment of referee, timekeepers, etc., being made by or with the sanction of defendants, and it resulted in a decision in favour of Palmer upon points.

12. Thereafter, the plaintiff and Palmer having duly carried out and fulfilled the terms and conditions of their contract, it became and was the duty of the third and fourth defendants, or

one or other of them to pay, and of the first and second defendants to pay or cause the other defendants, or one or other of them to pay to plaintiff the sum of £250, being his half share of the above-mentioned purse or prize, but neglecting their duty as aforesaid, the defendants have wrongfully refused to pay, or cause to be paid, as before stated, the said sum or any part thereof, and the first and second defendants have wrongfully interdicted the other defendants from so paying, notwithstanding that plaintiff has made demand therefore as he is legally entitled to do.

Wherefore the plaintiff claims:

1. As against the third and fourth defendants, or one or other of them, the one paying the other to be absolved: (a) An order directing them, or one or other of them, to pay to plaintiff the sum of £250 due as aforesaid; (b) interest thereon *a tempore mora*.

2. As against the first and second defendants: (c) An order compelling them to cause or direct the above defendants, or one or other of them to pay, the said sum to plaintiff; (d) or alternatively, and failing payment by the third and fourth defendants, or one or other of them, that they be ordered to pay to plaintiff the said sum, together with interest thereon *a tempore mora*.

3. As against all defendants: (e) Alternative relief; (f) costs of suit.

"B."

July 18th, 1904.

The said Watty Austin and Pedlar Palmer have agreed to box for the purse of £500 (five hundred pounds) given by Mr. Morrall and Mr. Haisman, of the Pavilion, Camp's Bay, to be contested for on the night of August 9th, 1904, we also agree to divide the purse of £500 (five hundred pounds), the winner to receive £250 and the loser to receive £250.

(Signed) W. J. AUSTIN.

„ THOMAS PALMER.

Witnesses:

A. McNaughton,

Harry Buntton.

To this declaration the first two defendants excepted and pleaded over as follows:

EXCEPTION.

The defendants, Leonard Morrall and Frederick Haisman, except to the declaration as disclosing no cause of action inasmuch as the contracts sued upon are *ipso jure* illegal contracts and are contrary to public morals and policy, and therefore void.

PLEA OVER.

And for a plea over in case the said exceptions should be overruled, but not

otherwise, the said defendants say as follows:

1. They admit that the plaintiff resides at Cape Town, but they do not admit the other allegations in paragraph 1.

2. They admit that the first defendant is the lessee and the second defendant is the manager of the said Grand Pavilion, and that they cater for the entertainment of the public, but they deny the other allegations in paragraph 2.

3. As to paragraph 3, the defendants admit the allegations therein contained.

4. The contracts annexed to the declaration and marked "A" were executed and signed at Camp's Bay and not in the office of the fourth defendant as alleged in paragraph 6, and the defendants crave leave to refer to the terms thereof for the true meaning and intent of the parties thereto.

5. By the terms of the said contracts the plaintiff and the said Palmer agreed, *inter alia*, to adhere to the following arrangement: (1) To enter into strict training from the date of the said contracts. (2) To commit no act either directly or indirectly, that would impute the said contracts, and thereupon it the purse (to wit, the first and second defendants).

6. The said arrangement was a condition precedent, and the defendants only undertook to put up the said purse of £500 if the said arrangement were faithfully carried out by the plaintiff and the said Palmer.

7. The plaintiff and the said Palmer did not faithfully carry out the said arrangement, but forthwith, to wit, on the said 18th day of July, fraudulently and collusively and without the knowledge or consent of the first and second defendants, executed the written agreement annexed to the declaration and marked "B," and thus committed an act which imperilled, as hereinafter set forth in paragraphs 9 and 10, the best interests of the donors of the said purse.

8. The plaintiff further in breach of the said arrangement did not enter into strict training from the date of the said contracts marked "A."

9. The first and second defendants signed and executed their said contract with the intention and for the purpose which were on the said date well known to the plaintiff and the said Palmer of charging persons for admission to view the said contest, and thus making profits for themselves, and popularising the said house of entertainment.

10. The first and second defendants were put to great expense in and about the organisation and management of the said contest, and in consequence of the terms of the said fraudulent and collusive agreement becoming known to certain persons, large numbers of people who would otherwise have paid

for admission were induced not to do so, and the said defendants in consequence have suffered loss, and have sustained damage in their character of public entertainers and in their said business.

11. The defendants admit that the plaintiff and the said Palmer at the time and place appointed boxed twenty rounds of two minutes' duration each, and that the said Palmer was declared the winner on points, but they deny that any contest took place in accordance with the terms of the said contracts marked "A."

12. The defendants say further that under the provisions of the contracts annexed to the declaration and marked "A," the fourth defendant in his capacity as sports editor, "Cape Argus," Cape Town, was constituted stakeholder of the said purse of £500, which was duly deposited with him in terms of the said contracts, and thereupon it was his duty as such stakeholder only to pay over the amount of the said purse to the winner of the said contest upon proof to his satisfaction that the terms and conditions of the said contracts had been faithfully carried out by the said Palmer and the plaintiff, and not otherwise. Neither the plaintiff, nor the said Palmer, nor any other person produced any such proof, and the fourth defendant acting lawfully and *bona fide*, and under the provisions of the said contracts, refused to pay over the amount of the said purse or any portion thereof to the plaintiff or the said Palmer.

13. Save as above, and save that they admit that they refuse to pay to plaintiff the said sum of £250, or any portion thereof, the defendants deny the allegations in paragraphs 4, 5, 6, 7, 8, 9, 10, 11, and 12.

Wherefore the defendants pray that the plaintiff's claim may be dismissed with costs.

The fourth defendant's exception and plea was as follows:

The fourth defendant excepts to the plaintiff's declaration, in that it discloses no cause of action against the said defendant, and prays that the said declaration may be set aside with costs.

And for a plea to the said declaration, in case the above exception should be overruled, the fourth defendant says:

1. He admits that the plaintiff and the first and second defendants reside in Cape Town, but has no knowledge of the other allegations in paragraphs 1 and 2.

2. He admits paragraph 3, save that he says that in the months of July and August, 1904, he was acting temporarily as Sports Editor, during the absence of the Sports Editor from this Colony, and that he is no longer in the employ of the third defendant.

3. He admits paragraphs 4 and 5, save that he says that the date when the said agreement was concluded was the 16th July, 1904.

4. As to paragraph 6, he admits that he knew of the execution of the said contract, and consented thereto, so far as he was concerned, but otherwise he denies the allegations in paragraph 6.

5. As to paragraph 7, he admits that he agreed to hold the sum of £500, if paid to him by the first and second defendants, as stakeholder, and to pay the same, in the event of the plaintiff and Palmer duly carrying out their agreement with the first and second defendants, to the winner of the said contest. He denies that in so agreeing he acted within the scope of his duty or with the knowledge or consent of the third defendant, though he admits that he purported to act in his capacity as Sports Editor. Save as above, he denies the allegations in paragraph 7.

6. As to paragraph 8, he admits that the plaintiff and Palmer entered into the agreement, copy whereof is marked A, but he says that he received no notice of such agreement until after the contest had taken place. He denies that he acquiesced in the said arrangement.

7. He says, further, that the said agreement B was entered into in violation of the rules and customs affecting the sport known as boxing, and in breach of the agreement between the plaintiff and Palmer and the first and second defendants, and more particularly of claus (2) thereof.

8. He has no knowledge of the allegations in paragraph 9.

9. As to paragraph 10, he admits that the date of the contest was altered to August 8. He admits that prior to the contest, the first and second defendants handed him a cheque for £500, but says that he has not cashed the said cheque or demanded payment thereof. He denies that the third defendant knew or consented to his receiving the said cheque.

10. As to paragraph 11, he admits that the contest took place on the said day, and that the decision was in favour of Palmer on points, but denies that the arrangements were made by or with the sanction of the third and fourth defendants.

11. As to paragraph 12, he admits that he has refused to pay the plaintiff the sum of £250, or any part thereof, and says by reason of matters hereinafter set forth, he was and is justified in so refusing. He admits that the first and second defendants have interdicted him from so paying, and says further, that they have stopped payment of the said cheque at the bank. Save as above, he denies the allegations in paragraph 12, so far as they refer to him.

12. He says further, that it was his duty as stakeholder to hand over the stakes only to the winner of the said contest, if such winner had duly observed the rules and customs of boxing, and fulfilled his agreement with the first and second defendants, and in the event of any dispute arising between the parties to the agreement "A," to retain the stakes in his possession, and to refuse to hand them over until such dispute had been duly decided.

13. The plaintiff was not the winner of the said contest, and had not duly observed the rules and customs of boxing or fulfilled his agreement with the first and second defendants, as hereinbefore set forth in paragraph 7, and prior to the plaintiff demanding from the fourth defendant the sum of £250, the first and second defendants had ordered the fourth defendant not to pay over the said sum or any part thereof, and had given him notice of a dispute between themselves and the plaintiff as to the due fulfilment by the plaintiff of his contract with them.

14. The fourth defendant still retains possession of the said cheque and is ready and willing to deliver the same to whomsoever this Honourable Court may direct.

Wherefore the fourth defendant prays that the plaintiff's claim against him may be dismissed with costs.

[De Villiers, C.J.: It is admitted that the plaintiff lost the contest; how then could he claim the money?]

Mr. Burton: They agreed that the prize should be divided.

[De Villiers, C.J.: That agreement was between Austin and Palmer only.]

Notice of it was given to the stakeholder. The division of the prize removes every element of gambling, and is so far a benefit to the community. These men were paid simply for an exhibition of their skill.

[De Villiers, C.J.: But the contract says that the prize was to be given to the winner.]

The people who gave the prize acquiesced in the division of the prize, and by their acquiescence varied the original contract.

[De Villiers, C.J.: This arrangement as to the division of the prize was only between Austin and Palmer. How can a prize be given to an unsuccessful contestant?]

They were both paid for assisting in a public performance.

[De Villiers, C.J.: What is the exception?]

Mr. Gardiner: We say that this was an illegal contract. English authorities go to show that all prize-fights are illegal.

[De Villiers, C.J.: On what grounds?]

(1) They are a breach of the peace.
(2) They expose the combatants to unnecessary danger. (3) They are demo-

BARSON V. BECK.

Mr. P. Jones moved to make absolute a rule nisi, allowing Mrs. Beck to sue in *forma pauperis* for a certain sum of money on an insurance policy.

Rule made absolute, Mr. Gardiner to act as counsel, and Messrs. Silberbauer, Wahl and Fuller as attorneys.

Es parte **TRIEGARDT.**

Mr. P. Jones moved for leave to pass a mortgage bond in lieu of another bond which had been prematurely paid on the anticipation of a sale of the property, which, however, did not go through, as the farm could not be sold until the death of the survivor. £1,000 was borrowed to pay off the first mortgage bond, and it was sought now to redeem this by the passing of another bond.

Order granted as prayed.

Ex parte **LLOYD.**

Mr. Pyemont moved, on behalf of the petitioner, a minor son of the late Mortimer Lloyd, of Kynana, for an order authorising the Master to pay out £216 and £44 in the estate of his late father. Counsel stated that the applicant would not be of age until June, 1906, and he was anxious to earn his own living as a transport rider in the Kynana district.

Hopley, J., said, in this particular case, it was to the benefit of the minor, although he was not in favour of such a practice.

Ex parte **MARTIN.**

Mr. Struben moved for an order authorising the Registrar of Deeds to pass transfer of certain property which the petitioner had settled on his wife by ante-nuptial contract, with certain conditions, *inter alia*, if there were any children, that it was to divert to them. Lately, there had been an exceptionally good offer for the property, and counsel said that it would be to the benefit of the wife and children to allow transfer.

Order granted, on condition the purchase price apply to the reduction of the payment of a certain bond, and the balance to be handed over to the Master of this Court, or some trustee to be approved of and appointed by him, to be invested by him on first mortgage for the benefit of the petitioner, Winifred Martin, during her lifetime, and of the issue of marriage after her death.

CAIRNCROSS V. LIZAMORE.

Dr. Rainsford moved for leave to attach certain property at Oudtshoorn, in order to found jurisdiction, and for

leave to sue by edictal citation for payment of a certain bond. The defendant now could not be found and was last heard of in Krugersdorp.

Order of attachment granted, with leave to sue edictally, citation and all notices be served together, personal service, if possible, failing which, one publication in the "Oudtshoorn Courant" and one in a Krugersdorp paper, return day, 15th April.

Es parte **ESTATE BADENHORST.**

Mr. P. Jones moved, on behalf of the petitioners, who are executors dative in the estate of their late father, and executors testamentary in the estate of their late mother, for leave to pass transfer of certain property at Hope Town, which one of them bought out of the estate.

The matter was ordered to stand over for the production of affidavits as to the price the property had realised, and what publicity was given to the sale.

Ex parte **ESTATE SNYMAN.**

Mr. W. P. Buchanan applied for leave to pass transfer of certain property. Petitioner was executor dative in his granddaughter's estate, and he had put up a piece of land in the estate for public auction. The sale was well attended, and the petitioner's bid of £175 was the highest.

Granted.

Ex parte **ESTATE ERASMUS.**

Mr. Struben applied for leave to sell certain property at Somerset East. The property was in a dilapidated condition, and unprofitable.

Granted, the shares of the minors to be paid to the Master.

Ex parte **SOUTH AFRICAN BRICK AND LIME CO., LTD.**

Mr. P. Jones moved for leave to pass transfer of certain landed property at Observatory-road. The applicant was the only surviving trustee of the company.

An order was granted that the liquidators be authorised to transfer the land in question.

Es parte **ESTATE PEACOCK.**

Mr. P. Jones moved, on behalf of the executor testamentary of the estate of the late John Peacock, for leave to purchase certain property at Queen's Town. He had obtained consent of all the heirs to take it over on the valuation of a sworn appraiser.

Granted.

Ex parte ESTATE DALY.

Mr. P. Jones moved, on behalf of one of the executors dative in the estate, for leave to pass transfer of certain property which was purchased at public auction.

Granted.

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

TRIAL CAUSE.

DOMINGO V. COLONIAL GOVERNMENT. { 1905.
Mar. 2nd.
" 3rd.

Damnnum injuriæ — Artificial change of course of river.

This was an action brought by Gabriel Domingo, of the Paarl, against the Colonial Government to recover a sum of £50 for damage to his property caused by the alleged negligent construction of a bridge over the Berg River.

The declaration set out that the plaintiff was the owner of certain land situated in the township of the Paarl, and bounded on the east side by the Berg River. The defendant was the Hon. T. W. Smartt, Commissioner of Works. In or about the year 1900 the Government constructed a certain bridge across the said river near to and above the plaintiff's land. Thereafter in or about January, 1901, the river became flooded, and owing to the obstruction caused by the bridge, which was made negligently and without protection against floods, the waters overflowed the bank of the said river, in consequence whereof the Government constructed certain protective works in order to prevent a like occurrence in the future. In September, 1904, the said river again became flooded, and in consequence of the protective works being negligently constructed, the flood waters, contrary to their natural course, flowed round and into the said protective works and upon the plaintiff's land, washing away portion of his soil and garden and a number of the poplar trees. He claimed (1) £50 as and for damages; (2) alternative relief; and (3) costs of suit.

Defendants, in their plea, said that the bridge was constructed under lawful authority, and was properly constructed, and all reasonable precautions were

taken against ordinary and usual floods in the river. In January, 1901, an extraordinary and violent flood occurred, which swept away the said bridge. They admitted that the banks were eroded. Thereafter, protective works were built. The defendants denied negligence, and prayed that the claim might be dismissed with costs.

The replication was general.

Mr. J. E. R. de Villiers was for the plaintiff; Mr. Howell Jones (with him Mr. Nightingale) was for the defendants.

Mr. De Villiers applied for leave to amend the replication by inserting the following words: As to paragraph 3 of the defendants' plea the plaintiff admits that the said bridge was washed away in January, 1901, but he says that the materials and debris therein remained lying, and are still lying in the said river, above the plaintiff's land, obstructing the natural flow of the said river, and diverting the said river on to the plaintiff's land.

Mr. Jones said that the defendants denied the allegations embodied in the proposed amendment, and he was placed in rather an awkward position if his learned friend were allowed to put fresh matter on the pleadings which the Government had no opportunity of denying. Furthermore, he would point out that the declaration did not allege any damage as having been caused to the plaintiff through the alleged negligent construction of this bridge.

Mr. De Villiers said that the Government had had notice of the proposed amendment.

Maasdorp, J., said he thought they should have the whole of the case before the Court. He consented to the proposal of the plaintiff to embody the proposed amendment as a paragraph of his declaration, and gave leave to the defendants to amend their plea so far as this addition was concerned.

Gabiel Domingo (the plaintiff), a Malay, said he was the owner of certain property on the banks of the Berg River. He was born at the Paarl. The stream adjacent to his property was broad prior to the temporary bridge erected by the Government. Mr. Loubser's property was situate between the bridge and witness's property.

Maasdorp, J., asked whether this was the old Lady Grey Bridge?

Mr. Jones said that in 1900 the old Lady Grey Bridge got into a defective state, and the Government then erected the temporary bridge, while they repaired, or really reconstructed, the old bridge. The old Lady Grey Bridge was situate below the plaintiff's property, while the temporary bridge was above his property.

Witness (continuing his evidence) said that in January, 1901, the temporary bridge, which had been made of stones from the bed, railway sleepers and iron, was washed away after the flood. The

sand silted up, and the usual flow of the river had been changed. In summer the water only went through a little channel instead of over the whole bed. After the disturbance the Government collected the materials, and heaped one portion of the debris on the side of Mr. Loubser's property and put the other on the sand bank on the eastern side. The sand bank had enlarged in the meantime. Mr. Loubser's land, which had been partially washed away, was filled up again by the Government, and protective battens were put up. Witness's property was not protected; at that time, as a matter of fact, it was not necessary. During a flood, in 1902, part of the soil deposited on Mr. Loubser's ground was again washed away; the same thing took place in 1903. In September, 1904, the water again burst over Loubser's property, and took away some of his ground. A portion of witness's ground was also carried away. The increase in the size of the sand bank had caused the water to rush with greater force towards the side of Loubser's property. From witness's property the bank sloped down about 10 or 12 feet to the river bed. The embankment was now about 12 yards nearer to his house than it was before the last flood, and was only about 5 yards distant. Some 20 or 30 poplar trees had been washed away. Instead of having good soil, he had now soft sand. It would take about a thousand cartloads of soil to fill the gap which had been caused, and it would also be necessary to make up the street again. He thought there was danger to his house. He would be content if the Government filled up the hole, and planted trees, and protected him against a further flood. He should also want to be paid for the trees he had lost. He thought the washaway had seriously affected the value of his property on account of the danger of another similar occurrence.

Cross-examined by Mr. Jones: When he bought his property the first flood had occurred, and steps had been taken to protect Loubser's property. He then knew that the bridge had diverted the flow. He did not think at that time that the diversion of the stream would damage his property. He attributed the damage done to his property to the sand bank, and part of the temporary bridge that was still lying in the river. He did not consider that the battens put up against the property of Loubser were sufficient to hold against floods. He estimated that the trees were worth £5 each.

John W. Price Logan, Government land surveyor, who had prepared the plan put in, said that the debris of the temporary bridge was about 25 ft. square and 5 or 6 ft. high.

Pieter Johannes Loubser, of the Paarl, said that his land adjoined the plaintiff's property. Before the Government erect-

ed the temporary bridge, the bed of the river was level, and the water flowed uniformly along the course. He was away at the time the bridge was erected, but on his return he found that the current of the stream had been diverted to his side of the river, and had done mischief to part of his property. The Government filled in the gap on his land caused by the flood. In 1903 the river was again in flood, and the water went over, and into the protective works. He claimed damages from the Government. In reply, he was referred by the Railway Department to the Municipality. He afterwards sued the Government for damages in the sum of £100. The Government did not file a plea to his declaration, but made him an offer of £25, with taxed attorney and client costs, such costs not to exceed £15. Witness accepted £25. He believed his attorneys agreed to a condition in the terms of settlement that the Government should not be held liable for any further damage due to the same cause. His property still suffered from the flow of the river. He saw the damage done to the plaintiff's property. He should think a portion of about 10 or 15 yards in breadth was carried away. He considered that the plaintiff's house stood in great danger. He considered that the eating away of the land on his own and plaintiff's property was due to the bridge having been erected by the Government. Even people who lived in some of witness's houses had given him notice, because they were afraid of the winter rains.

Cross-examined: He did not tell the Government that he was satisfied with the protective works that they put up. He admitted his attorney wrote informing the Government that he was satisfied.

Re-examined: He considered that the plaintiff's property was worth £150 less since the river had begun to overflow on to it.

Izaak Jacob de Villiers, of Lady Grey Bridge, said that after the flood of January, 1901, in which the temporary bridge was capsized, the river course was altered, and the water had since flowed in quite a different channel from formerly.

Johannes Everardus Louw, of the Paarl, said he calculated that about 1,000 yards of earth had been washed away from plaintiff's ground by the river. He valued the soil at 1s. a load.

Samuel Japha, of the Paarl, also spoke to the diversion of the river course after the flood of January, 1901.

Mr. De Villiers closed his case.

John S. Basson, photographer, the Paarl, spoke as to several photographs which he had taken of the locality, where the damage was alleged to have been done.

W. Westhoven, member of the Institute of Civil Engineers, and an official of the Public Works Department, said

that the Department, when the repairs were going at the Old Lady Grey Bridge, wanted a drift for temporary purposes, but the Municipality insisted upon a temporary bridge. The temporary bridge erected was, he thought, sufficient to stand all ordinary summer floods. They were expecting to get the permanent bridge finished before any large floods came down the river in winter. A flood of 4 feet had come down the river. The bridge ended on a sand bank. On the 15th January, 1901, a very high flood occurred. According to the department's record, it was an exceptionally high flood, higher than the ordinary winter floods. The Mayor of the Paarl wrote saying that there had not been a higher flood for thirty years. The bridge was constructed of "sleeper cradles." The "cradles" were founded upon sand, and were underwashed. The whole bridge was against the current. After the collapse, the bridge was taken to pieces, part of the material was placed on the east bank and part on the west bank, because they expected to have to rebuild the bridge. They, however, received no instructions from the Railway Department. The materials would in no way cause a diversion of the stream; it was absurd to say that they could. As to the protective works, he considered that these were sufficient for the purpose of replacing Loubser's land in its former condition. It was not uncommon for not only the Berg River but every river in South Africa to change its course. There had been no complaints about debris having been left on the banks of the river.

In cross-examination, witness said that the damages paid by the Government to Loubser, whose land had been eroded, referred to the trees which had been washed away. He did not consider that Domingo was entitled to any damages; he did not attach any value to the trees. He did not think that fifty cart-loads of earth had been washed away from plaintiff's property. The protective works were never considered to be a permanent feature; they were simply put there to replace the bank opposite Loubser's property in its former condition.

James Chadwick said that in 1900 and 1901 he was a clerk of works in the Public Works Department, and that he supervised the erection of the temporary bridge. He considered that it was well constructed. The bridge was tested by a 4 feet flood. A furious flood of about 10 or 12 feet of water, travelling at 8 to 10 miles an hour, swept away the bridge in January, 1901.

Thomas Weston Porry, civil engineer, of the Public Works Department, also gave evidence.

Mr. Jones closed his case.

Counsel having been heard in argument on the facts,

Maasdorp, J., in giving judgment, said that, in his opinion, the washaway

of the bank on plaintiff's property could be attributed to nothing else than the manner in which the sheeting was put up on Loubser's land. It was put up by the Government. It did not seem to him that the material placed in the river bed materially affected the flow of the river. He found that plaintiff had lost some poplar trees and a little soil, and that he was entitled to small damages. The sum claimed, it seemed to him, would more or less cover all the damage to plaintiff's property. He thought the parties might intimate to him if they were prepared to consent to prospective damages to close the matter entirely. If he gave small damages, plaintiff might be able to recover continuing damages.

Mr. De Villiers said his client preferred actual damages.

Judgment was thereupon given for the plaintiff for £10, with costs, including plaintiff's expenses as a witness and actual cost of making the plan.

[Plaintiff's Attorneys: Michau and De Villiers; Defendant's Attorneys: Reid and Nephew.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir JOHN BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

BOSMAN, POWIS AND CO. v. f 1905.
NORDEN. } Mar. 3rd.

Lease of licensed premises—
Licence—Removal of business—Transfer of licence.

The plaintiff, the holder of licences for two hotels, and owner of the land with the hotels thereon, sold the lease, licences, goodwill, furniture, and all contents thereof, and executed a lease of the hotels for five years, with a right of renewal for another five years in favour of the defendants, who obtained from the Licensing Court a transfer of the licence to themselves.

Held, affirming the judgment of a Divisional Court, that the defendants had no right, during the currency of the lease, to remove the business and the licence connected therewith to other premises.

This was an appeal from a judgment of Mr. Justice Hopley, sitting as a division of the Supreme Court, in an action brought against the present appellants, Bosman, Powis and Co., wine merchants, by the respondent Norden, for a declaration of rights under a certain agreement.

From the record it appeared that a certain agreement was contained in a broker's note, and a lease made subsequently to the broker's note. The plaintiff alleged that this agreement thus contained, so far as it had reference to certain licences of hotels that were leased, had only the effect of transferring the licences to the defendants pending the period during which the lease ran. The plaintiff said, further, that when the documents were drawn up, he raised the question specifically with regard to the protection and return of the licences to him upon the termination of the lease, and that thereupon Mr. Bosman, who was a member of the defendant firm to negotiate the matter with him, said that they could enter into the lease, and that the question of the protection of the licences and their return to plaintiff could be arranged subsequently. The plaintiff also laid some stress on certain representations made by Mr. Joseph, the broker whom he employed, and who was present at the negotiations.

Mr. Burton (with him Mr. Roux) was for the appellants; Sir H. Juta, K.C. (with him Mr. Gardiner), was for the respondent.

De Villiers, C.J., said he supposed that the decision of the appeal would have to depend entirely upon the broker's note.

Mr. Burton said he took it that that was so. He had mentioned the matter of the representations, which were pleaded very fully and very strongly in the declaration, because it would appear to the Court, he thought, that the case was very largely based upon these alleged representations. Now, these representations had been found by the learned judge in the Court below not proved, and the plaintiff must take his stand, his lordship admitted, upon the legal effect of the document. The question then was what, in view of the circumstances of this contract, must be taken to be the legal effect of the document. The broker's note was in the following terms: "Bought from Joseph B. Norden and sold to Bosman, Powis and Co., the lease, licences, goodwills, furniture, and

all contents, and the whole as a going concern, of and in the Old Standard Hotel and the Nil Desperandum Hotel, Kuil's River, with the exception of the stock of liquors, etc., for the sum of £1,000, upon the following terms—that a lease is to be granted by the seller to the purchaser of the aforesaid premises for five years, at a monthly rental of £35, purchaser to have the option at the end of the period of five years of taking the lease on for another five years, at a rental of £50." Clause 5 said that the premises to be included in the broker's note were the Old Standard Hotel, together with out-buildings, and half-portion of the Nil Desperandum Hotel. Counsel submitted that upon the face of the documents the plaintiff's rights must stand or fall. The effect of the documents was to transfer to the purchasers the licences in question, as well as the other matters contained. The note was a "bought and sold" note. It was clear that the lease was bought. The appellants maintained that the £1,000 was paid for the right to obtain the lease. There was no doubt the lease was bought, the furniture was bought, and the other things stipulated were bought. The appellants did not for a moment suggest that they bought the property, but they claimed that they had bought the lease. Looking at the intention of the parties, he submitted that it was a fair argument that the things on the broker's note were bought. He contended that the question of goodwill could not be confined to the licences. As to the licences, the question was, were the appellants holders of the licences as owners of the licences or as holders of the licences during the continuance of the lease? The learned judge in the Court below seemed to have thought these licences were old licences of very great value. He (counsel) did not consider that they were of very great value, and he pointed out that the Colonial Orphan Chamber, as a matter of fact, had been very reluctant to advance any more money to Norden. Again, Norden was hard pressed for money, and it was quite conceivable that he agreed to accept £1,000 for the licences.

De Villiers, C.J., put it to Mr. Burton whether it was correct to speak of "selling" licences?

Mr. Burton said that he thought it was clearly correct. Licences were regularly sold. A licence was a personal right in respect of certain premises.

De Villiers, C.J., said that if premises were sold, then it would be for the new owner to apply for a transfer.

Mr. Burton contended that under this document Bosman, Powis bought whatever right Norden had.

De Villiers, C.J., asked whether the licence and goodwill were not matters applicable to certain premises?

Mr. Burton admitted that goodwill was peculiar and applicable to certain premises. He contended, however, that

the licence was on a different footing. Counsel went on to comment upon the risk of the renewal being refused, and submitted that the argument of improbability that Norden would enter into a contract of this sort was not very strong. He contended that Norden, under these documents, divested himself of all rights that he had. Counsel quoted the cases of *Ohlsson's Cape Breweries v. Power* (10 C.T.R., 747), and *Ohlsson's v. Kuhr's Trustee* (11 C.T.R., 165), and *Ohlsson's v. Parson* (11 C.T.R., 165), and of *S. A. Moss*. On these cases, he urged that the licence was a personal right of which the holder could divest himself. He also quoted the English case of *Mawer v. Hindmarsh* (Law Times Reports, vol. 28, p. 644), in regard to the question of forfeiture of licences.

Sir H. Juta drew their lordships' attention to section 8, Act 44, 1885, which, he said, was for the protection of owners and lessors where the licence was in danger either of going away, or being forfeited. Under that section, the landlord, in the case in England which had been quoted, could have got his transfer. It seemed to him (Sir Henry) that the trouble arose because of the confusion that appeared, according to Mr. Bosman's evidence, to exist in the licensed victuallers' trade in Cape Town. They seemed to think that they could sell a licence. They need only refer to one section to see that they could not sell a licence. Section 51 said that any person who, during the currency of his licence, sold or disposed of his business may make application to the R.M. It was only in respect of these licensed premises that there could be a temporary transfer. Counsel went on to submit that it was never for one moment supposed that they could separate the licence from the premises. He rested his case on the contention that a licence was not a merchantable article, which could be handed about from one person to another, as was perfectly clear from section 55 of the Act.

Mr. Burton having been heard in reply.

De Villiers, C.J.: I quite agree with Mr. Burton that the decision of this question depends upon the construction of the agreement of lease executed between the parties and that the construction of that agreement depends upon the terms of the broker's note, which has been incorporated with the agreement. The broker's note, no doubt, uses the words, "bought from Joseph Norden and sold to Bosman, Powis and Co., the lease, licences, goodwill, furniture, and all contents, and so forth," for a certain price, but it is clear that it is not the premises that were sold, but the right to have a lease of the premises executed in terms of the subsequent part of the broker's note. If this had been an out-and-out sale, there would have been no difficulty

whatever, because there can be no doubt that the goodwill would have gone with the sale, that the sale would have carried the goodwill. The question was considered by the Court of Appeal in England in the case of *ex parte Punnnett*. In that case the Master of the Rolls said: "It is quite plain that the goodwill of a public-house passes with the public-house. In such a case the goodwill is the mere habit of the customers resorting to the house. It is not what is called a personal goodwill." In the present case, however, there is no sale of the premises, but there was a lease of the premises for five years, with a right of renewal for another five years. Now what was leased? Not merely the premises, but "the whole as a going concern, of and in the Old Standard Hotel and the Nil Desperandum Hotel, Kuil's River." Two hotels were included in the lease. What was let was two certain hotels, *qua* hotels. The question arises whether the lessee during the currency of this lease was entitled to take active steps, by means of which these premises will cease to be hotels, and will cease to enjoy the benefit of the lease. In my opinion, it is clear from the contract that he should not be allowed to do so. It would be quite inconsistent with the terms of this contract that he should be allowed to do that during the currency of the lease. It is another question whether he should be allowed to be perfectly passive, and do nothing and thus risk the loss of the licence on that account. That question does not arise for adjudication. But, I am clearly of opinion that active steps he should not be allowed to take, because it would be quite contrary to the implied terms of this contract. Great stress has been laid on the fact that the words "bought and sold" are used, but it is clear that the licence which is there said to be sold could not be sold *qua* licence, and that the goodwill which was sold was the goodwill of the leased premises. In the same way as the goodwill of the public-house, according to the Master of the Rolls in the case quoted, so the goodwill would go with the lease, it would not extend beyond the term of the lease, and in my opinion it will be inconsistent with the contract for the lessee to deal with the goodwill, and the licence in such a manner as to deprive the owner of the premises, at the expiration of the lease, of his rights. If, at the expiration of the lease, there is a licence still in existence, the lessor, in my opinion, will be entitled to that licence, and the lessee could not be allowed during the currency of that lease to do anything actively by means of which the licence or goodwill is transferred to any other place. The Court is aware of the great difficulty which the Legislature has thrown in the way of acquiring fresh licences. There are a great many requirements before fresh licences can be issued, there may be a

majority of the ratepayers that must consent, and the Court may certainly take judicial cognisance of the fact that there does exist the greatest difficulty in obtaining fresh licences. If, therefore, the defendants were now to be allowed to transfer what is described as the Old Standard Hotel, and the Nil Desperandum Hotel to two other premises, and thus deprive these particular premises of the real value which they possess, I think it would be clearly contrary to the contract entered into. For these simple reasons, I am of opinion that the judgment was right, and that the appeal must be dismissed, with costs.

Buchanan, J., and Maasdorp, J., concurred.

[Appellants' Attorneys: Zietsman and Bosman; Respondent's Attorneys: Sillerbauer, Wahl and Fuller.]

GENERAL MOTION.

Ex parte HUBBERSLEY AND WIFE.

Mr. M. Bisset again mentioned this matter, which was a petition for leave to register a certain ante-nuptial contract. The matter had been standing over for production of the contract, which counsel now put in.

Leave was granted to register the ante-nuptial contract, saving the rights of creditors who have become such before registration.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

TRIAL CAUSES.

MCKILLIP V. MCKILLIP. { 1905.
Mar. 3rd.

Mr. J. E. R. de Villiers moved, on behalf of the wife, for a decree of judicial separation from her husband on the ground of his incurable drunkenness. The parties were married in community of property at Cape Town in 1883. There was one male child of nine years of age of the marriage. The applicant brought certain landed property at Green Point and Port Alfred into the estate. Respondent never cohabited anything, but had mortgaged the property and squandered the money. The amount of the estate was now very small.

The respondent, J. McKillip, appeared, and handed in a paper giving a statement of his property, and denied the allegations of intemperance, stating that he was willing to take his wife back and forget and forgive.

[Hopley, J.: What are you going to forget and forgive? Or is it your wife who is to forget and forgive?]

The respondent said he desired to forgive his wife for leaving him without any notice by which action of hers his health had suffered.

Mr. De Villiers said that three doctors had certified that the respondent was absolutely incurable, and that his mind was affected.

Hopley, J., said that the respondent appeared to him to have given up his past bad habits. If the wife was a good wife she would be willing to give her husband another chance. After cautioning the respondent against a relapse, His Lordship said he would make no order at present. The matter would be postponed *sine die*, but there would be leave to the applicant to apply should her husband again relapse or be cruel to her.

RESSAY V. HOLLAND.

Mr. Upington moved for the release of Holland, who was at present suffering civil imprisonment, and counsel put in certain affidavits.

Mr. Van Zyl, for the plaintiff, asked that the case might stand over as they had only just received the affidavits, and had not had time to file replies. Having got an order restraining the respondents from parting with certain property, they felt now that they could not refuse the application for release, but wanted the costs.

Order of release granted, the question of costs to stand over.

SEALE V. DOOVEY.

This was an action to recover balance of money due for work and labour done.

The plaintiff was a builder and contractor, residing at Rondebosch, and the defendant resided at Salt River. On December 31, 1903, plaintiff contracted to build two houses for the defendant at Salt River. Plaintiff agreed to erect the two houses for £1,650. The houses were erected, and plaintiff had paid £1,500, but refused to pay the balance of £150, or £638 for certain extra work.

The defendant, in his plea, said that the plaintiff undertook to execute the work in a good and workmanlike manner, and according to the building regulations of the Municipality of Woodstock. He denied that the plaintiff erected the houses in a satisfactory manner. Defendant alleged that he had paid £1,619. Plaintiff had failed to execute certain work amounting in all to £78 0s. 6d. There was also certain work not done to the satisfaction of the Municipal Engineer, and another contractor had to do the work at a

the licence was on a different footing. Counsel went on to comment upon the risk of the renewal being refused, and submitted that the argument of improbability that Norden would enter into a contract of this sort was not very strong. He contended that Norden, under these documents, divested himself of all rights that he had. Counsel quoted the cases of *Ohlsson's Cape Breweries v. Power* (10 C.T.R., 747), and *Ohlsson's v. Kuhr's Trustee* (11 C.T.R., 165), and *Ohlsson's v. Parson* (11 C.T.R., 165), and of *S. A. Moss*. On these cases, he urged that the licence was a personal right of which the holder could divest himself. He also quoted the English case of *Mauer v. Hindmarsh* (Law Times Reports, vol. 28, p. 644), in regard to the question of forfeiture of licences.

Sir H. Juta drew their lordships' attention to section 8, Act 44, 1885, which, he said, was for the protection of owners and lessors where the licence was in danger either of going away, or being forfeited. Under that section, the landlord, in the case in England which had been quoted, could have got his transfer. It seemed to him (Sir Henry) that the trouble arose because of the confusion that appeared, according to Mr. Bosman's evidence, to exist in the licensed victuallers' trade in Cape Town. They seemed to think that they could sell a licence. They need only refer to one section to see that they could not sell a licence. Section 51 said that any person who, during the currency of his licence, sold or disposed of his business may make application to the R.M. It was only in respect of these licensed premises that there could be a temporary transfer. Counsel went on to submit that it was never for one moment supposed that they could separate the licence from the premises. He rested his case on the contention that a licence was not a merchantable article, which could be handed about from one person to another, as was perfectly clear from section 55 of the Act.

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Buchanan, J., and Maasdorp, J., concurred.

[Appellants' Attorneys: Zietsman and Bosman; Respondent's Attorneys: Silberbauer, Wahl and Fuller.]

GENERAL MOTION.

Ex parte HUBBERSLEY AND WIFE.

Mr. M. Bisset again mentioned this matter, which was a petition for leave to register a certain ante-nuptial contract. The matter had been standing over for production of the contract, which counsel now put in.

Leave was granted to register the ante-nuptial contract, saving the rights of creditors who have become such before registration.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLKY.]

TRIAL CAUSES.

M. KILLIP V. MCKILLIP. { 1905.
Mar. 3rd.

Mr. J. E. R. de Villiers moved, on behalf of the wife, for a decree of judicial separation from her husband on the ground of his incurable drunkenness. The parties were married in community of property at Cape Town in 1883. There was one male child of nine years of age of the marriage. The applicant brought certain landed property at Green Point and Port Alfred into the estate. Respondent never cohabited anything, but had mortgaged the property and squandered the money. The amount of the estate was now very small.

The respondent, J. McKillip, appeared, and handed in a paper giving a statement of his property, and denied the allegations of intemperance, stating that he was willing to take his wife back and forget and forgive.

[Hopley, J.: What are you going to forget and forgive? Or is it your wife who is to forget and forgive?]

The respondent said he desired to forgive his wife for leaving him without any notice by which action of hers his health had suffered.

Mr. De Villiers said that three doctors had certified that the respondent was absolutely incurable, and that his mind was affected.

Hopley, J., said that the respondent appeared to him to have given up his past bad habits. If the wife was a good wife she would be willing to give her husband another chance. After cautioning the respondent against a relapse, His Lordship said he would make no order at present. The matter would be postponed *sine die*, but there would be leave to the applicant to apply should her husband again relapse or be cruel to her.

RESSAY V. HOLLAND.

Mr. Upington moved for the release of Holland, who was at present suffering civil imprisonment, and counsel put in certain affidavits.

Mr. Van Zyl, for the plaintiff, asked that the case might stand over as they had only just received the affidavits, and had not had time to file replies. Having got an order restraining the respondents from parting with certain property, they felt now that they could not refuse the application for release, but wanted the costs.

Order of release granted, the question of costs to stand over.

SEALE V. DOOVEY.

This was an action to recover balance of money due for work and labour done.

The plaintiff was a builder and contractor, residing at Rondebosch, and the defendant resided at Salt River. On December 31, 1903, plaintiff contracted to build two houses for the defendant at Salt River. Plaintiff agreed to erect the two houses for £1,650. The houses were erected, and plaintiff had paid £1,500, but refused to pay the balance of £150, or £638 for certain extra work.

The defendant, in his plea, said that the plaintiff undertook to execute the work in a good and workmanlike manner, and according to the building regulations of the Municipality of Woodstock. He denied that the plaintiff erected the houses in a satisfactory manner. Defendant alleged that he had paid £1,619. Plaintiff had failed to execute certain work amounting in all to £78 0s. 6d. There was also certain work not done to the satisfaction of the Municipal Engineer, and another contractor had to do the work at a

cost of £44, which defendant claimed he had a right to recover.

Mr. Upington was for the plaintiff and Mr. W. P. Buchanan (with him Mr. Roux) appeared for the defendant.

Thomas Seale, plaintiff, stated that on December 31, 1903, he contracted with defendant to build two houses for him at Salt River. The work was to be done to the satisfaction of the Municipal officials at Woodstock. He did not include in his tender for the price of a balcony. He was to put in 18-inch foundations. When he commenced to excavate it was found that the whole of the site was refuse stuff, and it was impossible to build houses on the stuff, as they would not stand. Consequently, he had to make considerable excavations, in some places to the extent of 17 feet. This entailed a lot of extra work, for which he claimed £638. Defendant agreed to the extra work. Owing to an objection by the Municipal authorities, he could not put in a fire-proof partition, and plaintiff put in glass doors instead of wooden ones. He had received his final certificate after the building had passed the Municipal Regulations.

Cross-examined by Mr. Buchanan: He fixed his price on the 18-inch foundation, but he did not see the 18-inch struck out on the plan. His attention was not specially drawn to the foundation. The defendant and witness had a lot of conversation about the carrying out of the contracts. In this case he did not examine the site very well. He did not see in the specification when he looked through it that the depth of the foundations had been altered from eighteen inches, and had to be in cement concrete, and be brought from a depth to be satisfactory to the Town Engineer. The carting away of the stuff from the excavation cost £15. The amount of the claim was only for excavating and filling, and the cartage to the Woodstock dumping ground. After the completion of the contract there was an account due to Ahlboom Gullander and Co., and witness asked Doovey to sign a document to the effect that he acknowledged receipt of £182 5s. 8d., against an amount of £638 15s. 8d. outstanding at that time. Witness never got £50 in hard cash from Doovey. He was doubtful of the genuineness of some of the receipts now produced to him.

Re-examined by Mr. Upington: Witness filled in the excavation from time to time, and it was passed by the Municipality. The contract was to be carried out according to plans and specifications, and to the satisfaction of the Municipality.

William Harrison Grey, engineer and architect, stated that he had particulars of the depth of the excavation, but he had seen the excavating when it was on. The excavations then were about 14 feet deep. The place was an old brickfield that had been filled up. Witness worked

out the quantities carefully from a plan of the various depths supplied by Seale.

Cross-examined by Mr. Buchanan: Without anything being specified to the contrary stock doors and windows were put in. He remembered seeing a hole about fifteen feet deep at the back of the premises. From the plan he could give a good guess of the charge to erect a balcony.

Thomas Cairncross, civil engineer, stated he had been to the site in question, and made an independent calculation. He valued the extra work of excavating, etc., at £427 15s., and he made the price of the verandah £47.

Mr. Upington closed his case.

Thomas Tonkin, who had the plans and specifications drawn up, stated that he saw Seale, who was anxious to get the contract. Seale seemed to know all about the site. The Municipal Engineer said that the foundation would have to go down 13 feet. Seale's attention was called to the fact that he would find the foundation the most important item, as he would have to go down 13 feet, or perhaps more, to get at the solid.

At this stage counsel were heard on the question of whether the contract was entered into under the specification, or the schedule, and his lordship held that the parties must be bound by the agreement, as it stood, and on the adjournment suggested that the parties should consider their position and endeavour to arrive at a compromise without incurring further expenses.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAARDORP.]

TRIAL CAUSE.

INSOLVENT ESTATE ISRAEL-SON V. HARRIS AND BLACK AND OTHERS. { 1905.
Mar. 6th.
" 11th.

Builder's hypothec—Actual possession.

This was an action brought by the trustees in the insolvent estate of David Israelson against seven defendants mainly in the building trade, for a declaration that they have no lien or legal possession or occupation of a certain building belonging to the estate or any portion

Witness, in further evidence, said that Kinnes stopped working as soon as witness told him he had no money. Lewis worked for about a week after the meeting of creditors at Mr. Close's office. Bloom left shortly after the meeting. Each workman supplied his own tools. When the lift was brought by Messrs. Govey and Co., Mr. Shaw, their representative, called, and saw him, and he referred him to Mr. Close. Mr. Shaw came back, and the lift was placed by Mr. Shaw in the passage. Mr. Shaw got into the premises by taking out the boarding. Witness had a man named Monty on the building acting as caretaker. Monty had now left the Colony, and witness did not know his address.

Cross-examined by Mr. Schreiner: He had no clerk of works of his own on the premises. He had four or five men sleeping there, whose duty it was to look after the premises. He believed Bloom also had a man there. He did not call for tenders for the work. He took the men to the place and showed them what there was to be done.

De Villiers, C.J., intimated that he wished the parties would confine themselves to the simple issue whether defendants had possession of the building at any time, and if so, whether they subsequently lost it.

Witness, re-examined, said that Monty continued on the premises up to the date of witness's insolvency. Bloom had a man there.

By the Court: Bloom took on as a contractor for £4,500 all the carpenters' work, and undertook to look after all the works. Witness supplied all the timber. He actually paid to Bloom £3,850 or £3,865. Bloom had to look after the work generally. Bloom was not "over" Black's, but if there was anything that was wrong, Bloom had to report to witness. He did not know whether he should call Bloom a clerk of works. Bloom was the head man of all the works, to protect witness's interests.

Charles Frederick Shaw, of Messrs. Govey and Co., gave evidence with regard to a visit he paid to the premises on the 14th or 15th October to deposit a lift. He found no one in charge of the premises. There was no work going on. He only found builders' refuse about the place.

Mr. Schreiner closed his case.

James Black, of Harris and Black, said he had never known that Bloom was supervising their work. He was not aware that Bloom had anything to do with their work. On the 2nd September, Israelson owed his firm £1,066. Witness had a Kafir on the premises until the 22nd September. Scaffolding was taken away that had been done with, but they left sufficient to complete the job. Witness went in and out of the premises after the 2nd September as he pleased. He had left

cement and lime there. Witness also spoke of the measures taken to close the premises. As to the man Monty, he knew that Monty had been a labourer on the building, and that he was afterwards employed in the bar.

Abraham Bloom, another of the defendants, said that he was the contractor for carpentry. He had nothing in writing relating to the contract. He was to superintend all the work up to the first floor. Monty was not the caretaker of the building. Monty was there just at the beginning, and asked witness if he could finish a room so that he could live there. Witness had told Mr. Close that he would wait until the work had been finished, but that was subject to other money being raised that had been mentioned by Israelson. Witness had a man staying on the premises until they were locked up.

Cross-examined: It was part of his duty to see that all the work went on right. That was a friendly arrangement, and not something for which he was specially paid. Witness kept no books at all. He had not claimed against the estate, because he thought there would be nothing for the concurrent creditors. He had eight rooms locked up, of which he held the keys. Black and Lewis had locked up other rooms.

Further evidence was given by Geo. Kinnes, the plumbing and drainage contractor, who claimed £196 against the insolvent estate; Thomas Smith, book-keeper of the last witness; Joel Lewis, painter, who had a claim for £50; Morris Tamse, who supplied labour for the brickwork, and who claimed £275; Henry Frank Wm. Rohr, manager for Jenkins and Co., asphalters, who claimed £80.

Mr. Searle closed his case.

Postea (March 11th).

The Court intimated that they would first hear counsel for the defendants.

Mr. Schreiner admitted that the title to the property which was in the defendants' possession was in the trustee, but he submitted that no provision of the Insolvent Ordinance in any way allowed the trustee to have a better right than the owner of the property could have had. The trustee in this matter was but the successor of the owner of the property, who was Israelson. The action was one for ejectment, based upon the seventh paragraph of the declaration, which set out that certain acts had been done by the defendants in locking and boarding up the property. The essence of the case for plaintiffs was that these acts constituted wrongful and unlawful trespass on the part of the defendants. One important point was that the insolvent (in reply to a question put by the Court) said that he told the defendants, when they said they would lock up the place, that they could do as they liked. Possession was, on the insolvent's own

admission, taken by his consent by Black and Blum on behalf of all the defendants. Counsel went on to contend that the defendants, in doing the work that they did, were not looking merely to the credit of Israelson; they were looking to their lien on the buildings. They did, he submitted, all that a group of persons could have done to secure real possession of the building. They locked up the premises, nailed up certain parts, took certain rooms, and had people sleeping there. Counsel did not claim that there was exclusive possession of the building by the defendants; he contended, however, that even a single contractor could not have exclusive possession. As far as Jenkins's claim was concerned, it was hard on him, but he had given up his claim. With the other defendants, however, it was not so. Counsel adduced a number of authorities in support of his contentions. He quoted *Voet* (20-2-28) *Maasdorp, Nathan, and Van Leeuwen*, and cited *Brown's Assignees v. Pote* (4 E.D.C., 50) and *Stern v. Morom* (13 C.T.R., 802). He proceeded to state the position of the different defendants. Harris and Black had a large contract, but there was still an amount owing to them of £1,066. Their materials were there, as well as certain of their tools, their signboard was in one of the windows, and they had locked one of the rooms. Turnbull and Bigott had withdrawn from the action. As to Jenkins and Co., they had been paid half of their charges, and had been promised the other half in three months. Jenkins had thereupon gone away from the premises. Counsel admitted that he could not press Jenkins's claim to have had possession of the building. Kinness was still on the premises, and had been ready to continue the work. Kinness had been associated with Harris and Black in what was done after the insolvency of Israelson. He had a claim of £196. Counsel also contended that Tamsey, Lewis and Blum clearly had possession, along with the other defendants, of the building. He submitted that it had not been shown that the man "Monte," whom Israelson described as his caretaker, had any possession of the Flat Iron on behalf of the insolvent.

Without calling on Mr. Searle.

De Villiers, C. J.: The Legislature did not intend by the proviso to extend the rights of retention beyond the law that existed at the time the law was passed. The question was what was the law at the time the Act was passed? I think the proviso itself in a few words says that the law authorised the right of retention where there is actual possession. In the present case, therefore, I am clearly of opinion that the plaintiff had no such actual possession of the buildings as to entitle them to the right of retention. In the first place, all those

who have been concerned, and were concerned, in the building of this property, are not before the Court. The foundations were laid by Israelson. Several workmen were engaged upon different parts of the work. But all the plaintiffs before the Court do not constitute all the parties who would have been entitled jointly to claim the possession of the whole of the property. I am therefore clearly of opinion that the actual possession required by law is actual possession of the whole property sought to be retained. None of these people had possession of the whole of this property, nor had they jointly possession of the whole of the property. It is true that some of them had rooms in which they kept their tools, but that was the sole purpose for which they took possession. As to Bloom, he had possession of more than one room, and he had keys of several rooms, but the relations between Bloom and Israelson were such that it was to be expected he would have some degree of control and authority over the buildings. He was not in the position of clerk of the works, but still he was in this position that if anything went wrong he would report to Israelson, and that such a man occupied certain rooms is just what one would expect. I am satisfied that Bloom never occupied or kept the keys of these rooms for the purpose of asserting a right of possession on behalf of all the persons who had been engaged upon the building of this house. When they saw that the man was unable to pay, they did not think it worth their while remaining on the buildings. It is true some odd tools were left about, but that does not make a person an occupier of the premises. Then, subsequently, when these people began to hear that they would lose their money, there was a conversation with Israelson, who said they could go on the premises if they liked. Then I think they not only had the keys of the rooms, but they put on a lock on one of the doors, and in that way obtained admission to the whole of the premises. But during the same period Israelson had possession, and Israelson had a person sleeping on the premises. Although he was a man in an inferior position, yet, still he was there asserting the right of the owner to some extent to the occupation to the whole of the premises. What was done afterwards does not amount to such a possession of the whole of the building, as to justify the Court in saying that the terms of this proviso had been complied with. There was no such actual possession of the whole of the property, in respect of which this retention is claimed, as to justify the Court in giving judgment for the defendants. The rooms were simply locked for the purpose of keeping their tools, and the occupation is not of such a nature as to give them a right of retention.

Witness, in further evidence, said that Kinnes stopped working as soon as witness told him he had no money. Lewis worked for about a week after the meeting of creditors at Mr. Close's office. Bloom left shortly after the meeting. Each workman supplied his own tools. When the lift was brought by Messrs. Govey and Co., Mr. Shaw, their representative, called, and saw him, and he referred him to Mr. Close. Mr. Shaw came back, and the lift was placed by Mr. Shaw in the passage. Mr. Shaw got into the premises by taking out the hoarding. Witness had a man named Monty on the building acting as caretaker. Monty had now left the Colony, and witness did not know his address.

Cross-examined by Mr. Schreiner: He had no clerk of works of his own on the premises. He had four or five men sleeping there, whose duty it was to look after the premises. He believed Bloom also had a man there. He did not call for tenders for the work. He took the men to the place and showed them what there was to be done.

De Villiers, C.J., intimated that he wished the parties would confine themselves to the simple issue whether defendants had possession of the building at any time, and if so, whether they subsequently lost it.

Witness, re-examined, said that Monty continued on the premises up to the date of witness's insolvency. Bloom had a man there.

By the Court: Bloom took on as a contractor for £4,500 all the carpenters' work, and undertook to look after all the works. Witness supplied all the timber. He actually paid to Bloom £3,250 or £3,865. Bloom had to look after the work generally. Bloom was not "over" Black's, but if there was anything that was wrong, Bloom had to report to witness. He did not know whether he should call Bloom a clerk of works. Bloom was the head man of all the works, to protect witness's interests.

Charles Frederick Shaw, of Messrs. Govey and Co., gave evidence with regard to a visit he paid to the premises on the 14th or 15th October to deposit a lift. He found no one in charge of the premises. There was no work going on. He only found builders' refuse about the place.

Mr. Schreiner closed his case.

James Black, of Harris and Black, said he had never known that Bloom was supervising their work. He was not aware that Bloom had anything to do with their work. On the 2nd September, Israelson owed his firm £1,066. Witness had a Kafir on the premises until the 22nd September. Scaffolding was taken away that had been done with, but they left sufficient to complete the job. Witness went in and out of the premises after the 2nd September as he pleased. He had left

cement and lime there. Witness also spoke of the measures taken to close the premises. As to the man Monty, he knew that Monty had been a labourer on the building, and that he was afterwards employed in the bar.

Abraham Bloom, another of the defendants, said that he was the contractor for carpentry. He had nothing in writing relating to the contract. He was to superintend all the work up to the first floor. Monty was not the caretaker of the building. Monty was there just at the beginning, and asked witness of he could finish a room so that he could live there. Witness had told Mr. Close that he would wait until the work had been finished, but that was subject to other money being raised that had been mentioned by Israelson. Witness had a man staying on the premises until they were locked up.

Cross-examined: It was part of his duty to see that all the work went on right. That was a friendly arrangement, and not something for which he was specially paid. Witness kept no books at all. He had not claimed against the estate, because he thought there would be nothing for the concurrent creditors. He had eight rooms locked up, of which he held the keys. Black and Lewis had locked up other rooms.

Further evidence was given by

Geo. Kinnes, the plumbing and drainage contractor, who claimed £196 against the insolvent estate; Thomas Smith, book-keeper of the last witness; Joel Lewis, painter, who had a claim for £50; Morris Tamse, who supplied labour for the brickwork, and who claimed £275; Henry Frank Wm. Rohr, manager for Jenkins and Co., asphalters, who claimed £80.

Mr. Searle closed his case.

Postea (March 11th).

The Court intimated that they would first hear counsel for the defendants.

Mr. Schreiner admitted that the title to the property which was in the defendants' possession was in the trustee, but he submitted that no provision of the Insolvent Ordinance in any way allowed the trustee to have a better right than the owner of the property could have had. The trustee in this matter was but the successor of the owner of the property, who was Israelson. The action was one for ejectment, based upon the seventh paragraph of the declaration, which set out that certain acts had been done by the defendants in locking and boarding up the property. The essence of the case for plaintiffs was that these acts constituted wrongful and unlawful trespass on the part of the defendants. One important point was that the insolvent (in reply to a question put by the Court) said that he told the defendants, when they said they would lock up the place, that they could do as they liked. Possession was, on the insolvent's own

when the original debt was incurred, any complication that might arise in the case would be owing to the assignment proceedings as to whether there was any purchase made then or afterwards, between the plaintiff and Venter, and if it affected Venter individually or not.

Daniel Kruger, the plaintiff, stated that the defendant Venter was also lying on the farm. Venter and Naude were in partnership at that time. The farm was used for the stock belonging to the partnership. The defendant Venter himself made out an account dated February 3, 1904, but it was not actually written until a later date. At the meeting of creditors in the estate of Venter and Naude, and before that meeting Venter wrote him an account, and later on he wrote out the account erroneously dated February 3. In March, 1903, he supplied this partnership with certain sheep and goats. The sheep, which were actually sold to Venter, were sent to Johannesburg to be sold. The goats remained, and were disposed of by the assignee. Witness looked upon Venter as the owner of the farm. Witness's horses were sent to Willowbank, which belonged to the partnership, and where Naude lived. It was intended that the horses were to be sent to Bechuanaland, but they were never despatched. He never was paid any money over these transactions. After the assignment he got a horse, cow, and calf from Venter, which he set off against the account. He went as a creditor to the meeting on the occasion of the assignment, and voted, but he was never asked to sign the deed of assignment. When he asked for his dividend, he was informed that his name was not on the list of creditors. Afterwards Venter and he made an arrangement by which if witness lent him £100 he was to get 7s. 6d. in the £, and in addition the defendant's household furniture. The assignee wrote saying that his name was not on the list of creditors, as Venter had paid him. When he found he could not get his dividend he cancelled the arrangement he had made with him. Witness bought the horse from Venter, and credited the partnership for the amount. Naude had never made any claim for the horse.

Cross-examined by Mr. Jones: He had no other transactions with the partnership, which was really a partnership in the speculation of cattle. He worked as a labourer for Venter and Naude. While witness was on commando the military did not take the sheep. Witness went on commando in December, 1902.

[Hopley, J.: There wasn't so much danger then? You are talking about after peace.]

The witness explained that he joined the forces about six months after the outbreak of war. Continuing, under

cross-examination, he said the sheep remained with his father during the war. He paid his father with the £60 received from Venter. He had a pocket-book containing a record of the proceedings, but it was not with him. He never had any dealings with Naude. The first time he spoke to Naude about the debt was when he put the matter in his attorney's hands. Naude came to witness, and wanted to give him four or even of land. At the examination he voted for 7s. 6d. in the £, but he was not prepared to accept it now. A messenger of the Court came to the farm to attach Venter's furniture, but did not do so when witness assured him that it did not belong to Venter. Witness thought Naude was present when the agreement was signed.

Re-examined by Mr. Burton: Naude wanted to settle with him by giving him some even; that offer was made before Venter.

Johan Adriaan Venter, owner of the farm Braakfontein, stated that he sold part of the farm to Venter and Naude. He never got paid. The assignee offered him the farm back for the purchase price, plus £300 for improvements. The defendants held everything in partnership. The plaintiff had stock of his own.

Cross-examined by Mr. Jones: He bought wool twice from the plaintiff, who had a couple of hundred sheep, which he heard he bought from his father. Witness paid the plaintiff about £50 for doing wire fencing work. It was only after the assignment that they began to have private estates.

Johannes Louw, farmer, stated that he was up at Philip's Town in 1903, and saw the plaintiff, who worked under witness for a time. Venter told witness that he would pay the plaintiff himself. The plaintiff at that time had sheep which ran separately.

Carl Nicholaas Kruger, farmer, of Fauresmith, O.R.C., stated that Naude and Venter were in partnership on a speculation in stock. Shortly before the winter of 1903, the plaintiff had sheep to witness's knowledge. While he was on the farm he saw the sale between Venter and the plaintiff. Witness assisted in sending the sheep to Johannesburg.

Cross-examined by Mr. Jones: When he heard the sale take place, although he was anxious to pay sixpence more for the sheep, he did not make any offer.

Petrus Jacobus Venter, one of the defendants in the case, stated that he made out the account headed "Philip's Town, 3rd February." The account was really made out in March. He made out the second account to replace an insufficient one that had been made out before the assignment. The difference was an item for £55 for a cow calf and two horses. The plaintiff cancelled the agreement as to the furniture. He bought the 198 sheep for the firm of Venter and Naude. The partnership

got the benefit of the sheep transaction, and his bankbook would show it. Kruger bought the horses, and sold them to the firm. Venter sent them to Kimberley. With regard to the £15, the partnership got the benefit, because witness used it on the business of the firm in going to Johannesburg.

Cross-examined by Mr. Jones: When the estate was assigned, Mr. Coetzee made out a schedule of the debts. Witness and Naude were there, and swore to the schedule. On February 5, 1904, Mr. Coetzee made a list of witness's debts, and witness signed it. Witness did not mention Kruger's debt as it did not occur to him. He did not know what was in the list.

[Hopley, J.: Is it your habit to swear to the accuracy of things you know nothing about?]

I trusted to Mr. Coetzee.

Cross-examination continued: Kruger mentioned the debt to Naude before witness. The list was drawn out so that Kruger could get the money, and then witness could get his children from Holland. Witness often told Naude of the debt, and Naude said it was a lawful debt. Witness was at present a convict, sentenced to two years and a half for having stolen cattle in his possession.

Mr. Jones: Who were some of the owners?

[Hopley, J.: What is the object of the question; he is not being tried for that.]

No, my lord; but we want to find out the ins and outs of it.

[Hopley, J.: I don't see the relevancy of the question. Are you suggesting that the partnership account should benefit by this transaction in stolen cattle?]

Witness further stated that if everything had gone on all right, he would have paid for the fencing and the repairs to the house himself.

Mr. Burton closed his case.

Isaac Naude stated he was in partnership with Venter as a live-stock buyer from 1899 to February, 1904, when he found at the meeting of creditors that he could not meet his claims. Witness made the money, and Venter lost it. Kruger was present at the meeting, and witness knew of no claim on his behalf. After Venter was arrested, witness heard for the first time of the plaintiff's claim. Venter had bought a lot of other stuff for the firm without witness's knowledge. On his claim in reconvention, witness could not personally claim £25 for the horse, but the assigned estate should be credited with that amount.

The defendant Naude (under cross-examination) stated that before the war Braakfontein was not used largely for grazing the partnership sheep. The £300 for improvements went to the benefit of the assignment. Witness carried on operations at Willowbank, three

miles away. After the war, witness concluded that the business was no good, but he did not take the trouble to dissolve the partnership. In ten months Venter lost £17,000, and during that time he overwhelmed witness with lies. After having ceased operations with Venter, several accounts came into witness on behalf of the partnership. The plaintiff did not present a claim at the assignment; all the others did. The plaintiff was clearly a creditor on the promissory note, but the note was not presented. After the meeting, the plaintiff told witness that Venter owed him money. He was not aware of any offer to settle plaintiff's account by giving him some ostriches. Witness might have offered the plaintiff the erven at Petrusville. All he had left was a few erven and furniture. Lately he had been sued by Mr. Steytler, and there was a return of *nulla bona*, because his family was away.

Re-examined by Mr. Jones: The horse that was claimed in reconvention was sold at the sale of the assets to J. A. Venter for £25, but the horse was not delivered; Kruger had now possession of it.

Further cross-examined: Witness knew that the plaintiff had the horse, although the assignee claimed it from several other people.

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Cross-examined by Mr. Burton: He was perfectly certain that J. A. Venter was at the sale. Naude was wrong when he said the cart was sold to the same man. In his own account he only mentioned the sale of one horse to a P. J. Venter, but there was no mention of another horse. It was not a fact that he sold the horse to P. J. Venter, the defendant, and could not get the money out of him. It must have been a clerical error. Witness was convinced absolutely that the plaintiff's was a bogus claim.

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Mr. Jones closed his case.

Counsel having been heard in argument on the facts,

Hopley, J.: The defendant Naude said he was anxious to get out of the partnership, but he did not take any active steps to bring about a dissolution. The only point in the case is to whether the plaintiff had a genuine claim against this partnership. In the peculiar and somewhat suspicious circumstances, the explanation given by the plaintiff is the only one possible he could have given, and it is difficult to believe that the independent witnesses for the plaintiff would come to the Court to commit deliberate perjury. Disallowing some of the smaller items, there will be judgment for the plaintiff for £116 15s., the defendants jointly and severally to pay the costs, the plaintiff declared a necessary witness.

[Plaintiff's Attorneys: Mostert and Son; Defendant's Attorney: G. Trolip.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

TRIAL CAUSES.

CLAREMONT MUNICIPALITY (1905.
V. COLONIAL GOVERNMENT. { Mar. 7th.

Rating of Crown property—Railway buildings — Occupation by individuals.

The Railway Department having to enlarge the Railway station at C., bought a cottage about 400 yards from the station, not on Railway property, for the stationmaster, who proceeded to occupy it as his private residence.

Held, that the cottage and grounds so occupied were liable to be rated under Acts 36 of 1891 and 19 of 1892.

At the time when the Government took over the Railway there was a cottage at a crossing in N. on Railway property immediately adjoining

ing the land, which was then occupied and continued afterwards to be occupied by a gatekeeper, whose duty it was to open and close the gates for persons wishing by night or by day to cross the Railway line.

Held, that the gatekeeper's cottage was not liable to be rated under the above Acts.

This was an action brought by the Claremont Municipal Council against the Colonial Government to recover the sum of £18 4s. 7d., alleged to be due upon rates for 1904 from defendants as owners of certain property occupied by officials or employees of the Railway Department.

The declaration set out that certain immovable property, belonging to the Colonial Government, was within the Claremont Municipality, and under the control and administration of the Commissioner of Works. It consisted of (1) land and dwelling-house in Bath-road, occupied as a private residence by the stationmaster, and valued for rating purposes at £700; (2) land and dwelling-house in Mill-street, occupied as a private house by a platelayer, and valued for rating at £450; (3) land and two dwelling-houses situated off Camp Ground-road, occupied and valued at £200 and £400 respectively. Save the stationmaster, all the occupiers paid rent, and it had been deemed necessary by the department that they should occupy those houses to expedite their attendance on their duties as railway officials. The Municipality had levied owners' rates on the said properties for 1904, and there was now overdue a sum of £18 4s. 7d. In accordance with the provisions of Act 36, 1891, and Act 19, 1902, the properties were beneficially occupied by individuals in their private capacity, and were not railway buildings. The Government refused to pay the sum of £18 4s. 7d., or any part thereof. This amount was now claimed.

Defendants, in their plea, admitted the formal paragraphs 1, 2, 3, and 4. They also admitted paragraph 5, and said, further, that it was necessary that for the proper performance of their duties the said officials should occupy the said houses. Defendants also stated that the said houses were railway buildings in terms of the statutes referred to, and that the Colonial Government was entitled to exemption from paying owners' rates thereon.

Mr. Schreiner, K.C. (with him Mr. Bisset) for plaintiffs. Mr. H. Jones (with him Mr. Nittingale) for defendants.

Mr. Schreiner stated that the plaintiffs had received a letter from the Gov-

ernment attorneys, dated the 15th February, stating that they found that the premises mentioned in paragraph 4 of section (c) of the declaration were occupied by a gatekeeper and checker, and not by two gatekeepers as stated therein. They admitted liability in regard to the house occupied by the checker. They (the attorneys) found that they were in error in stating that the stationmaster was the only official who did not pay rent, and that they found that the gatekeeper did not pay rent. Mr. Schreiner went on to say that there were now therefore three properties in relation to which the claim of the Municipality was made. The correspondence that would be put in would show that there had been ten properties rated on which the Government at first refused to pay, except one in Palm Boom-road, which was admitted. Afterwards the Government admitted five others, and then four remained upon which the declaration was filed, and which had now been reduced to three.

Mr. Howel Jones put in a draft of an amendment of the plea, in accordance with the letter of the defendants' attorneys.

Mr. Schreiner said that he should not object to the amendment of the plea. He thought perhaps his learned friend on behalf of the Government would admit that the rate had been duly levied, and assessed, leaving open only the question as to whether the property named was exempt.

Mr. Jones acquiesced.

Mr. Schreiner said that the issue would now be narrowed down to the construction of the Acts 36 of 1891 and 19 of 1892. Section 4 of the former Act provided that no rates should be levied by or be payable to a municipality upon any line of railways and buildings situated in any part of the Colony belonging to the Colonial Government. In the following session of Parliament a further Act was passed which expunged section 4 of the Act of 1891, the object, said Mr. Schreiner, being to make the law general in relation to this matter. A proviso, however, appeared in the Act of 1892, as follows: "Provided that the term 'railway buildings' shall not apply to such buildings as are beneficially occupied by individuals in their private capacity."

John Samuel Merrington, valuator of the Claremont Municipality, said that the stationmaster's residence was not situate within the expropriated property of the Railway Department, and it was immediately adjoined by four cottages, on which the Government paid rates, the whole being comprised in one estate purchased by the Government. There was a dwelling-house in Mill-street beyond the expropriated property of the Government. This was occupied by a platelayer. Then there was a dwelling-house situate close to the line occupied

by a checker. There was another property near Newlands Station occupied by the gatekeeper at the crossing to Camp Ground-road. Witness did not know how that property came into the hands of the Government, whether it was in the original expropriation, or it had been a piece of Crown land.

Cross-examined by Mr. Jones: He had formerly been secretary of the Council up to 1898, and during his term of office rates were not levied on platelayers' and gatekeepers' houses, because they were Government property. He then thought that they were barred by the Act of 1892.

Mr. Schreiner closed his case.

Alfred James Parsons, district engineer, proved a plan of the stationmaster's residence, and adjoining property. The ganger's house at Newlands was, he said, practically within the station yard, and about 100 feet from the line. The stationmaster's residence was about 1,200 feet from the station. He believed that the triangular piece of ground, on which the gatekeeper's cottage stood, belonged to the original expropriation.

Gowan Cresswell Clarke, chief traffic manager of the C.G.R., said that the land on which the stationmaster's house stood was bought to free the railway building at Claremont, and give greater accommodation for the travelling public. Up to that time the stationmaster had occupied part of the station building. It was desirable that the stationmaster should live as near the station as possible, because he was supposed to be always available, night or day, in case of fogs, accidents, or other emergencies. The principal purpose of the purchase was to get a site for the stationmaster's residence. Only one of the four houses adjoining was occupied, viz., by a porter of the Claremont Station. The porter was not bound to occupy that house. The particular platelayer occupying one of the houses named was a foreman, and should reside close at hand. As to the gatekeepers, it was most necessary that they should live as near as possible to the line. Witness had been in the Government service since 1878. The gatekeeper's cottage near Newlands Station seemed to him to be one of the old properties taken over when the line was expropriated.

Cross-examined: The Newlands stationmaster lived on the Hardwick Estate, a full ten minutes' walk from the station, but that was only a temporary expedient. They had plans made and ground laid out for a stationmaster's house quite close to the Newlands Station. The Claremont stationmaster did not pay rent; he had a salary and house allowed.

Harry Elliott, resident engineer of the Western System, C.G.R., said it was necessary that the platelayer near Newlands Station should live in close proximity to the line. If he refused to live in

that house they would have to get another man who would. The gatekeepers should live close to the line, because they were really on duty the whole of the 24 hours.

Cross-examined: He should not say that the stationmaster at Claremont had not "beneficial occupation"; he should call it "enforced occupation."

[Do Villiers, C.J.: It may be both "beneficial" and "enforced."]

Alfred Wm. Bowers, stationmaster at Claremont, and Francis Kemp, gatekeeper, Newlands, also gave evidence.

Mr. Jones closed his case, and counsel were heard in argument.

Do Villiers, C.J.: A great deal of evidence has been given in this case, but the decision of the Court will depend mainly upon the construction of the Acts of Parliament relating to the rating of Government property. By the Act 45 of 1882 it was enacted that all land within any municipality shall be ratable property within the meaning of this Act, except as hereinafter stated. The exceptions, amongst others, were the property of Her Majesty or of the Colonial Government, which is unoccupied or used for public purposes, land in the occupation of the Government, or of any person or public body, and used for public purposes. Then, by the Act of 1891, there was a complete change of the policy of the Legislature in regard to the exemption of Crown property. The second section of Act 36 of 1891 enacted, "that from and after the taking effect of this Act any immovable property which is situated within the limits of any municipality or corporate town, and which is vested in Her Majesty the Queen, in her Colonial Government, or occupied by the Colonial Government for public purposes, shall, subject to the provisions hereinafter contained, be liable to be rated for Municipal purposes by the Council of such Municipality or town, to the same extent and in the same manner as if the said property had been owned or occupied, as the case may be, by a private person." There were certain exceptions introduced by the 4th section, in which it was provided that rates should be levied by and payable to the Municipality "except any line of railway and railway buildings situate in any part of the Colony." Now, the first question is, independently of the Act of 1892, to which I shall presently refer, would any of the buildings in question fairly come within the designation of a line of railway or railway buildings? Clearly, they do not form part of the railway. Do they form part of the railway buildings? As to the stationmaster's residence, it clearly was not a railway building. It was not included within the original expropriation; it did not form part of the station; it was purchased by the Railway Department because the stationmaster's quarters, form-

ing part of the station, were required for the purpose of enlarging the station, and it was some 1,200 feet, I understand, distant from the station. But, in no sense of the word, did that building ever constitute a railway building. Then, in regard to the ganger's cottage, that also is wholly separated. It is also called a platelayer's cottage. That is wholly separate property, acquired by the department after the original construction of the railway, and that also, in my opinion, cannot in any sense be considered a railway building. But the cottage occupied by the gatekeeper appears to me to fairly come within the designation of a railway building. It is essential to have a cottage at that particular place, so that there should be a person in the immediate vicinity at the beck and call of those who wish to cross the rails, and it is admitted also that this cottage formed part of the land taken over by the Government. I take it that it was really expropriated for the purpose of placing this gatekeeper's cottage upon it, and that this cottage was so essential a part of the working of the railway, so indispensable to the working of the railway, that it may fairly be considered as one of the railway buildings taken over by the Cape Government. Now, the next question is whether the Act of 1892 in any way affects the decision of the present case. The 3rd section of Act 19 of 1892 contains this proviso: "That the term 'railway buildings' shall not apply to such buildings as are beneficially occupied by individuals in their private capacity." I am clearly of opinion that the intention of this proviso was not in any way to add to the exemptions, but to define them. In the Act of 1891 there was a general proviso, which I have already read, that the property of the Crown and the property of the Colonial Government shall be liable to be rated for municipal purposes, in the same manner as if the property was owned or occupied, as the case may be, by a private person. Then there was the exception, and, in my opinion, the proviso to the third section of Act 19 of 1892 was intended to make it clear that the exception of "railway buildings" shall not be construed so widely as to include "such buildings as are occupied by individuals in their private capacity." Now, take the stationmaster's residence. In my opinion, it is "beneficially occupied" by an individual, viz., the stationmaster, and it is occupied by him in his private capacity. There is nothing official in connection with the occupation of that building. It is not a "railway building," and does not require any special care on his part. He occupies it as a private individual, and although it is a matter of convenience for him as stationmaster that he should be near the station, yet he

still occupies that property in his private capacity. In my opinion, therefore, the stationmaster's house, which is entirely outside the station buildings, is liable to be rated. The same remark applied to the platelayer's cottage. Then, in regard to the gatekeeper's cottage, it is just a doubtful point with me whether this proviso was not intended to render such a building liable to be rated, but, upon the whole, I have come to the conclusion that, seeing that it came fairly within the designation of "railway buildings" before the Act of 1892 was passed, and seeing also that the gatekeeper is there at the call night and day of persons wishing to cross over the railway, it may be held that his occupation is not in his private capacity, but in a public capacity. I consider, therefore, that the action should fail in regard to the claim for a rate upon the gatekeeper's cottage. The result, therefore, of the case will be that judgment will be entered for the plaintiffs for £14 ls. 3d., with costs. [Plaintiff's Attorneys: Tredgold, McIntyre and Bisset; Defendant's Attorneys: Reid and Nephew.]

VILANDER CONCESSIONS V. { 1905.
COLONIAL GOVERNMENT. { Mar. 7th.

Concession—Judgment of Concession Court—Declaration of rights.

The chief of a native territory made a concession to C. of the right to prospect, dig for and convert to his own use all precious stones and minerals found within the limits of the concession. C. ceded his rights to the plaintiffs. The British Government annexed the territory and appointed a Court, under a Proclamation, giving such Court full judicial powers to decide upon the validity of all concessions with an appeal to the Privy Council. The Court allowed the claim to the concession in question, but "subject to all laws and regulations of British Bechuanaland relating to mines and minerals, and otherwise in force in the said territory." There was no appeal against this judgment.

Held, in an action for a declaration of rights, that the plaintiffs were not entitled to any declaration inconsistent

with the laws and regulations in force in the territory at the time when the judgment of the Commission was given.

This was a special case stated by the Vilander Concessions Syndicate and the Colonial Government for the opinion of the Court.

The special case was stated in the following terms:

1. The plaintiffs in this suit are Harry Mosenthal, George Joseph Samuel Mosenthal, and William Mosenthal, carrying on business at Port Elizabeth in this colony under the style or firm of Adolph Mosenthal and Company; Wilhelm Heinrich Lieberman, Charlotte Paulina Bellstedt, in her capacity as executrix testamentary in the estate of the late Johann Christoph Bellstedt and Dirk Elise Vreede, carrying on business at Port Elizabeth aforesaid as Lieberman, Bellstedt and Company; Oscar Arnold Arndt and Carl Johannes Cohn, carrying on business at Hamburg in Germany under the style of Arndt and Cohn; and the Consolidated Rand Rhodesia Trust and General Exploration Company, Limited, a company duly registered in London with limited liability, the successors in title, in respect of the matters herein in suit of one Emil Castens; the said parties being associated together in respect of the concessions, rights, claims, interest, property, and title hereinafter referred to and herein in suit, under the style or firm of the Vilander Concessions Syndicate, hereinafter termed the "Syndicate," and being as such syndicate the successors in title in respect of the matters herein in suit of one Adolph Heinrich Carstensen hereinafter referred to.

2. The defendant is the Honourable Arthur John Fuller, in his capacity as the Secretary for Agriculture, and as such representing the Government of this colony.

3. Before, during, and after the period commencing with the month of November, 1889, and terminating in April, 1890, one David Vilander (hereinafter termed the "Chief") was the Chief of the Meir and Kalahari (hereinafter termed the "tribe"), a native tribe occupying and lawfully and peaceably possessing a certain extent of territory (hereinafter termed the "territory") in the country or land known as Bechuanaland and the Kalahari.

4. Over the said country a protectorate had been established by Her late Majesty Queen Victoria in her Imperial Government; and therein, and subject to such protectorate, the territory was an independent protected State, and the said Vilander was the true and rightful chief thereof, duly possessed of and exercising rights of sovereignty in respect of the territory of the tribe, and,

clothed as such chief, exercising such sovereign rights with the concurrence of his Raad with all right, authority, and power to grant land and to make concessions in regard to mineral rights, and in respect of the country or territory occupied by him and the people or tribe under him.

5. On or about the 22nd November, 1889, an agreement in writing was duly entered into between one Adolph Heinrich Carstensen, then of Vryburg, in British Bechuanaland, and the chief, whereby, on the conditions and for the consideration set forth in the said agreement, certain mineral concession and prospecting rights were granted to the said Carstensen. A copy of the said agreement is hereto annexed marked "A." The said agreement is hereinafter termed "the concession."

6. Thereafter, on or about the 10th April, 1890, the concession being then still of full force and effect, a further agreement in writing was duly entered into between the same parties for the like purposes and under the like conditions and provisions as those obtaining in the concession, but for an increased consideration and in respect of and throughout a more extended area. A copy of the said further agreement is hereto annexed marked "B," the said further agreement being hereinafter termed "the further concession."

7. On the 21st January, 1890, the said Carstensen, for value absolutely sold, ceded, assigned, transferred, conveyed, and set over to a certain syndicate, termed the Vilander Concession Syndicate, or its trustees for the time being, all his right, title, estate, interest, profit, property, claim or demand whatsoever in and to the concession, and in and to all rights and privileges conferred upon him thereunder, together with any documents of title or otherwise in anywise relating or having reference thereto. The said syndicate is that mentioned in the first paragraph hereof, and the plaintiffs constitute the said syndicate.

8. Thereafter in or about the month of August, 1890, the said Carstensen, for value ceded, assigned, transferred, and set over to the said syndicate all his right, title, estate, interest, profit, property, claim or demand whatsoever in and to the further concession in and to all rights and privileges granted to him thereunder, and thereafter on the 4th April, 1893, formally ratified such cession and assignment, and thereby again ceded, assigned, transferred and set over to the syndicate or its trustees for the time being all his right, title, interest, estate, profit, property, claim or demand in and to the further concession, and in and to all rights and privileges granted to him thereunder.

Copies of the above cessions are hereto annexed "C" and "D" respectively.

9. By virtue of the above concessions and cessions the syndicate became and was and is now entitled to claim, have, exercise and enjoy all the right, title, estate, interest, profit, property, privileges, claim, or demand of what kind soever which, or the right to claim, was vested in or passed by the said Carstensen.

10. The sum of £500 agreed to be paid annually by the concessionaire as the consideration for the concessions was paid to the Chief Vilander up to the 5th May, 1891, being the date of the annexation of his country to British Bechuanaland, and was thereafter from time to time paid to the said Vilander up to the time of his death, and thereafter to his executors, but the Government does not recognise the validity of any payment made after the 5th May, 1891, aforesaid. No amounts under the concessions and no fees or licence moneys have been paid either to the Government of the former Crown Colony of British Bechuanaland since 5th May, 1891, or to the Cape Government since the annexation of the said territory to this colony in 1895.

11. By Proclamation No. 106, B.B., 1891, Her Majesty's Sovereignty was proclaimed over the territory to the west of British Bechuanaland, known as Bechuanaland and the Kalahari, in which the territory referred to in this case was included, and by Proclamation No. 120, B.B., 1891, provision was made for the law to be administered therein.

12. In terms of Proclamation No. 159, B.B., 1893, a Court styled "The British Bechuanaland Concession Court" was constituted and established in order to inquire into and decide upon the validity of and scope of claims founded upon grants of land or mineral or other concessions in the territory referred to in paragraph 11.

13. Thereafter, on the 1st September, 1893, and subsequent days, the said Court duly sat to inquire into and decide on the claims advanced before it by the trustees for the syndicate in respect of the concession and further concession, and to hear evidence adduced in support thereof or otherwise, the Crown Prosecutor appearing on behalf of the Government of British Bechuanaland.

14. Thereafter, on the 7th December, 1893, the said claim was duly granted and allowed, as will appear from a copy of the judgment hereto annexed and marked "E."

15. Under the provisions of the "British Bechuanaland Annexation Act, 1895," British Bechuanaland became annexed to this colony, and section 30 of the Act maintained the provisions of Proclamation No. 169, B.B., 1893, and preserved the jurisdiction of the British Bechuanaland Concession Court.

16. By section 21 of the said Act it was provided that all liabilities of the Governor of the annexed territory at the time of the said annexation should be deemed to be liabilities of the Governor of this colony.

17. On divers occasions, both before and after the said annexation, grants were issued in respect of land in the territory prior to the annexation by the Governor of British Bechuanaland and thereafter by the Governor of this colony, and therein the right to minerals or precious stones was reserved to the Government, as will appear on reference to the terms of the "conditions" inserted in the said grants and hereto annexed, marked respectively "F" and "G."

18. The syndicate has duly sought to obtain from the Government recognition of its rights, and has maintained that such reservations are unlawful, but the Government has refused to recognise the rights of the syndicate in respect of the concession or further concession and maintains that it is entitled to make such reservations for its own benefit.

19. The plaintiffs contend that the concession and further concession are and have been of full force and effect and binding upon the Government, and that they are entitled to have their rights in, arising out of, and under the said concession and further concession, declared accordingly by this Honourable Court, and to obtain an order declaring that as to all grants already issued with such reservations the Colonial Government is bound to recognise the said reservations as made for and on behalf of the plaintiffs, and directing the Government as to any further grants of land in the said territory to include a condition subjecting such grants to the rights of the plaintiffs and their successors or assignees under the aforesaid concessions.

20. The defendant contends that the plaintiffs are not entitled in the premises to the relief claimed. The parties pray for judgment in accordance with their respective contentions with costs.

Mr. Schreiner, K.C. (with him Mr. McGregor) for plaintiffs; Sir H. Juta, K.C. (with him Mr. Nightingale) for the defendant.

Mr. Schreiner said that Carstensen conceded all his rights to the syndicate whom the plaintiffs represented. He conceded his rights under the first concession of the 21st January, 1890, and subsequently, in August, 1890, he made a second concession to the syndicate. He confirmed that second concession by a document dated the 2nd April, 1893. By Proclamation No. 106 of 1891 the territory of David Vilander was annexed to and formed, after that time, part of Her Majesty's dominions. Proclamations 120 and 123 made provision for the law to be in force in and for the civil administration of the territory. The

concessions thus granted and ceded were dealt with afterwards by a Court, which was established under Proclamation No. 163, referred to in paragraph 12 of the special case, called the British Bechuanaland Concessions Court. That Court sat in September, 1893, and decided on the claims advanced before it by the trustees of the syndicate, in respect of those concessions of Carstensen, and it heard evidence. The Crown Prosecutor appeared on behalf of the Government of British Bechuanaland.

The judgment of the Concessions Court, dated December 1, 1893, was in the following terms: "Claim No. 6.—A. H. Carstensen, mineral rights over the whole of Vilander's country. The entire claim as proved granted, subject to all laws and regulations of British Bechuanaland relating to mines and the minerals and otherwise in force in the said territory."

De Villiers, C.J., asked Mr. Schreiner if he accepted the judgment given by the Bechuanaland Concessions Court.

Mr. Schreiner said that he did.

[De Villiers, C.J.: "Subject to the regulations, etc.," as stated in the judgment?]

Mr. Schreiner said that, of course, they could not be given judgment with one hand and have it taken away with the other. They were before the Court that day because the Government refused to recognise their rights, and because the Government said they reserved the minerals for their own benefit. He submitted that it was for his lordship to say that the Government was entirely wrong in its attitude towards the plaintiff syndicate. Here the Government, without going to Parliament, without a new Act, proceeded to use certain forms of language, dealing with the land as though it were Crown land, open to be dealt with as they pleased. It never could be denied that the title to that land was, after annexation, in the Crown, but it was not waste Crown land, Crown land of the ordinary character; it was Crown land, subject to certain rights, and to rights confirmed by a competent court in 1893.

Sir H. Juta said that the sovereign rights of the chief and his heirs and successors were retained under the cession. The cession to Carstensen was an *imperium in imperio* of the widest character, and hence it was of the greatest public importance that there should be a decision as to the validity of this concession. The agreements provided that, in addition to the sum of £500 paid annually, there should be paid a sum of 5s. per month. The agreement specially was that if the payments were not paid for a period of three months, this device came to an end. The contention of the defendants was that by the annexation His Majesty, in the Colonial Government, had stepped into the shoes of Vilander. The payments had not

put into possession, the defendants have retained possession of the site and building, and still retain, and they have never at any time given up, nor has anyone of them ever given up possession.

5. They deny that they or any of them at any time trespassed upon the said premises, but they admit that on or about the 5th November the first and seventh defendants, acting for themselves and for the remaining defendants, closed the front door opening on to Riebeeck-street, and nailed up the access to other unfinished portions of the building, and continued to retain possession of the building, and they say that, by reason of the matters herein-after referred to, they were in law justified in their said actions. Save as above, they deny the allegations in paragraph 7.

6. They admit paragraphs 8, 9, 10, and 11, save that as to paragraph 9, they deny that they or any of them dealt with the premises wrongfully or unlawfully.

7. As to paragraph 12, they deny that the plaintiffs have sustained any damages for which the defendants are liable.

Wherefore they pray that the plaintiffs' claim may be dismissed, with costs.

The plaintiffs' replication was general.

Mr. Schreiner, K.C. (with him Mr. Gardiner) for the plaintiffs. Mr. Searle, K.C. (with him Mr. Upington) for the defendants.

Mr. Searle said that he found there were certain little inaccuracies in the declaration. One of the defendants, Jenkins, had not, as a matter of fact, proved preferently against the estate. The seventh defendant had not proved at all, and the third had now filed a concurrent claim. Turnbull and Bygott now said that they wished to withdraw from the action, and that they had been joined as defendants under a misapprehension as to their position.

John Edwin Paul Close gave particulars as to the surrender of the estate, and the meetings of creditors and election of trustees. He said that he found there were bonds against the property to the amount of £38,000 odd. There was other immovable property in the estate, but it was all bonded, and he did not think that there would be anything to be distributed to concurrent creditors out of this. There were no movables to speak of in the estate. Witness spoke of the meeting of Israelson's creditors held early in September at his (witness's) office, when Israelson had got into arrear with his payments. At that time Israelson hoped to be able to raise money from Mr. Gourlay, but Mr. Gourlay did not advance any more money. Before witness was called in, Mr. Gourlay had advanced £3,000. There were other people besides the

defendants working on the premises at the time the building operations came to an end. Outside the claims made by the defendants, there were claims amounting to £5,000, largely for materials supplied for the building. The architect, for instance, had a claim for £1,500. The plaintiffs claimed damages, because they had been prevented from selling the buildings at an early date. The interest on the bonds had been running, and the sale had had to stand over, to the detriment of some of the other creditors. He computed that they had lost at least a month in selling the property, in consequence of the position assumed by the defendants. The interest on the bonds amounted to £2,463 a year. There was also insurance running, at the rate of £30 a month.

[De Villiers, C.J.: How is it that you did not apply to the Court for an interdict against the defendants?]

I had no *locus standi* at the time.

[De Villiers, C.J.: When were you appointed trustee?]

On the 25th November.

[De Villiers, C.J.: Well after that? You claim damages by reason of the acts of the defendants. Why did you not take steps to interdict the defendants?]

Mr. Searle: I am instructed that there was a suggestion made to the defendants that we should bring the matter on motion, but they did not agree to that.

Witness: They understood all along, my lord, that we were fighting the case.

[De Villiers, C.J.: Do you press the claim for damages, Mr. Searle?]

Mr. Searle said he understood that the plaintiffs thought the estate should be awarded damages.

Witness: I am not anxious to press the claim for damages. We feel sympathetic towards these creditors, but we don't see why they should be creditors, to the exclusion of the others.

David Israelson, the insolvent, gave evidence as to the erection of the Flat Iron, and his difficulties in financing the work.

By the Court: He understood that Mr. Black's men stopped work because he could not pay them. During a period of six weeks they did no work whatever. They left their material on the premises.

Witness (continuing his evidence) said that a day or two after he had given notice of his intention to surrender, Black and Bloom came to the premises and said that they were closing up the premises. They proceeded to close the premises. Jenkins and Co. finished all their work about three months, perhaps more, before he gave notice to surrender.

Mr. Schreiner said he admitted that Jenkins and Co. were out of possession.

Witness, in further evidence, said that Kinnes stopped working as soon as witness told him he had no money. Lewis worked for about a week after the meeting of creditors at Mr. Close's office. Bloom left shortly after the meeting. Each workman supplied his own tools. When the lift was brought by Messrs. Govey and Co., Mr. Shaw, their representative, called, and saw him, and he referred him to Mr. Close. Mr. Shaw came back, and the lift was placed by Mr. Shaw in the passage. Mr. Shaw got into the premises by taking out the hoarding. Witness had a man named Monty on the building acting as caretaker. Monty had now left the Colony, and witness did not know his address.

Cross-examined by Mr. Schreiner: He had no clerk of works of his own on the premises. He had four or five men sleeping there, whose duty it was to look after the premises. He believed Bloom also had a man there. He did not call for tenders for the work. He took the men to the place and showed them what there was to be done.

De Villiers, C.J., intimated that he wished the parties would confine themselves to the simple issue whether defendants had possession of the building at any time, and if so, whether they subsequently lost it.

Witness, re-examined, said that Monty continued on the premises up to the date of witness's insolvency. Bloom had a man there.

By the Court: Bloom took on as a contractor for £4,500 all the carpenters' work, and undertook to look after all the works. Witness supplied all the timber. He actually paid to Bloom £3,850 or £3,865. Bloom had to look after the work generally. Bloom was not "over" Black's, but if there was anything that was wrong, Bloom had to report to witness. He did not know whether he should call Bloom a clerk of works. Bloom was the head man of all the works, to protect witness's interests.

Charles Frederick Shaw, of Messrs. Govey and Co., gave evidence with regard to a visit he paid to the premises on the 14th or 15th October to deposit a lift. He found no one in charge of the premises. There was no work going on. He only found builders' refuse about the place.

Mr. Schreiner closed his case.

James Black, of Harris and Black, said he had never known that Bloom was supervising their work. He was not aware that Bloom had anything to do with their work. On the 2nd September, Israelson owed his firm £1,066. Witness had a Kafir on the premises until the 22nd September. Scaffolding was taken away that had been done with, but they left sufficient to complete the job. Witness went in and out of the premises after the 2nd September as he pleased. He had left

cement and lime there. Witness also spoke of the measures taken to close the premises. As to the man Monty, he knew that Monty had been a labourer on the building, and that he was afterwards employed in the bar.

Abraham Bloom, another of the defendants, said that he was the contractor for carpentry. He had nothing in writing relating to the contract. He was to superintend all the work up to the first floor. Monty was not the caretaker of the building. Monty was there just at the beginning, and asked witness if he could finish a room so that he could live there. Witness had told Mr. Close that he would wait until the work had been finished, but that was subject to other money being raised that had been mentioned by Israelson. Witness had a man staying on the premises until they were locked up.

Cross-examined: It was part of his duty to see that all the work went on right. That was a friendly arrangement, and not something for which he was specially paid. Witness kept no books at all. He had not claimed against the estate, because he thought there would be nothing for the concurrent creditors. He had eight rooms locked up, of which he held the keys. Black and Lewis had locked up other rooms.

Further evidence was given by

Geo. Kinnes, the plumbing and drainage contractor, who claimed £196 against the insolvent estate; Thomas Smith, book-keeper of the last witness; Joel Lewis, painter, who had a claim for £50; Morris Tamse, who supplied labour for the brickwork, and who claimed £275; Henry Frank Wm. Rohr, manager for Jenkins and Co., asphalters, who claimed £80.

Mr. Searle closed his case.

Postea (March 11th).

The Court intimated that they would first hear counsel for the defendants.

Mr. Schreiner admitted that the title to the property which was in the defendants' possession was in the trustee, but he submitted that no provision of the Insolvent Ordinance in any way allowed the trustee to have a better right than the owner of the property could have had. The trustee in this matter was but the successor of the owner of the property, who was Israelson. The action was one for ejectment, based upon the seventh paragraph of the declaration, which set out that certain acts had been done by the defendants in locking and boarding up the property. The essence of the case for plaintiffs was that these acts constituted wrongful and unlawful trespass on the part of the defendants. One important point was that the insolvent (in reply to a question put by the Court) said that he told the defendants, when they said they would lock up the place, that they could do as they liked. Possession was, on the insolvent's own

admission, taken by his consent by Black and Blum on behalf of all the defendants. Counsel went on to contend that the defendants, in doing the work that they did, were not looking merely to the credit of Israelson; they were looking to their lien on the buildings. They did, he submitted, all that a group of persons could have done to secure real possession of the building. They locked up the premises, nailed up certain parts, took certain rooms, and had people sleeping there. Counsel did not claim that there was exclusive possession of the building by the defendants; he contended, however, that even a single contractor could not have exclusive possession. As far as Jenkins's claim was concerned, it was hard on him, but he had given up his claim. With the other defendants, however, it was not so. Counsel adduced a number of authorities in support of his contentions. He quoted Voet (20-2-28) Maasdorp, Nathan, and Van Leeuwen, and cited *Brown's Assurances v. Pote* (4 E.D.C., 50) and *Stern v. Morom* (13 C.T.R., 802). He proceeded to state the position of the different defendants. Harris and Black had a large contract, but there was still an amount owing to them of £1,066. Their materials were there, as well as certain of their tools, their signboard was in one of the windows, and they had locked one of the rooms. Turnbull and Bigott had withdrawn from the action. As to Jenkins and Co., they had been paid half of their charges, and had been promised the other half in three months. Jenkins had thereupon gone away from the premises. Counsel admitted that he could not press Jenkins's claim to have had possession of the building. Kinness was still on the premises, and had been ready to continue the work. Kinness had been associated with Harris and Black in what was done after the insolvency of Israelson. He had a claim of £196. Counsel also contended that Tamsey, Lewis and Blum clearly had possession, along with the other defendants, of the building. He submitted that it had not been shown that the man "Monte," whom Israelson described as his caretaker, had any possession of the Flat Iron on behalf of the insolvent.

Without calling on Mr. Searle,

De Villiers, C. J.: The Legislature did not intend by the proviso to extend the rights of retention beyond the law that existed at the time the law was passed. The question was what was the law at the time the Act was passed? I think the proviso itself in a few words says that the law authorised the right of retention where there is actual possession. In the present case, therefore, I am clearly of opinion that the plaintiff had no such actual possession of the buildings as to entitle them to the right of retention. In the first place, all those

who have been concerned, and were concerned, in the building of this property, are not before the Court. The foundations were laid by Israelson. Several workmen were engaged upon different parts of the work. But all the plaintiffs before the Court do not constitute all the parties who would have been entitled jointly to claim the possession of the whole of the property. I am therefore clearly of opinion that the actual possession required by law is actual possession of the whole property sought to be retained. None of these people had possession of the whole of this property, nor had they jointly possession of the whole of the property. It is true that some of them had rooms in which they kept their tools, but that was the sole purpose for which they took possession. As to Bloom, he had possession of more than one room, and he had keys of several rooms, but the relations between Bloom and Israelson were such that it was to be expected he would have some degree of control and authority over the buildings. He was not in the position of clerk of the works, but still he was in this position that if anything went wrong he would report to Israelson, and that such a man occupied certain rooms is just what one would expect. I am satisfied that Bloom never occupied or kept the keys of these rooms for the purpose of asserting a right of possession on behalf of all the persons who had been engaged upon the building of this house. When they saw that the man was unable to pay, they did not think it worth their while remaining on the buildings. It is true some odd tools were left about, but that does not make a person an occupier of the premises. Then, subsequently, when these people began to hear that they would lose their money, there was a conversation with Israelson, who said they could go on the premises if they liked. Then I think they not only had the keys of the rooms, but they put on a lock on one of the doors, and in that way obtained admission to the whole of the premises. But during the same period Israelson had possession, and Israelson had a person sleeping on the premises. Although he was a man in an inferior position, yet, still he was there asserting the right of the owner to some extent to the occupation to the whole of the premises. What was done afterwards does not amount to such a possession of the whole of the building, as to justify the Court in saying that the terms of this proviso had been complied with. There was no such actual possession of the whole of the property, in respect of which this retention is claimed, as to justify the Court in giving judgment for the defendants. The rooms were simply locked for the purpose of keeping their tools, and the occupation is not of such a nature as to give them a right of retention.

Their claim of retention extends over the whole of the unoccupied portion of these buildings, and that claim, in my opinion, fails altogether, and for these reasons judgment of the Court will be in terms of the prayers "A" and "C" of the declaration. As to the claim for damages, Mr. Close has stated that he does not press it, nor do I think even if pressed, the Court would be likely to award damages in the present case, seeing that no steps were taken by the trustee to assert the right of the estate against these people. The defendants are in an untenable position, and I think they must pay the costs.

Maasdorp, J., concurred.

[Plaintiffs' Attorneys: Herold and Gie; Defendants' Attorneys: Findlay and Tait.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

GENERAL MOTION.

Ex parte ESTATE DE { 1905.
VILLIERS. { Mar. 6th.

Mr. Alexander moved, as a matter of urgency, for the appointment of a trustee in the insolvent estate of De Villiers and Co., of Stellenbosch. The trustee appointed at the first meeting had since died, and now the three creditors who proved at the second meeting were desirous that J. Smuts, who was a partner with the late trustee, should be appointed.

[Hopley, J.: Is this a competent way? Has it been done before? I think the proper way would be to hold a meeting and appoint a trustee.]

Mr. Alexander said it was done in this way to save expense.

Hopley, J., said if all the creditors had not consented he would not have felt entitled to make an order; but, as a matter of fact, everybody that could be affected by this order concurred in this application. He could see it would save expense. The person wished for by the creditors to replace the late trustee was practically the same person, as he was in business with him, and would be really the best man to realise the estate. He did not say this would be binding upon the Court in any future action in the Court. In this particular matter he felt it would be doing the best for all the parties to accede to the application. Order accordingly. Costs to come out of the estate.

At a later stage his Lordship said he had his doubts about granting such an order, and in granting it he took it that Mr. Alexander had looked into the law to see that there was nothing against it.

His attention had been called to the 52nd section of the Ordinance, and by that it was only competent for the Court to make an order for the preservation of the estate until a new trustee was appointed. The matter came suddenly before him, and Mr. Alexander ought to have called his attention to the section, but in all probability it escaped his attention. He was doubtful whether he could make such an order, and he would therefore now vary it by ordering that Mr. Smuts be appointed as trustee, with full powers, in the place of Mr. Bosman (deceased), and proceedings to be forthwith taken to have a new trustee elected. This might land the parties in more costs than the proceedings this morning, but it is the law. The costs would come out of the estate.

TRIAL CAUSE.

KRUGER V. VENTER AND { 1905.
NAUDE. { Mar. 6th.
" 7th.

Partnership—Joint and several liability of partners.

This was an action to recover £182 5s., balance of account, for sheep and goats sold and delivered, money lent, and work done; also £24 on a promissory note. Provisional sentence and judgment had been obtained, and the promissory note paid.

The declaration set out that the plaintiff was a farmer, residing in Philipstown, and the defendants were speculators, trading under the style of Venter and Naude. In 1903 and 1904 witness sold the partnership sheep, goats, and horses. A detailed account was submitted, showing a balance of £182 5s. The total amount of the account was £297 5s. Against that, amounts of £60 and £55 were credited.

The plea on the part of Naude set out that the transaction had nothing to do with the partnership. In February, 1904, the partnership estate was assigned. The plaintiff was fully aware of the proceedings, and put forward no claim. Naude claimed in reconvention £25 for a horse sold to plaintiff.

The replication set out that the plaintiff attended a meeting of creditors, but never signed any assignment deed. As to the horse, plaintiff said he bought the horse from Venter, not Naude. It was not the property of Naude, and he had nothing to do with the sale.

Mr. Burton (with him Mr. Van Zyl) was for the plaintiff, and Mr. P. Jones for the defendant Naude. The defendant Venter was not represented.

Mr. Burton explained that while there was abundant evidence to show

Hopley, J.: The defendant Naude said he was anxious to get out of the partnership, but he did not take any active steps to bring about a dissolution. The only point in the case is to whether the plaintiff had a genuine claim against this partnership. In the peculiar and somewhat suspicious circumstances, the explanation given by the plaintiff is the only one possible he could have given, and it is difficult to believe that the independent witnesses for the plaintiff would come to the Court to commit deliberate perjury. Disallowing some of the smaller items, there will be judgment for the plaintiff for £116 15s., the defendants jointly and severally to pay the costs, the plaintiff declared a necessary witness.

[Plaintiff's Attorneys: Mostert and Son; Defendant's Attorney: G. Trolip.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

TRIAL CAUSES.

CLAREMONT MUNICIPALITY (1905.
V. COLONIAL GOVERNMENT. { Mar. 7th.

Rating of Crown property—Railway buildings—Occupation by individuals.

The Railway Department having to enlarge the Railway station at C., bought a cottage about 400 yards from the station, not on Railway property, for the stationmaster, who proceeded to occupy it as his private residence.

Held, that the cottage and grounds so occupied were liable to be rated under Acts 36 of 1891 and 19 of 1892.

At the time when the Government took over the Railway there was a cottage at a crossing in N. on Railway property immediately adjoin-

ing the land, which was then occupied and continued afterwards to be occupied by a gatekeeper, whose duty it was to open and close the gates for persons wishing by night or by day to cross the Railway line.

Held, that the gatekeeper's cottage was not liable to be rated under the above Acts.

This was an action brought by the Claremont Municipal Council against the Colonial Government to recover the sum of £18 4s. 7d., alleged to be due upon rates for 1904 from defendants as owners of certain property occupied by officials or employees of the Railway Department.

The declaration set out that certain immovable property, belonging to the Colonial Government, was within the Claremont Municipality, and under the control and administration of the Commissioner of Works. It consisted of (1) land and dwelling-house in Bath-road, occupied as a private residence by the stationmaster, and valued for rating purposes at £700; (2) land and dwelling-house in Mill-street, occupied as a private house by a platelayer, and valued for rating at £450; (3) land and two dwelling-houses situated off Camp Ground-road, occupied and valued at £200 and £400 respectively. Save the stationmaster, all the occupiers paid rent, and it had been deemed necessary by the department that they should occupy those houses to expedite their attendance on their duties as railway officials. The Municipality had levied owners' rates on the said properties for 1904, and there was now overdue a sum of £18 4s. 7d. In accordance with the provisions of Act 36, 1891, and Act 19, 1902, the properties were beneficially occupied by individuals in their private capacity, and were not railway buildings. The Government refused to pay the sum of £18 4s. 7d., or any part thereof. This amount was now claimed.

Defendants, in their plea, admitted the formal paragraphs 1, 2, 3, and 4. They also admitted paragraph 5, and said, further, that it was necessary that for the proper performance of their duties the said officials should occupy the said houses. Defendants also stated that the said houses were railway buildings in terms of the statutes referred to, and that the Colonial Government was entitled to exemption from paying owners' rates thereon.

Mr. Schreiner, K.C. (with him Mr. Bisset) for plaintiffs. Mr. H. Jones (with him Mr. Nightingale) for defendant.

Mr. Schreiner stated that the plaintiffs had received a letter from the Gov-

ernment attorneys, dated the 15th February, stating that they found that the premises mentioned in paragraph 4 of section (c) of the declaration were occupied by a gatekeeper and checker, and not by two gatekeepers as stated therein. They admitted liability in regard to the house occupied by the checker. They (the attorneys) found that they were in error in stating that the stationmaster was the only official who did not pay rent, and that they found that the gatekeeper did not pay rent. Mr. Schreiner went on to say that there were now therefore three properties in relation to which the claim of the Municipality was made. The correspondence that would be put in would show that there had been ten properties rated on which the Government at first refused to pay, except one in Palm Boom-road, which was admitted. Afterwards the Government admitted five others, and then four remained upon which the declaration was filed, and which had now been reduced to three.

Mr. Howel Jones put in a draft of an amendment of the plea, in accordance with the letter of the defendants' attorneys.

Mr. Schreiner said that he should not object to the amendment of the plea. He thought perhaps his learned friend on behalf of the Government would admit that the rate had been duly levied, and assessed, leaving open only the question as to whether the property named was exempt.

Mr. Jones acquiesced.

Mr. Schreiner said that the issue would now be narrowed down to the construction of the Acts 36 of 1891 and 19 of 1892. Section 4 of the former Act provided that no rates should be levied by or be payable to a municipality upon any line of railways and buildings situated in any part of the Colony belonging to the Colonial Government. In the following session of Parliament a further Act was passed which expunged section 4 of the Act of 1891, the object, said Mr. Schreiner, being to make the law general in relation to this matter. A proviso, however, appeared in the Act of 1892, as follows: "Provided that the term 'railway buildings' shall not apply to such buildings as are beneficially occupied by individuals in their private capacity."

John Samuel Merrington, valuator of the Claremont Municipality, said that the stationmaster's residence was not situate within the expropriated property of the Railway Department, and it was immediately adjoined by four cottages, on which the Government paid rates, the whole being comprised in one estate purchased by the Government. There was a dwelling-house in Mill-street beyond the expropriated property of the Government. This was occupied by a platelayer. Then there was a dwelling-house situate close to the line occupied

by a checker. There was another property near Newlands Station occupied by the gatekeeper at the crossing to Camp Ground-road. Witness did not know how that property came into the hands of the Government, whether it was in the original expropriation, or it had been a piece of Crown land.

Cross-examined by Mr. Jones: He had formerly been secretary of the Council up to 1898, and during his term of office rates were not levied on platelayers' and gatekeepers' houses, because they were Government property. He then thought that they were barred by the Act of 1892.

Mr. Schreiner closed his case.

Alfred James Parsons, district engineer, proved a plan of the stationmaster's residence, and adjoining property. The ganger's house at Newlands was, he said, practically within the station yard, and about 100 feet from the line. The stationmaster's residence was about 1,200 feet from the station. He believed that the triangular piece of ground, on which the gatekeeper's cottage stood, belonged to the original expropriation.

Gowan Cresswell Clarke, chief traffic manager of the C.G.R., said that the land on which the stationmaster's house stood was bought to free the railway building at Claremont, and give greater accommodation for the travelling public. Up to that time the stationmaster had occupied part of the station building. It was desirable that the stationmaster should live as near the station as possible, because he was supposed to be always available, night or day, in case of fogs, accidents, or other emergencies. The principal purpose of the purchase was to get a site for the stationmaster's residence. Only one of the four houses adjoining was occupied, viz., by a porter of the Claremont Station. The porter was not bound to occupy that house. The particular platelayer occupying one of the houses named was a foreman, and should reside close at hand. As to the gatekeepers, it was most necessary that they should live as near as possible to the line. Witness had been in the Government service since 1878. The gatekeeper's cottage near Newlands Station seemed to him to be one of the old properties taken over when the line was expropriated.

Cross-examined: The Newlands stationmaster lived on the Hardwick Estate, a full ten minutes' walk from the station, but that was only a temporary expedient. They had plans made and ground laid out for a stationmaster's house quite close to the Newlands Station. The Claremont stationmaster did not pay rent; he had a salary and house allowed.

Harry Elliott, resident engineer of the Western System, C.G.R., said it was necessary that the platelayer near Newlands Station should live in close proximity to the line. If he refused to live in

clothed as such chief, exercising such sovereign rights with the concurrence of his Raad with all right, authority, and power to grant land and to make concessions in regard to mineral rights, and in respect of the country or territory occupied by him and the people or tribe under him.

5. On or about the 22nd November, 1889, an agreement in writing was duly entered into between one Adolph Heinrich Carstensen, then of Vryburg, in British Bechuanaland, and the chief, whereby, on the conditions and for the consideration set forth in the said agreement, certain mineral concession and prospecting rights were granted to the said Carstensen. A copy of the said agreement is hereto annexed marked "A." The said agreement is hereinafter termed "the concession."

6. Thereafter, on or about the 10th April, 1890, the concession being then still of full force and effect, a further agreement in writing was duly entered into between the same parties for the like purposes and under the like conditions and provisions as those obtaining in the concession, but for an increased consideration and in respect of and throughout a more extended area. A copy of the said further agreement is hereto annexed marked "B," the said further agreement being hereinafter termed "the further concession."

7. On the 21st January, 1890, the said Carstensen, for value absolutely sold, ceded, assigned, transferred, conveyed, and set over to a certain syndicate, termed the Vilander Concession Syndicate, or its trustees for the time being, all his right, title, estate, interest, profit, property, claim or demand whatsoever in and to the concession, and in and to all rights and privileges conferred upon him thereunder, together with any documents of title or otherwise in anywise relating or having reference thereto. The said syndicate is that mentioned in the first paragraph hereof, and the plaintiffs constitute the said syndicate.

8. Thereafter in or about the month of August, 1890, the said Carstensen, for value ceded, assigned, transferred, and set over to the said syndicate all his right, title, estate, interest, profit, property, claim or demand whatsoever in and to the further concession in and to all rights and privileges granted to him thereunder, and thereafter on the 4th April, 1893, formally ratified such cession and assignment, and thereby again ceded, assigned, transferred and set over to the syndicate or its trustees for the time being all his right, title, interest, estate, profit, property, claim or demand in and to the further concession, and in and to all rights and privileges granted to him thereunder.

Copies of the above cessions are hereto annexed "C" and "D" respectively.

9. By virtue of the above concessions and cessions the syndicate became and was and is now entitled to claim, have, exercise and enjoy all the right, title, estate, interest, profit, property, privileges, claim, or demand of what kindsoever which, or the right to claim, was vested in or passed by the said Carstensen.

10. The sum of £500 agreed to be paid annually by the concessionaire as the consideration for the concessions was paid to the Chief Vilander up to the 5th May, 1891, being the date of the annexation of his country to British Bechuanaland, and was thereafter from time to time paid to the said Vilander up to the time of his death, and thereafter to his executors, but the Government does not recognise the validity of any payment made after the 5th May, 1891, aforesaid. No amounts under the concessions and no fees or licence moneys have been paid either to the Government of the former Crown Colony of British Bechuanaland since 5th May, 1891, or to the Cape Government since the annexation of the said territory to this colony in 1895.

11. By Proclamation No. 106, B.B., 1891, Her Majesty's Sovereignty was proclaimed over the territory to the west of British Bechuanaland, known as Bechuanaland and the Kalahari, in which the territory referred to in this case was included, and by Proclamation No. 120, B.B., 1891, provision was made for the law to be administered therein.

12. In terms of Proclamation No. 159, B.B., 1893, a Court styled "The British Bechuanaland Concession Court" was constituted and established in order to inquire into and decide upon the validity of and scope of claims founded upon grants of land or mineral or other concessions in the territory referred to in paragraph 11.

13. Thereafter, on the 1st September, 1893, and subsequent days, the said Court duly sat to inquire into and decide on the claims advanced before it by the trustees for the syndicate in respect of the concession and further concession, and to hear evidence adduced in support thereof or otherwise. The Crown Prosecutor appearing on behalf of the Government of British Bechuanaland.

14. Thereafter, on the 7th December, 1893, the said claim was duly granted and allowed, as will appear from a copy of the judgment hereto annexed and marked "E."

15. Under the provisions of the "British Bechuanaland Annexation Act, 1895," British Bechuanaland became annexed to this colony, and section 30 of the Act maintained the provisions of Proclamation No. 169, B.B., 1893, and preserved the jurisdiction of the British Bechuanaland Concession Court.

16. By section 21 of the said Act it was provided that all liabilities of the Governor of the annexed territory at the time of the said annexation should be deemed to be liabilities of the Governor of this colony.

17. On divers occasions, both before and after the said annexation, grants were issued in respect of land in the territory prior to the annexation by the Governor of British Bechuanaland and thereafter by the Governor of this colony, and therein the right to minerals or precious stones was reserved to the Government, as will appear on reference to the terms of the "conditions" inserted in the said grants and hereto annexed, marked respectively "F" and "G."

18. The syndicate has duly sought to obtain from the Government recognition of its rights, and has maintained that such reservations are unlawful, but the Government has refused to recognise the rights of the syndicate in respect of the concession or further concession and maintains that it is entitled to make such reservations for its own benefit.

19. The plaintiffs contend that the concession and further concession are and have been of full force and effect and binding upon the Government, and that they are entitled to have their rights in, arising out of, and under the said concession and further concession, declared accordingly by this Honourable Court, and to obtain an order declaring that as to all grants already issued with such reservations the Colonial Government is bound to recognise the said reservations as made for and on behalf of the plaintiffs, and directing the Government as to any further grants of land in the said territory to include a condition subjecting such grants to the rights of the plaintiffs and their successors or assignees under the aforesaid concessions.

20. The defendant contends that the plaintiffs are not entitled in the premises to the relief claimed. The parties pray for judgment in accordance with their respective contentions with costs.

Mr. Schreiner, K.C. (with him Mr. McGregor) for plaintiffs; Sir H. Juta, K.C. (with him Mr. Nightingale) for the defendant.

Mr. Schreiner said that Carstensen conceded all his rights to the syndicate whom the plaintiffs represented. He conceded his rights under the first concession of the 21st January, 1890, and subsequently, in August, 1890, he made a second concession to the syndicate. He confirmed that second concession by a document dated the 2nd April, 1893. By Proclamation No. 106 of 1891 the territory of David Vilander was annexed to and formed, after that time, part of Her Majesty's dominions. Proclamations 120 and 123 made provision for the law to be in force in and for the civil administration of the territory. The

concessions thus granted and ceded were dealt with afterwards by a Court, which was established under Proclamation No. 169, referred to in paragraph 12 of the special case, called the British Bechuanaland Concessions Court. That Court sat in September, 1893, and decided on the claims advanced before it by the trustees of the syndicate, in respect of those concessions of Carstensen, and it heard evidence. The Crown Prosecutor appeared on behalf of the Government of British Bechuanaland.

The judgment of the Concessions Court, dated December 1, 1893, was in the following terms: "Claim No. 6.—A. H. Carstensen, mineral rights over the whole of Vilander's country. The entire claim as proved granted, subject to all laws and regulations of British Bechuanaland relating to mines and the minerals and otherwise in force in the said territory."

De Villiers, C.J., asked Mr. Schreiner if he accepted the judgment given by the Bechuanaland Concessions Court.

Mr. Schreiner said that he did.

[De Villiers, C.J.: "Subject to the regulations, etc.," as stated in the judgment?]

Mr. Schreiner said that, of course, they could not be given judgment with one hand and have it taken away with the other. They were before the Court that day because the Government refused to recognise their rights, and because the Government said they reserved the minerals for their own benefit. He submitted that it was for his lordship to say that the Government was entirely wrong in its attitude towards the plaintiff syndicate. Here the Government, without going to Parliament, without a new Act, proceeded to use certain forms of language, dealing with the land as though it were Crown land, open to be dealt with as they pleased. It never could be denied that the title to that land was, after annexation, in the Crown, but it was not waste Crown land, Crown land of the ordinary character; it was Crown land, subject to certain rights, and to rights confirmed by a competent court in 1893.

Sir H. Juta said that the sovereign rights of the chief and his heirs and successors were retained under the cession. The cession to Carstensen was an *imperium in imperio* of the widest character, and hence it was of the greatest public importance that there should be a decision as to the validity of this concession. The agreements provided that, in addition to the sum of £500 paid annually, there should be paid a sum of 5s. per month. The agreement specially was that if the payments were not paid for a period of three months, this device came to an end. The contention of the defendants was that by the annexation His Majesty, in the Colonial Government, had stepped into the shoes of Vilander. The payments had not

been made, and the position taken up was that these agreements had become absolutely void. As to the judgment of the Concessions Court, he submitted that that Court did not go into the question of whether the concession was valid, regardless of whether payments had or had not been made. No payments had been made to the Colonial Government. Counsel proceeded to discuss the Proclamation No. 163, and said that, under that Proclamation, monopolies were prohibited. He contended that it was absolutely clear that this concession, if permitted, would create a monopoly; hence sole and exclusive rights did not attach to the concession. It was true that the plaintiffs had under the concession a right to win minerals, a right to take gold and precious stones; but it did not prevent other people from doing the same, it did not give a sole and exclusive right to the plaintiffs. The judgment of the Concessions Court, he submitted, gave the plaintiffs no rights beyond the rights of a prospector or claim holder. It was subject to the laws in force in Bechuanaland at the time, and at the time there were only two laws in operation dealing with gold, precious stones, silver, or platinum. The Government holding sovereign rights were entitled to the reservation as to the mines and minerals; the plaintiffs might prove the right to go and win minerals. He contended that they had no right to go and have what was really a personal servitude registered.

Mr. Schreiner, in his reply, argued that the rights given by Vilanders were sole and exclusive, and that that was the fair interpretation of the judgment pronounced by the Concessions Court.

De Villiers, C.J.: This is an action arising out of a certain concession of mining rights granted by the Chief Vilander to one Carstensen in November, 1899, and afterwards extended in April, 1900. Since the date of the concession the territory of the Chief has been annexed to this Colony, and Carstensen has ceded his rights to the plaintiffs who, by this action, ask for a declaration of their rights as against the Colonial Government. There are no facts in dispute, for the parties have agreed upon a special case in which the facts are fully set forth, and the respective contentions of the parties clearly stated.

After Her Majesty's sovereignty had been proclaimed over the territory in question, a Concession Court with the very widest powers was established by the proper authority to inquire into and decide upon the validity and scope of claims founded upon grants of land or mineral or other concessions in the territory. The claim submitted by Carstensen was duly adjudicated upon by the Concession Court on the 7th of December, 1893, in the following terms: "The entire claim as proved

granted, subject to all laws and regulations of British Bechuanaland relating to mines and minerals and otherwise in force in the said territory." That judgment has never been appealed against, and it remains binding on the plaintiffs as cessionaries from Carstensen as well as upon the Government. In 1895, British Bechuanaland, including the territory in question, was annexed to this Colony, and by the 30th section of the Annexation Act the provisions of the Proclamation establishing the Concession Court were maintained in force. It appears that the sum of £500 agreed to be paid annually by Carstensen for his right to the minerals within the area of his concession was paid to the Chief up to the time of his death, and thereafter to his executors, and that no payment or tender of payment has ever been made either to the Government of the former Crown Colony of British Bechuanaland or to the Cape Government since the annexation of 1895. On several occasions before and after annexation grants have been issued by the Government containing the following conditions: "That the rights of the proprietor shall not extend to any deposits of minerals or precious stones which may at any time be or be discovered on the land hereby granted, and the right of mining for minerals or precious stones is reserved by the Government under such regulations as were established by law at the date of annexation of British Bechuanaland, and subject to the conditions mentioned in the judgment of the Concession Court, dated 7th December, 1893." The contention of the plaintiffs now is that the concession is binding upon the Government and that they are entitled to obtain an order declaring that as to all grants already issued with reservations the Colonial Government is bound to recognise the said reservations as made on behalf of the plaintiffs and directing the Government as to any further grants of land in the said territory to include a condition subjecting such grants to the rights of the plaintiffs and their successors or assignees. The defendant's contention is that the plaintiffs are not entitled in the premises to the relief claimed. The simple question, therefore, to be decided is whether the plaintiffs are entitled to a declaration and direction in manner and form claimed by them.

A preliminary objection was raised by the defendant's counsel that whatever right the plaintiffs might have under the concession they have forfeited by reason of their not having paid the annual rents to the Government either of the former Crown Colony or of this Colony. This point, however, has not been clearly raised in the case stated for the opinion of the Court, and it is quite possible that,

if the point had been raised, the plaintiffs might have had an effectual reply to the defence. I am bound to add that I cannot agree with the plaintiffs counsel that payments to Vilander's executors were valid payments under the concession. It is true that under the 7th clause of the first agreement the rents were made payable to the Chief, "his heirs, successors, or assignees," but it is clear from other parts of the agreement that the executors administering the private estate of Vilander cannot be regarded as "heirs, successors or assignees" referred to in the agreement. The 4th clause, for instance, provides that "the grantee shall be bound to obey and faithfully carry out all laws, rules and regulations which are now or hereafter shall be enacted or made by the Chief, "his heirs, successors or assignees." It is obvious that the Chief did not intend his executors to be included among his heirs, successors or assignees who were to enact the laws of his land. As events turned out the legal successor of the Chief is the Cape Government.

The Government, however, does not rely for its defence upon this clause of the agreement, but upon the judgment of the Concession Court read by the light of those laws and regulations of British Bechuanaland relating to mines and minerals which were in force in the said territory before the establishment of that Court. It would serve no useful purpose to refer in detail to the several Proclamations which embody those laws and regulations, and it is sufficient to say that they are wholly inconsistent with the declaration and direction which this Court is now asked to make. There can be no possibility of a doubt as to whether the Concession Court intended by its judgment to subject Carstensen's rights under the concession to all laws and regulations relating to mines and minerals enacted by the competent Legislature for British Bechuanaland. If those laws and regulations are somewhat inconsistent with a recognition of the concession I can only say that this Court has no power or jurisdiction to correct any mistake that may have been made by the Concession Court. It is by no means clear, however, that a mistake was made. The Concession Court possessed very wide power to impose conditions upon the exercise of any grant or concession, and the rights conferred on Carstensen by the agreement were exceedingly vague, and were not exclusive of the exercise of similar rights by others. The Chief was induced to make the concession, and the concessionaire hoped to make a good thing out of it, but the precise rights of the latter were not very clearly defined. Then, when the Concession Court came to consider his claim, the grant was confirmed subject

to a condition which may possibly deprive the grant of all its real value, but the judgment stands unreversed and not even appealed against. It is not, therefore, competent for this Court to make any declaration or give any direction which is inconsistent with that judgment.

In this view of the case it becomes unnecessary to consider the further objection raised on behalf of the defendant that, as the obligation to pay the rents was of a purely personal nature and might not always hereafter be fulfilled by the plaintiffs, their alleged right to the minerals cannot be registered as a real and perpetual servitude against the land. For the reasons already stated I am clearly of opinion that the defendant's contention is correct "that the plaintiffs are not entitled in the premises to the relief claimed.

I wish, however, to make it perfectly clear that, in my opinion, the decision in support of the defendant's contention should not have the effect of a final judgment in his favour, but should be in the nature of an absolution from the instance. It is quite possible that the plaintiffs may be able hereafter to adduce further evidence in support of their claim, or to devise some other form of claim which it is in the power of the Court to grant. If a fresh action should be brought, the defendant will be able to raise the defence of forfeiture of the plaintiffs' rights by reason of non-payment of rent to the Government, but as the case stands, the absence of any payment, or even tender of payment, to the Government, affords a reason for absolving the defendant from the instance and not for giving judgment in his favour.

The opinion of the Court is, that the defendant's contention is correct, but this finding is to have the effect of absolution from the instance, and the plaintiff will have to pay the costs of this action.

[Plaintiffs' Attorneys: Syfret, God-lonton and Low; Defendant's Attorneys: Reid and Nephew.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

GENERAL MOTIONS.

DICKERSON V. GACULI. { 1903.
{ Mar. 7th.

Mr. J. E. R. de Villiers, for the respondent, moved for discharge of a notice of appeal on the ground that the appellant had not prosecuted it within

a reasonable time. Notice of appeal was given on the 13th July last, and nothing had been heard of it since.

Appeal discharged with costs.

Ex parte KRUGER.

Mr. J. E. R. de Villiers said the petitioner was married to his wife, who died in February, 1903, in community of property. There were four minor children. The movables were worth £350, and the farm £800. In order to liquidate the estate the petitioner had to raise two loans for £1300. During martial law he was ordered to keep 500 sheep to supply the block line. After the war a great drought caused nearly all the sheep to die, and petitioner was now in possession of only a cart and two horses. He was unable to pay the interest on the bonds. Counsel asked for an order authorising the petitioner to sell the farm to pay off the bonds, pay the minor shares into the Guardian Fund, and use the balance for farming purposes.

Order as prayed.

MARSHALL AND OTHERS V. WARD AND CO.

This was an application for an order calling on the respondent to perform a certain contract by transferring certain shares, or, in the alternative, an order liquidating the estate.

Mr. Searle, K.C., was for the applicants, and Mr. Burton (with him Mr. Jones) was for the respondents.

Mr. Burton said he consented on behalf of the respondents to the alternative order.

Mr. Searle said the only question remained was for the appointment of a liquidator, and Mr. Burton pointed out that the applicants wanted practically to appoint themselves, and he was in favour of appointing two independent men in Mr. Close and Mr. Hazel.

Maasdorp J., said it was essential that some outside person should be appointed, and the name of the liquidator could be agreed upon and mentioned again.

The order of liquidation granted, the costs to be paid in the liquidation of the company.

Subsequently, counsel announced that it was agreed that Mr. Close should act as liquidator, and give security for £1,000 to the satisfaction of the Registrar.

Order accordingly.

HADLEY V. SCOTT.

This was an application for the discharge of an order restraining the applicant from removing certain furniture

from Montrose Villa. The affidavit of Hadley set out he hired Montrose Villa from one Wood for three months, and had paid the rent. He purchased the furniture, and paid £50 for it. A piano and certain other furniture were hired, and he contended that those articles could not be sold, alienated, or liable to attachment, owing to the debts of one Wood.

Mr. Burton was for the applicant and Mr. P. Jones for the respondent.

Mr. P. Jones put in a replying affidavit.

The order was discharged, with costs.

URMANN V. URMANN.

Interdict Property in Bank.

At the instance of a wife who contemplated suing her husband for divorce and division of the common property, the Court interdicted a Bank from parting with any of such property in its custody.

This was an application for an interdict. The parties were married in community of property on January 20, 1903. Respondent was a manufacturing jeweller, in the employ of Myers' Bros. There was one child of the marriage, fourteen months old. For some time past serious differences had occurred between them, and respondent left his wife on Sunday, January 29, and said he was not returning, but came back on the following Monday week, and said he would not live with her, but would allow her £17 a month. Respondent had boasted on several occasions that if once he left, he would never return. She knew that he had scrip and a considerable amount of money in the Standard Bank, Adderley-street. Applicant was going to bring an action for divorce or judicial separation and division of the estate, but feared, in pursuance of his threats, the respondent would remove his securities and cash as soon as she took action, and leave the country. Applicant asked for an order interdicting the bank from parting with the securities and money, and also for an order as to alimony.

Answering affidavits were put in by Joseph Urmann, deying generally the allegations, and offering to live with his wife. He had no intention of leaving the country.

Mr. Burton was for the petitioner, and Mr. W. P. Buchanan was for the respondent.

Maasdorp J., said that something serious must have taken place was clear from the fact that the respondent actually left the house and remained away for a considerable

time, and on his return he did not associate with the applicant as a husband should. He was also heard to say he did not intend to live with his wife, and was quite prepared to make her an allowance of £17 a month. As the parties were married in community of property, the wife must be protected, and an order will be granted attaching the property in the South African Association, pending an action to be brought forthwith by the applicant; the respondent ordered to make an allowance of £10 a month, and to pay the applicant's attorneys £30 towards the costs of the suit. Costs of this application to be costs in the cause.

INCORPORATED LAW SOCIETY V.
DONNER AND CO.

Agent—Holding out as attorney
—Contempt of Court.

This was an application for an order committing the respondents for contempt of Court, by reason of their having issued an order of demand purporting to be signed and sealed by an attorney-at-law. The document, which bore the Imperial Arms, was signed "J. H. Macnamara, solicitor," and it was purchased from a representative of Messrs. Richards, the late Government printers, by an assistant in the respondent firm. The assistant informed the secretary of the Law Society that the letters were sent out in order to frighten people whose accounts were overdue.

The answering affidavit by Mr. Thomas, of the sole partner in the respondent firm, set out that his head clerk, who had at present left the country, and whose intended departure was notified to the Law Society, induced him to purchase the forms from Messrs. Richards, whose representative gave the assurance that to use the forms was quite in order, and that many of them had been disposed of to firms in Cape Town.

Counsel having been heard in argument on the facts,

Masendorp, J., said the respondent was guilty of very improper conduct, as, on his own admission, he intended to mislead people that there was more authority in the document than it really possessed. He admitted that the document was used because of its official look, and was sent out in order to induce his customers to pay their debts. The document, in appearance, is certainly misleading. It is very official and legal in form, and there is no doubt the person reading this document would be under the impression it was issued out of some court of justice, and that was exactly the intention of the respondent. The Court, as a rule, is very adverse to exercise its

jurisdiction for contempt of Court, and under all the circumstances, though the conduct of Mr. Thomas has been extremely improper and ought to be checked, I think that the aim of the applicants will be reached by ordering the respondent to pay the costs of this application.

[Applicants' Attorneys: Van Zyl and Buissinné; Respondents' Attorneys: Walker and Jacobsohn.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.)]

TRIAL CAUSE.

RECEIVERS, GRAND JUNCTION { 1905.
RAILWAYS V. WALKER. { Mar. 8th.

This was an action brought by the Receivers of the Grand Junction Railways against John Walker and Son and John Walker personally for an order for transfer of certain properties in connection with the undertaking and contracts for the construction of certain railways. Mr. Schreiner, K.C. (with him Mr. Upington) was for the plaintiffs; Mr. Russell was for the defendants.

Mr. Russell said that before the trial was proceeded with he should like to make an application for a commission to take the evidence in London of John Walker, the defendant, and other persons residing in the United Kingdom, whose evidence may be material to the case, and also for costs to be costs in the cause. Counsel read the petition of the defendant, who craved leave to refer the Court to his affidavit of the 18th November last. The petitioner appended a certificate from a medical man in London, who said that the defendant was in his 70th year, and was quite unfit to take a journey through the tropics to Cape Town, or any sub-tropical climate, much less to undergo the worry attendant upon litigation in a sub-tropical climate. Counsel said that a similar application was before the Court some time ago.

Mr. Schreiner said that he did not see how the defendant's evidence was material to the claim in convention. As to the claim in reconvention, in that matter defendant was really the plaintiff,

and he claimed a sum of over £387,000 on debentures. The application, if granted, would not only entail delay in the litigation, but it would also entail great expense in instructing some one to deal with the evidence given by Mr. Walker. The defendant ought to pay the costs of that day. He did not see why the defendant could not come out to this country, say, in May next, when the weather was cooler.

Mr. Russell (replying to his lordship) said that his client would be prepared to pay the costs of the day.

De Villiers, C.J., said that he would make an order in the following terms: That the case be postponed until the last day of next term, if the cost of the day be forthwith paid, and that the decision be postponed upon the application for examination of Mr. J. Walker on commission until the plaintiff shall have had an opportunity of obtaining an affidavit as to the state of his (Mr. Walker's) health. If the defendant should not pay the costs of to-day within a week from this date, then the Court will set down the case for trial on Saturday, the 18th March.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

ADMISSION.

{ 1905.
Mar. 8th.

Mr. Sutton moved for the admission of Mr. Harry Saunders, as an attorney-at-law and notary public.

Application granted, and oaths administered.

RHODES V. RHODES AND BOWEN.

This was an action for a decree of divorce against the first-named defendant, and damages against the second defendant. Leave was granted to sue by edictal citation in September last, and the order was personally served. The second defendant pleaded and subsequently made a tender, which was now put in by consent. The declaration set out that the plaintiff was an attorney at Kimberley, and the first defendant his wife, and the second defendant an attorney of Kimberley until June, 1904. The plaintiff was married in January, 1895, at Graham's Town, without community of property. In terms of an ante-nuptial contract, the plaintiff settled on his wife an assurance policy, and £2,000, which he invested for her. About June last the first defendant deserted him, and plaintiff alleged that she committed adultery with the second defendant during the months of April, May, and June, and was at pre-

sent living in open adultery with Bowen. He claimed a decree of divorce against the first-named defendant, and forfeiture of the benefits under the ante-nuptial contract, and £2,000 damages against the second defendant, with costs. The plea put in by Bowen set out that at present he resided in Australia. He had no knowledge with regard to the settlement. He admitted adultery on the voyage between Cape Town and Tasmania, but denied adultery at Kimberley, and he denied that the plaintiff suffered any damages. Counsel then read certain evidence taken on commission, from which it would appear that the first defendant, who travelled as Mrs. Bowen to Tasmania with the co-defendant, was attended by a doctor, who stated that she was pregnant. The stewardess recognised the photos as those of Mr. and Mrs. Bowen. The second defendant tendered £500 and costs.

Mr. Schreiner, K.C. (with him Mr. P. Jones) for plaintiff. Defendants in default.

James Joseph George Rhodes, the plaintiff, an attorney at Kimberley, stated he was married on 3rd January, 1895, at Graham's Town. At the time of his marriage he entered into an ante-nuptial contract, settling on his wife his assurance policy and £2,000, which he invested. In 1899 he got to know Bowen first, who became very friendly with his wife. At the end of 1903 he went to Hermanus. In June, 1904, his wife asked to come down to Cape Town, and witness saw her off at the Kimberley Station. He never saw her since. He accepted the tender of £500, with costs, from the second-named defendant.

A decree of divorce was granted against the first defendant, with forfeiture of the settlements under the ante-nuptial contract, and costs, and judgment against the second defendant on the consent paper for £500, with costs, the plaintiff to have his witness's expenses.

VENTER V. VENTER AND OTHERS.

{ 1905.
Mar. 8th.
" 9th.

Sale to minor children—Revocation.

V., wishing to provide for certain minor children, sold certain land to them jointly for £800. His wife having subsequently admitted that two of these minors were illegitimate, V. made another disposition of his property, excluding these two children from all share in his property.

Held, that as the Court had refused to find that these

children were illegitimate, they could not be deprived of their rights under the sale, but as their curator had stated that they were willing to accept £100 each in satisfaction of their claims, the Court ordered transfer to be passed to the remaining beneficiaries, on condition of their paying out this sum.

This was an action for a declaration of rights, brought by the executors of the estate of the late Hermanus Venter, in which they asked for the transfer of property to certain three minor sons, who were half-brothers of the plaintiffs. The matter had previously been before the Court, and it was ordered that all parties should be joined in a declaratory action, particularly those children who were said to be disinherited by the will (14 C.T.R., 77). The deceased had been married three times, and in 1902 he discovered that his wife was unfaithful to him. He got a divorce, and alleged that the two last children, who were represented by Mr. Roux, were not his children. Mr. Hermanus was married three times, and by the first wife he had fourteen children, eight or nine by the second, and eight by the third. In 1899 the father sold to the children, as from himself, a certain amount of ground, to the value of £600, and the seller and buyer papers were duly executed. Subsequently he became suspicious of the faithfulness of his wife, and in divorce proceedings the wife admitted that the two children were not those of Hermanus Venter. Thereupon, in 1902, the deceased had fresh papers of seller and buyer executed, in which these two children were excluded from the purchase (which purchase was of the nature of a gift from the father to his children). The two minor children were now disputing the revocation.

Mr. Burton appeared for the plaintiffs, Mr. Gutsche appeared to counsel on behalf of the first defendant, and Mr. Roux appeared for the second defendants as *curator ad litem*.

L. Jacobus Coetzee, attorney, practising at Philip's Town, said that the documents produced were drawn up by him and signed in his presence. The first document, signed in November 26, 1900, was the declaration of seller to the eight children. There were two more of the same date, being declarations of seller and buyer. They were signed before him in February, 1902. These were in regard to the three sons. Mr. Venter said that a mistake had been made, and only the last three children

were to get transfer. The Civil Commissioner accepted the amended papers.

[Hopley, J.: It is an attempt to set aside a sale by papers subsequently drawn.]

Mr. Burton: That is what it will come to.

Cross-examined: The paper selling to the eight minors was drawn in the office of witness. Mr. Venter knew quite well what he was doing.

[Hopley, J.: Your point is that the Civil Commissioner acted *ultra vires*?]

Mr. Roux: Yes, my lord, he acted *ultra vires*, and therefore could not bind the eight buyers.

Johan Carl Martinus Venter, one of the plaintiffs, and also one of the tutors of the six children, stated that he knew of the trouble his father had with his wife. The three eldest children had more or less £100 when their father died, but no landed property. The other five had very little. Under a bond, witness had to give each of the children £100 as they came of age. Witness was one of the executors of the will, and came to ask the Court what was to be done.

Cross-examined by Mr. Roux: If the Court found that the two minors, now excluded, were to get their eighth share, he did not think the estate could do it.

Counsel having been heard in argument.

Cur. Adv. Vult.

Postea (March 9th).

Hopley, J.: This is a case in which the late Mr. Hermanus Carl Venter, who was an old man with no less than three families by three different wives, in his old age wished to provide for the youngest family, who were all minors at the time. There were eight of them, and, as far as he knew, in the year 1900, at all events when he proposed to provide for them, these eight were all his own legitimate children, and in or about November, 1900, he provided for these. He set apart some of his landed property, and entered into a sale, a transaction which bore upon its face the look of a sale from himself to his minor children. He made a declaration on the 26th November, 1900, that he had sold for £600 certain landed property, which is the property in question in this case, to the eight minor children. He does not seem to have made at the same time a corresponding declaration as the guardian or agent for these children as purchaser, but apparently, about a year afterwards, in November, 1901, that declaration was made by himself as agent for these same eight children, dealing with the same landed property, thus making a completed sale to these eight children. It has been said that as these children had no assets to speak of, this must be looked upon as a donation by the father to the children, and must be treated upon that basis. I am not satis-

fied on the evidence that it was intended to be an out-and-out donation. In my opinion, it must be treated as a sale to the eight, and accepted by him as their guardian. If it was a sale, the rights of these eight children became vested in the property. Shortly afterwards, or somewhere about 1901, the old man discovered the infidelity of his wife, and he subsequently took proceedings to have her divorced, and then it seems to have occurred to him to make another settlement, and endeavour to disinherit the two youngest children, who in the divorce proceedings his wife admitted were illegitimate. In November, 1901, the agent went before the Civil Commissioner at Hanover, and paid transfer duty on this sale of £24, and £1 12s. as a fine for the delay, so that everything was in order as a sale. On the back of the receipt which the Civil Commissioner gave, the names of these eight minors were placed, as being the people to whom the transfer was to be made. That receipt was given in December, 1901. Two months after that it appears the old gentleman came to the conclusion that he had made a mistake, but I don't think it was a mistake, because every child's name is fully set out, and it is not likely that the attorney would have known the Christian names of each one of the eight. I don't think that was the mistake that was made, but when he came to the attorney in 1902, he said he had made a mistake in the way he had provided for his family, and he thought he had better make a new disposition. He went to the attorney, and declared he had sold this property for £600 to only three of these sons. The difficulty, however, was to put in the names of these three people without cancelling the previous sale. The documents were in the hands of the Civil Commissioner, and so, to endeavour to put right what was called a mistake, a declaration was made in February, 1902. A Justice of the Peace and an attorney of this Court wrote to his correspondent at Philip's Town telling him to ante-date this document. Now that, of course, was improper, and he ought not to have endeavoured by filling in a false date to have made it appear that the declarations were made before him in November, 1900, when, as a matter of fact, they were not made until February, 1902. Either as a Justice of the Peace or as an attorney of this Court, he acted improperly. But I have to view the matter to see if these subsequent declarations made any difference in the matter. In my opinion they could not be taken to make any difference. The sale had been concluded, transfer duty paid, and the rights of the children vested in the land. That being the case, it now remains to adjust the rights of the parties. No transfer was actually given of this property, but in his will the seller again dealt with this property.

and left this very same property to the same three children to make provision for the youngest three children. This provided for six children of the marriage, and cut out altogether the two youngest, which he considered illegitimate. He seems to have asked that certain benefits for these two youngest children should be forfeited, but the Court has previously refused to look upon them as illegitimate, having been born in wedlock. In leaving this property, he left it to the three to whom the second lot of declarations purported to sell it, on condition they should pay to their sisters a certain amount, the sum of £225, and he also left to the brother an erf in Philip's Town, on condition he paid to two sisters £25. Thus he provided for six of these children, by leaving the three eldest this farm, he left the two daughters £250 between them, and he left the son the erf. But these two youngest were left out of the will altogether. Now the matter comes before the Court for a declaration of all their rights. It seems to me that these two youngest children ought to have their rights fixed by the Court by a declaration that they are entitled to set up this purchase as a sale. They probably would not have the £600 to tender for the price, and it has been stated in Court on their behalf if they could get £100 paid to each of them, they would be satisfied to withdraw all their claims. It seems to me that would be the wisest course to adopt. The other three have been settled with, and they do not set up any claim. They only wish to remain as provided for by their father's will. I think it is clear there should be transfer to the three eldest sons mentioned in the will, on condition that they pay out to the two youngest children the sum of £100 each. Then there is the matter of costs, which ought really, in a case like this, to come out of the estate, because the testator has really caused this application; but as I understand, all the assets have been distributed, and the estate liquidated, except this matter, that there would be some difficulty in making up this arrangement. I think it would be somewhat unfair to the children of the first two marriages to order them to contribute to a matter with which they are not concerned. I think the people that ought to contribute are these who now come before the Court with regard to this particular property. It seems that the three to whom transfer will be ordered, and Mr. Roux's two clients, ought to pay the costs of those proceedings. The executors will have the right to mortgage the property for the purpose of meeting the liabilities which now fall upon the property in consequence of this judgment.

[Attorneys for plaintiff: Mostert and Son. For first defendant: Silberbauer, Wahl and Fuller. For second defendant: Zieteman and Bosman.]

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

TRIAL CAUSE.

MITCHELL V. SAM WEIL { 1905.
SYNDICATE. } Mar. 9th.

Mining company — Agent — Remuneration — Damages for non-delivery of shares.

The defendants engaged to remunerate M. for his services with a certain money payment and certain mining shares. These shares were not delivered, and M. now sued for delivery and also for damages for non-delivery.

Held, that he could not succeed on both claims.

Held further, that he was not entitled to damages for delay in the delivery of the shares, though they had greatly fallen in value.

Philip v. Metropolitan Railways (10 Juta, 52) followed.

This was an action brought by John Layton Mitchell, a mining engineer of Bulawayo, against Samuel Weil, Julius Weil, and George David Smith, trading as the Sam Weil Syndicate, to recover a certain sum and shares alleged to be due to him by way of commission, and damages in the sum of £1,353.

It was stated that Mr. Smith had not filed a plea, and that he was not represented before the Court.

The plaintiff's declaration was as follows:

1. The plaintiff is a mining engineer, residing at Bulawayo, Rhodesia.

The defendants are Samuel Weil, Julius Weil, and George David Smith, residing in Cape Town, and trading in co-partnership as the Sam Weil Syndicate.

2. During the years 1895, 1896, and 1897 the plaintiff was employed by the defendants to acquire on their behalf gold-mining claims in Rhodesia.

3. In or about the month of December, 1895, the plaintiff, acting as the duly-authorized agent of the defendants, entered into an agreement with one Benjamin William Leach, in the Ingwenia district of Matabeleland, in terms of

which the plaintiff, with the authority and consent of the defendants, and on their behalf, agreed to acquire for the said syndicate certain gold-mining claims, the property of the said Leach.

4. The claims so purchased from the said Leach were described as follows: Veracity, Naomi 1, 2, 3, Monica, Nararan, Cusco, Laura, Outalpa, and Mea, afterwards repegged as the Bud.

5. In consideration of the services rendered to the defendants by the plaintiff in the purchase of the said claims, the defendants undertook to pay to the plaintiff a commission of 10 per cent. on any properties secured to the defendants by the plaintiff, the said commission being payable on the sale or flotation of the said properties.

6. Thereafter the said claims were duly sold and transferred on or about the 1st March, 1899, from the defendants to a company known as the Enterprise Gold-mining and Estates Company, Limited.

7. The consideration for which the said claims were transferred to the said Enterprise Gold-mining Company, Ltd., was £10,000 in cash and shares equal to £217 7s. 10d. in cash, per block of ten claims, and £782 12s. 2d. in shares per block of ten claims.

8. The plaintiff says that in terms of the agreement referred to in paragraph 4 of this declaration, he was entitled to demand from the defendants, on the sale by them of the said claims to the Enterprise Gold-mining Company, Ltd., the payment of the sum of £217 7s. 10d. and 782 shares in the said Enterprise Gold-mining Company, Ltd., as will more clearly appear from the account annexed to this declaration, which the plaintiff prays may be considered as inserted herein.

9. The defendants have refused and neglected to pay to the plaintiff the said amounts of £217 7s. 10d., and have refused to deliver to the plaintiff the said 782 shares in the said Enterprise Gold-mining Company, Ltd.

10. With respect to the said shares, the plaintiff is entitled to demand from the defendants the payment of the sum of £1,153, as and for damages sustained by the plaintiff, owing to the wrongful refusal of the defendants to deliver the said shares in accordance with the terms of the said contract, the said shares having greatly fallen in value since the date of the flotation of the said Enterprise Gold-mining Company, Ltd.

11. The defendants are further indebted to the plaintiff in the sum of £25, being the purchase price of certain two claim licences purchased by the plaintiff for and on behalf of the defendants during the month of December 31, 1895.

12. All things have happened, all times elapsed, and all conditions fulfilled necessary to entitle the plaintiff to demand from the defendants the amounts

set forth in the account annexed to this declaration, together with the sum of £1,153, as and for damages aforesaid, and the sum of £25, but the defendants wrongfully refuse to pay the said claims or any portion thereof.

Wherefore the plaintiff prays: (a) That the defendants may be ordered to pay to him the said sum of £217 7s. 10d., with interest *a tempore morae*, and to deliver to him 782 shares in the said Enterprise Gold-mining Company, or the value of the said shares; (b) judgment in the sum of £1,153, as and for damages as aforesaid; (c) judgment in the sum of £25; (d) alternative relief.

The plea of the defendants Samuel Weil and Julius Weil was:

1. As to paragraph 1 of the plaintiff's declaration the said defendants say that they are not permanent residents at Cape Town, but have visited it at various times, and that the Sam Weil Syndicate is no longer in existence, but otherwise they admit the said paragraph.

2. They deny paragraph 2 of the plaintiff's declaration. During the years mentioned therein the plaintiff was in the employ of the syndicate at a monthly salary, and was engaged in looking after work on the mining property of the syndicate, such as erecting beacons and keeping them in order, and was under a duty to submit particulars of any claims which were available for purchase and which were brought to his notice.

3. In the course of his said employment and in the discharge of his duty, the plaintiff in or about December, 1885, brought to the notice of the defendant Smith certain gold mining claims, which are the claims mentioned in paragraph 3 of the plaintiff's declaration, and with the authority of the said Smith entered into an agreement with the said Leach upon certain terms not necessary to specify for the acquisition of the said claims by the syndicate, and the said claims were then described as is set forth in paragraph 4 of the plaintiff's declaration.

4. They deny paragraph 5 of the plaintiff's declaration. They say that a certain agreement under which the plaintiff was entitled against the syndicate to a commission of 10 per cent. on the sale or flotation of claim properties pegged by him on behalf of the syndicate, or purchased by the syndicate on his introduction had no relation to and did not include the claims referred to in the declaration with the acquisition of which the plaintiff was only connected in manner set forth in paragraph 3 hereof.

5. They deny paragraph 6 of the plaintiff's declaration. They say that the registration of the claims aforesaid was not recognised as valid by the Mining Commissioner, and the said claims were thereafter forfeited and

wholly lost to the syndicate. The areas comprising the said claims were repegged by others known as the Bell Syndicate in 1897, but that syndicate thereafter also forfeited the said claims. In 1898, at the time when the plaintiff had no connection with the syndicate, the same areas were lawfully pegged for and on behalf of the syndicate by their agent, and subsequently the title thereto was perfected.

6. The claims so acquired by the said agent in 1898 were duly sold and transferred in March, 1899, to the Enterprise Gold Mining and Estate Company, Limited.

7. They admit paragraph 7 of the plaintiff's declaration save that the claims therein mentioned are those referred to in paragraph 6 hereof, and save that they say that in connection with the flotation of the said company the syndicate paid 20 per cent. on £50,000 to provide working capital, £1,000 for advertising, and £1,500 and upwards for brokerage, a *pro rata* portion of which expenses must be deducted from the consideration set forth in paragraph 7 of the declaration.

8. As to paragraphs 8, 9, 10, and 12 of the plaintiff's declaration they admit that they refuse to pay the plaintiff the amounts or deliver to him the shares therein mentioned, but otherwise they deny the allegations in the said paragraphs.

9. As a special further plea, if necessary, they say that the plaintiff is not entitled to have and maintain this action by reason that before action brought he for valuable consideration ceded and assigned all his, the plaintiff's claim aforesaid, and notified the defendant Samuel Weil accordingly.

10. As to paragraph 11 of the plaintiff's declaration, they say that if the plaintiff, as is now alleged, expended on behalf of the syndicate the sum of £25 therein mentioned he should have charged the same in his account with the syndicate, but they are ready and willing upon proof by him that he did properly expend the same on behalf of the syndicate, and has not received it, to pay the amount, but they have had no such proof, and do not admit the allegations contained in that paragraph.

Wherefore, subject to the production of such proof as is referred to in paragraph 9, they pray that the plaintiff's claim may be dismissed with costs.

The plaintiff, in his replication, specially denied the alleged cession of his claim, and as to the rest he joined issue.

Mr. Burton (with him Mr. Swift) for plaintiff; Mr. Schreiner, K.C. (with him Mr. P. Jones) for the first two defendants. The third defendant in default.

Mr. Burton said it was important that the Court should be acquainted with correspondence which recently took place between the parties. On the 14th

February the defendants' attorneys wrote to the plaintiff's attorneys tendering in full satisfaction of claims (a) and (b) of the declaration the sum of £1,000, which Mr. Mitchell could have entirely in cash or shares, or partly in cash and partly in shares in the Enterprise Company at their face value of £1 sterling. As to the licences on which £25 was claimed, they (the writers) were informed that the charge was high, but they would be prepared to pay this sum. The tender was for £1,025, with taxed costs to date in full satisfaction of the plaintiff's demand. On the 20th February the plaintiff's attorneys said that they were instructed to decline defendants' tender. The plaintiff, it was added, was surprised that defendants should only have tendered him the actual amount of the commission due, without regard to the damage which he had sustained. On the 23rd February defendants made for plaintiff's acceptance a further proposal, and offer to pay him according to prayer (a) of the declaration, also on prayer (b) £200 damages, and on prayer (c) £25 for the licences, with taxed costs. The defendants said that they made this offer because they desired to avoid further litigation. On the 2nd March the plaintiff replied declining this offer. Mr. Burton went on to say that so far as the plaintiff was concerned, the offer of the defendants being, as he was informed, still open, substantially, the question before the Court was whether the sum of £200 was a sufficient measure of damages.

[Maasdorp, J.: But how has the plaintiff suffered these damages if the shares are now delivered to him?]

Mr. Burton: We say we suffered damages because we did not get the shares earlier, inasmuch as if the shares had been delivered to us when they should have been, according to the contract, we should have made a handsome profit on them. Those shares have now fallen to a very low price. We get the shares, but we have lost all opportunity of making the profit we should have made out of them.

Mr. Swift then proceeded to read the evidence, taken on commission in Bulawayo, on the 23rd and 24th November last, of John Layton Mitchell (the plaintiff), Charles Davis Fleming, mining commissioner; Wm. Dalgetty, broker's clerk, Bulawayo; and Arthur G. S. Richardson, Duncan S. Campbell.

Mr. Jones read the evidence taken on commission of the defendants, Sam Weil and G. D. Smith.

Mr. Burton then called,

Alfred Bolus, of Bolus Bros., stock-brokers, Cape Town, who said that his firm had a transaction in Enterprise shares in September, 1900, at 20s. The shares had not, to his knowledge, been largely dealt in in Cape Town. The price on the London market when the

last mail left England was given in one paper at 11s. 3d., buyers, and 13s. 9d., sellers, and in another paper 8s. 9d., buyers, and 11s. 3d., sellers. From a mining list he found that the prices during the past few years had been as follows: 1904, highest 20s., lowest 6s. 3d.; 1903, highest 33s. 9d., lowest 8s. 9d.; 1902, highest 37s. 6d., lowest 15s.; 1901, highest 15s., lowest 7s. 6d.

Cross-examined: He thought 12s. 6d. would be a fair price for the shares at the present time.

Mr. Burton closed his case.

Julius Weil (one of the defendants) said that the Weil Syndicate had been dissolved, and all the parties had been satisfied. Mr. Smith had held a half interest. The cost of development had, as far as he knew, been the usual amount. The firm of Julius Weil and Co. had the largest holding of shares in the company. The company was considerably interested in the Giant Company. The claims in the Gwelo district were not sufficiently encouraging to go on with. In exploiting the Giant Company, the Enterprise Company expended for development purposes £40,000 cash. The Consolidated Goldfields and witness advanced the Giant Company £10,000 to continue the necessary development that the engineer said he would like to see done before going to flotation. Then they subsequently floated the company for £245,000, of which 45,000 were reserve shares. The Giant Company then returned to the Enterprise the whole of its £40,000, and also 80,000 shares. Witness did not withdraw from the offer defendants made on the 28th February. Witness had confidence in the future of the Enterprise Company. The shares were not by any means broadly spread.

Cross-examined: He did not see how the plaintiff had suffered damages by reason of the non-delivery of the shares. The only way in which he could have suffered damage was if he could have said that had he had the shares when they were at the very highest pinnacle, he could have sold them. If the plaintiff had sold at 37s. per share he would have had the benefit of the whole 37s., seeing that if the shares had been delivered to him he would have had to pay nothing for them. Intrinsically, witness thought the shares were worth more to-day than when the company was started. He understood that it was agreed that a fair market price to-day would be 12s. 6d.

Maasdorp, J., put it to witness whether, seeing that on the average of the past few years the shares had been of the value of 20s., a proper measure of damages would be the difference between that figure and the present market price upon the shares that should have been delivered to the plaintiff.

Witness said he was not in a position to answer that question.

Counsel having been heard in argument.

Maasdoorp, J.: The plaintiff in this case alleges that he rendered certain services to the defendants in obtaining for them a number of claims or properties in Rhodesia, and that it was agreed between the parties that, in consideration of the services rendered by the plaintiff to the defendants in the purchase of the said claims, the defendants undertook to pay to the plaintiff a commission of 10 per cent. on any property secured to the defendants by the plaintiff, the said commission being payable on the sale or flotation of the said properties. The plaintiff further states that the properties which he obtained on behalf of the defendants were afterwards sold and transferred on the 1st March, 1899, from the defendants to the Enterprise Gold Mining and Estates Company, and that the consideration given for these claims was £10,000 in cash and shares, equal to £217 7s. 10d. in cash per block of ten claims, and £782 12s. 2d. in shares per block of 10 claims. Plaintiff states that in respect of the consideration obtained by the company for these claims, he was entitled to a sum of £217 in cash, and to 782 shares in the Enterprise Company. There is also a further claim for £25 for out-of-pocket expenses incurred by the plaintiff in respect of certain licences. In respect of these allegations, the defendant now claims £217 7s. 10d., with interest *a tempore morae*, and the delivery of 782 shares in the Enterprise Gold Mining Company, and to have also £1,153 as damages suffered by him because of the non-delivery of these shares upon the due date by the defendants. Then there is this further claim for £25. At first the whole of the claim put forward by the plaintiff was disputed by the defendants. At one time they regarded these claims as not having been obtained through the services of the plaintiff, but that after his efforts to obtain the claims the whole matter had fallen through. However, they now abandon that position, and they are prepared to accede to certain of the plaintiff's claims. Admitting that he rendered services for which he is to be remunerated, they tendered on the 28th February last to pay the sum of £217 7s. 10d., to deliver to him 782 shares, and in respect of damages to pay him the sum of £200, and also to pay the further claim of £25. The only difference between the parties, therefore, at present is whether the plaintiff is entitled to damages in the sum of £1,153, or only in the sum of £200. The question of damage is raised on the ground that the shares were available for distribution in the beginning of 1900, and that the defendants then failed to deliver them. Since that period the shares have been saleable at various prices, and at one time they rose to as much as 39s.

Their value now seems to be 12s. The plaintiff, therefore, seeks to recover the difference between 12s. and 39s. per share. The question the Court has to decide is whether the plaintiff is entitled to delivery of the shares, and also to the damages suffered through the delay of the defendants in making the delivery to the plaintiff of the shares. Upon this question there is a passage in which the matter is dealt with by Voet. In Voet, 13, 1, 20, appears the following passage: For neither can a purchaser, on the ground of delay in the delivery of the thing sold, claim the value of the profit which he might have obtained, by trading if the delivery had been made at the proper time. Upon the doctrine here laid down by Voet there was a case decided in the Supreme Court, *Philip v. The Metropolitan and Suburban Railway Company* (10 Juta, 52). The Chief Justice, in giving judgment, in that case, quotes this passage from Voet, and says: "There may be exceptions to this general rule, as, for instance, where the defendant's refusal to perform his part of the contract has been fraudulent, but no such exception arises in this case." Of course, the exception would be based upon the principle that where the defendant had been guilty of fraud he would be liable to damages, which would not occur there, there is simply a question of breach of contract. Now, in this case decided in the Supreme Court it appeared that there had been land sold, and the purchase price for the land had been paid, but the transfer of the land did not take place for a considerable time. Plaintiff afterwards sued the defendant for transfer of the land, and also claimed damages for the loss he had suffered through the delay. If this case is decided on the principles here laid down, then it must be held that the plaintiff is not now entitled to claim delivery of the shares, and also to ask for damages suffered through the delay. But it has been urged by Mr. Burton that these cases go off on the principles applicable to purchase and sale, and would not affect a case of the present character. It seems to me that upon this particular principle there can be no difference. Supposing, for instance, it was a case of exchange, the same principle would be applicable even if money was not to pass on one side. Here we have a case neither of sale nor exchange, but of giving services in return for the delivery of these shares. It seems to me that for the value the plaintiff puts on his services he now claims this consideration. I am of opinion that there is no difficulty in applying the principles mentioned in the authority cited to the present case, and, if that is so, I come to the conclusion that the plaintiff is not entitled to damages caused merely by delay, and I may say that no case has been cited in which any plaintiff has yet been successful in obtaining the delivery

of shares and damages on the ground that the shares were not delivered in due time. It appears that some damages have been tendered by the defendants, and Mr. Schreiner has explained that there were certain circumstances which influenced the defendants, in coming to the conclusion that, although they did not know exactly on what claim for damages the plaintiff might be successful, probably some good reason for claiming damages might be made out, and defendants were, therefore, induced to tender the sum of £200. It is quite possible the question may have been raised whether the plaintiff would not have been entitled to more than the mere interest *a tempore morae*, and might have claimed interest from the year 1899, so there seems to me to have been good ground for apprehension that the plaintiff might have been entitled to some damages. It is not now necessary to go into the question of what amount he would have been entitled to through loss of interest, because it is quite clear that the amount tendered would far exceed any amount which might be arrived at by any calculation. Under the circumstances, judgment must be entered for the plaintiff under prayers (a) and (c), and under prayer (b) judgment must be entered for the sum of £200 as and for damages. As it seems to be agreed by the parties that a tender to that effect was made on the 28th February, 1905, costs must be paid by the defendants up to that date, and costs incurred after that date must be paid by the plaintiff.

[Plaintiff's Attorneys: Syfret, God-lorion and Low; Defendant's Attorneys: Van Zyl and Buissimé.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

TRIAL CAUSES.

VAN NIEKERK V. VAN { 1905.
NIEKERK. { Mar. 9th.

This was an action to compel the defendant to carry out a certain agreement with regard to the division of certain land in the district of Malmesbury, and to sign the papers necessary for the purpose. The declaration set out that the parties were the undivided owners of certain land in the Malmesbury district. In the month of July, 1903, they agreed to a partition, and the necessary documents were drawn up and signed by the plaintiff, but the defendant refused to carry out the agreement. In his plea the defendant stated that he agreed to the partition of the land, subject to the adjust-

ment of their rights. He was never consulted with regard to this adjustment, and knew nothing about it until the documents were sent to him. The mode of division cut off the water supply for his live stock. He was ready and willing to sign the document, provided the plaintiff gave him a right to the water, and a right of way of ninety feet wide. The bondholders over the property refused to agree to the partition.

Sir H. Juta, K.C. (with him Mr. Russell), was for the plaintiff, and Mr. W. P. Buchanan (with him Mr. D. Buchanan), was for the defendant.

Henry Thomas, Elsie's River Halt, said he had been connected with land speculation, and made arrangements to purchase the plaintiff's land with a view to cutting it up into plots. The defendant was aware of the division. Certain pegs were put down, showing the division. The defendant chose the portion on which the homestead was when the division was made. About a month later the defendant came to him, and asked witness to sub-divide, and sell his land. Or written instructions from the defendant, witness gave the surveyor authority to sub-divide his ground. It was agreed that they would keep the two homesteads for their "educational scheme." One hundred and fifteen of lots of the defendant's ground were sold, and all those of the plaintiff's. Transfer was not yet taken, as the people would not pay until the siding was put there. The defendant's portion was sold on the misrepresentation that a siding was going to be placed there.

Cross-examined by Mr. Buchanan: He purchased the plaintiff's portion in July, when arrangements were made to divide the two farms. The defendant was with the surveyor all over the farm, and showed him how the division was to be carried out. Not a single word was said about the water. Witness believed he would give £2,000 for the ground, and although that would settle the case, he was not in Court to do business.

Alfred Holme, Government land surveyor, who divided the farm, in July, 1903, stated the defendant knew what witness was doing. The beacons enclosed more ground than the diagram showed, and the farm was about equally divided. Witness went with the defendant and another person to fix a place where the siding was to be on the defendant's ground. The defendant must have known what witness was doing when he pegged out the other lots.

Cross-examined by Mr. Buchanan: Thomas engaged him first, and witness took it that he was arbitrator between the two brothers in dividing the land. The defendant knew of the sub-division when they were working at the siding.

Thos. Cairncross, engineer, who went out to the land in February last, stated that he had holes made in the bed of the

river at the defendant's place, and found water at 1 ft. 9 in. and 1 ft. 11 in. from the surface. He concluded there was no difficulty in getting water at that place.

Cross-examined by Mr. Buchanan: He had to bore for water.

Nicholas Frederick van Niekerk, plaintiff, said he sold his half of the farm to Thomas. When they discussed the matter together, defendant said he would take the part with the buildings on it.

[Hopley, J.: Did your brother see the pegs showing the division?]

Witness: After Mr. Holme finished the survey, I showed my brother the pegs.

Arthur Wallace Steer, plaintiff's attorney, said the defendant fully understood and agreed to the plan.

Sir H. Juta closed his case.

The defendant stated that when his brother said he had sold his part of the farm, witness said: "Why did you not say anything about it before, and sell the whole farm?" Plaintiff said perhaps the buyer would take the lot, and that he was getting £1,500 for his part. Plaintiff said he would have the ground divided into two equal parts. In May or June they asked him to sign certain documents, which he refused to do.

Abraham van Niekerk stated that he was a brother of the defendant and plaintiff, and during his father's time he herded the cattle. In summer the little river was quite dry. There was no water in the middle of the farm in midsummer.

Rachel van Niekerk, wife of the defendant, stated that the plaintiff told her he had sold his portion, and the defendant could choose what portion he would have about the boundary, and witness said he would give a reply on Saturday. The first time she saw Thomas was after the surveyor had been on the farm. Her husband said he could not decide until Saturday.

Katrina Jameson, sister of the defendant, stated she was present when the plaintiff and Thomas came to the house. The defendant said he would consent on Saturday.

Andries Loubser, a neighbouring farmer denied that water could always be got in the bed of the Klamputs River.

Cross-examined by Sir H. Juta: On the side of the defendant's farm, he did not see a fountain in the river. About a month or so ago he was on the farm.

Lamber Dreyer, neighbouring farmer, stated that in dry summers there was no water in the Klamputs River.

Cross-examined by Sir H. Juta: He knew nothing of the wells on the farm, but he saw no reason why they should not be made.

Mr. Buchanan closed his case, having been heard in argument on the facts.

Hopley, J.: The declaration might have been excepted to as being at variance with the summons, but as no

such exception was taken, it is for me to see whether I am satisfied there was a contract, such as set forth in the declaration, and whether effect should be given to it. The proposal to divide was one of the fairest that could be devised, and the defendant got his choice, and took the portion with the two houses. That he agreed to this line, as spoken of by more than one witness, I am quite satisfied. The defendant asked Thomas to dispose of his portion, and the matter was committed to a document, which was drawn up in Mr. Steer's office. The defendant clearly acquiesced in the sub-division. The defendant will be ordered to give transfer, as agreed upon by him in July, 1903, according to the documents drawn up by Mr. Holme, the land surveyor, and that the defendant give transfer of the remaining extent of the land held in common by them. If there be any expenses in getting the remaining extent properly described, these expenses will be shared equally by the plaintiff and the defendant, the defendant to pay the costs of this present action, and the plaintiff to have his witnesses' expenses.

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

TRIAL CAUSE.

	1905.
FOURIE AND OTHERS V.	Mar. 10th.
MOSTERT AND OTHERS.	" 13th.
	" 14th.
	" 31st.
	Apr. 17th.

Will, joint—Adiation—Condition
ne exeat extra familiam—Sale
 —Fraudulent misrepresentation.

This was an action for a declaration of rights. From the pleadings it appeared that the plaintiffs were certain of the children of Coenraad Fourie, and the defendants, one Mostert and Mrs. Annenberg, who was married out of community of property, and the third defendant, Ockert Fourie, one of the sons under the will. By the will and codicil, the property at Oudtshoorn and Ladismith was be-

questioned to the children, subject to a certain condition that the heirs could sell their rights only to one another. Under false and fraudulent misrepresentations, the plaintiffs were induced to give their consent to a sale of Ockert's share to the defendants, who represented that the share had been purchased for £3,050, and that he was getting in exchange a farm worth £2,700, after all his (Ockert's) debts had been paid. Plaintiffs sought for a declaration of their rights, and were willing to purchase the share inherited by Ockert for £1,900, which was the actual price arranged upon. The defendants in their plea denied that the plaintiffs were by false and fraudulent representation induced to sign the consent.

Sir H. Juta, K.C. (with him Mr. Upington), was for the plaintiffs and Mr. Schreiner (with him Mr. Sutton), was for the defendants.

Johannes Fourie, one of the plaintiffs stated that under the testament of his parents, the heirs could only sell their shares to one another. He knew Mrs. Annenberg before September last year Mostert came to the farm in September last, and told witness that he had bought his brother Ockert's share. Witness asked him what right Ockert had not to sell the ground, and added that if he did, the Jews would come and take the ground, and he (witness) would have to suffer. Mostert said he had bought Ockert's share for £3,000, and that he would pay all his debts, and leave him with £350 clear. Mostert further said he had bought Ockert a beautiful farm at Oudtshoorn for £900. It had a magnificent vineyard and an orchard. Witness said he would go to his attorney at Ladismith and make inquiries. Mostert said he was anxious to settle the matter, and at his request witness accompanied him from farm to farm to see the different brothers. Eventually it was decided that the ground should not be apportioned by a land surveyor, but by arbitrators. Witness, when he heard Mostert say that he had bought the whole of the Ockert's share, and not one-seventh, refused to have anything to do with the matter.

Cross-examined by Mr. Schreiner: Before Ockert negotiated with Mostert, he never heard that he attempted to sell his share to Klaassen. When there was water, they were all making a good living on the farm. If a man had got to take his portion at the bottom, he would suffer more in the dry season. He had never heard anything about Ockert trying to get rid of his property. Ockert did not beg of witness to give his consent to the sale. When his brothers had important business, they consulted witness about it. Stephanus came home from Oudtshoorn one night, but he was not competent to do business. The following Sunday he was capable of doing business, but although he ex-

pressed an intention of doing so, he did not go and see Ockert. Mrs. Annenberg's husband promised to give furniture to Stephanus's wife if Stephanus would sign the consent. Witness was the first to sign the document in Brink's office. He identified a document similar to that put before him on the first occasion, when Mr. Brink made alterations. When Mostert, witness, and his father were together, his father might have asked Mostert, who was going to pay the annuity of £15 per annum. Mostert said that Ockert would pay. Ockert did not ask for assistance outside, because witness could not pay the £1,900 for the farm. Mr. Mostert said, if witness agreed to sell the ground, he would pay all the debts of Ockert, who would have £350 over. Ockert said that the ground he was buying was double the value, and much larger than the ground he was selling. He did not advise Nicholas to sign the consent. Witness said: "I won't sign anything; you can do what you like." He did not help Mostert to get the other brother's signatures.

Re-examined by Sir H. Juta: If he could buy Ockert's share for £1,900, he would have no difficulty in selling it at a higher price.

Fredrick Ellis, brother-in-law of Johannes Fourie, stated that in September last year he was in Johannes Fourie's farm. He was present at the conversation between Mostert and his brother-in-law. Mostert told the last witness that he had bought Ockert Fourie's ground, and Johannes said he would not sign his consent. Then Mostert read a document. Johannes positively refused to sign the document. Mostert said he had given £3,500 for the ground, and told Johannes that he had purchased for Ockert a fine farm at Oudtshoorn. Mostert's explanation about a bargain which witness could not understand was that he was anxious to clear Ockert of debt, and place him on a good footing.

Cross-examined by Mr. Schreiner: Johannes Fourie was not willing to sign. He heard all the conversation, but something might have escaped him.

Louis Fourie, another plaintiff, in the case, gave corroborative evidence of the transaction, as set forth by his brother, with the exception that he valued Ockert's share at £4,000.

Daniel Stokes, carpenter, of Oudtshoorn, who had formerly been farming in the district, stated that he knew the plaintiff's farm. He was there last September, doing some work, when Mostert came on the farm on Saturday, 24th, and wanted a paper signed by Louis Fourie, stating that he was buying Ockert's share. Mostert said to Louis: "Now, Louis, don't be foolish, come and sign the paper." Louis said he wanted a sub-divided portion that must be sur-

veyed. Louis told his brother that they should buy the share themselves.

Cross-examined by Mr. Schreiner: He was not related to the parties. The paper was read out after he came into the house. It was stated in his presence by Louis Fourie that there was the name of a Jew in the paper, and Mostert explained that by the fact that he had to get £800 off Minnie Annenberg.

Stephanus Fourie, one of the plaintiffs, stated that he saw Mostert about six o'clock on the evening of the 24th September at the farm. Mostert wanted witness to sign the consent paper, but witness refused to do so. Mostert came back later on, and endeavoured to impress witness with the beautiful farm he had bought for Ockert at the other side of Oudtshoorn, and stated that he had bought Ockert's share for £3,050, and the other farm would cost £2,700. Next morning, Mostert renewed the application, and witness told him to go away, as he would sign nothing. Ultimately witness gave his consent, but if he had known that the purchase price was £1,900 instead of £3,050 he never would have signed it. He was still ready to buy Ockert's share for £1,900.

Cross-examined by Mr. Schreiner: He had £100 in cash at home, and 130 ostriches on the farm. Witness was an insolvent. Previous to the 24th September, witness saw Joseph in Oudtshoorn, but Joseph did not tell him that the farm at Oudtshoorn which Mostert had bought was a bad one. When Mostert and Annenberg came to the farm he did not tell them that he had seen Joseph the previous day and talked the matter over with him. He was fined for malicious injury to property by breaking through the gates on Mostert's property.

Re-examined by Sir H. Juta: His estate was voluntarily surrendered. He had been carrying on farming ever since, and was a far better farmer now than ever.

Johannes Mostert, brother-in-law of the plaintiffs, stated that the defendant Mostert came to his farm with a paper on the morning of the 24th September. The defendant asked him to sign a document stating that he had bought Ockert's share. Witness refused to sign it. The defendant told him he bought Ockert's share for £3,050. Eventually he agreed to sign the paper when he saw the names of the others on it. If witness had known that the price was £1,900 he would not have signed the document. He valued Ockert's share at £3,000.

Cross-examined by Mr. Schreiner: His wife was not joined as one of the plaintiffs. The defendant did not call to see him on the 22nd September. Witness did not send the defendant to Johannes first, stating that whatever Johannes did he (witness) would do likewise.

Paul Stephan Klassen stated on the 1st November last year he went to Johan Smit's place at Oudtshoorn. There were between five and six morgen of arable land. There would be about three thousand nine hundred vines in the vineyard.

Sir H. Juta closed his case.

Jacobus Mostert, defendant in the case, stated that on 15th September two options, one for £1,000 and another for £2,000, were obtained by witness. The contract that was subsequently made was for the option on the whole. On the 17th September he got an option from Mr. J. J. Smit at Oudtshoorn. The option mentioned £900 as the purchase price of Smit's property. Witness went out to Smit's farm with Ockert, and after looking over the farm agreements were come to between witness, Ockert, and Smit. Next morning, along with Ockert and Annenberg he went into Attorney Theron's office, and had the deeds drawn up from the options. The documents were read over to Ockert, and everything was clearly explained to him. It was only after the documents had been drawn up that he discovered the conditions of the will. The attorney drew up the consent paper, and Ockert, Annenberg, and witness went out to the farm. Witness told Mostert that Ockert got £1,900 for the farm, and that another farm was to be bought for him for £1,500. Mostert told witness to go to Johannes first, and if he signed he (Mostert) would sign also. Witness also saw the plaintiffs' father, and talked the matter over with him. When witness saw Johannes on the morning of the 24th he seemed to know all about it, and asked about Ockert's debts. Witness told him Ockert would get £350 to settle his debts. Witness never said that he was paying £3,050 for the ground, nor did he say that £2,700 was to be paid for Ockert's new farm. Witness did not describe the farm as stated by the plaintiffs. They seemed to know all about the transaction. Johannes was not willing to sign at the time; he wanted to see Becker, an attorney at Ladismith, first. The old man's attitude was taken up chiefly in respect of the annuity of £15 per annum. It was suggested by Johannes and his father that the farm should be divided by arbitration. The pencil alterations on the consent paper were made by Mr. Brinck on the suggestion of Johannes providing for the division by arbitration. When Mr. Brinck read over the document, Johannes expressed his satisfaction, and signed it. The only trouble in getting Louis to sign was that he was anxious to have a surveyor instead of dividing the farm by arbitration. Witness paid off £350 to settle Ockert's debts. Johannes helped him materially to get the signatures. Stephanus had been very adverse to signing, and it

was only when the suite of furniture was promised to Mrs. Fourie that he agreed to sign. The farm was divided in due course. At the time of the purchase he thought at £1,900 the farm was a good bargain, but he did not think so now.

Cross-examined by Sir H. Juta: Witness thought the value of Ockert's share was about £1,800. Witness was a speculator in land. It was not a big blow to him when he heard that he had to obtain the permission of the other members of the family. He knew perfectly well that the brothers would be very anxious to buy Ockert's share for £1,250, which was really the amount he was paying for it, when Smit's property was counted as a joint transaction. He would not have told the brothers if they had asked him what he paid Smit for his property. The brothers were not in the least curious to find out what sort of property Smit's was.

Jacobus Mostert, under cross-examination continued, stated that he was anxious to get the consent paper signed before Monday as Joseph, to whom the Fouries owed money, might come on the scene and try to get possession of the ground. Joseph's idea was to lend them plenty of money, and force them to be insolvent. He was not afraid that Joseph would offer a better price. Witness was not anxious to get possession of the land before any question was asked. He did not think it necessary to bring Ockert, who had tried to get rid of his land, to his brothers in order to induce them to give their consent. Ockert was never present at any of the interviews when the brothers were reluctant about signing the consent paper. If Klassen said witness told him he was going to give £3,050 for Ockert's farm it was not true. Stephanus told witness that he (witness) had humbugged his brother by selling him worthless ground. Witness told him it was not so. The terms for the purchase of Smit's farm was a bond of £400 and the rest in cash.

Re-examined by Mr. Schreiner: He spoke to the wives of the plaintiffs about the matter, and three of them were in court at present.

Mr. Annenberg, husband of the second defendant, stated that he went with Ockert to Smit's farm. The sale was concluded with Ockert apart from Smit, and then they saw Smit, and the sale was arranged. Ockert was quite sober when the documents were read over in the attorney's office. It was after the deed of sale was drawn up that he heard of the restriction in the will. Stephanus said that he had been to Joseph's, and knew all about it, and refused to sign the consent paper. Witness explained that Ockert would be insolvent in a few months, and when he explained to Stephanus his own posi-

tion he got a bit annoyed. Not a word was said about the new farm that Ockert was to get. There was no mention of the price. Mrs. Fourie said she would talk to her husband if witness would make her a present of a suite of furniture. Witness agreed to that in order to save time. Stephanus then agreed to sign the paper. Stephanus was afraid that his property would be cut into a seventh. The business had been quite straightforward throughout. In all £350 was paid in respect of Ockert's debts. There was never a word said to Paul Klassen about the price of the farms. The only question was that by a mistake of the attorney the document was erroneously drawn, and the plaintiffs said that the defendant had purchased a seventh of Ockert's share, which would be a seventh of a seventh, instead of a seventh of the whole. When Mr. Bink asked the heirs if they objected on the ground of misrepresentation there was no reply from them.

Cross-examined by Sir H. Juta: He was very much surprised to hear of the misrepresentations. His brother-in-law was a very "bad hat"; he was a gambler. His brother was in court, and he challenged him to take an action against him.

He included in his furniture business the sale of mules and speculation in land. Some people might call that gambling, but he drew the line at cards. Witness obtained about £800 from another business, and put it into this transaction in his wife's name. His business was insolvent for about £6,000, and there was that amount of debt about a couple of months ago. His only creditor was aware that he was taking £800 out of the estate to buy property for his wife. He expected the Court to believe that. On the 8th October he put Ockert's ostriches in the pound; in all there were about thirty-four. Relations were strained when Johannes came up with a stick to prevent him impounding Ockert's ostriches. His religion forbade him to drive on a Saturday if he could possibly avoid it, and he did not do any business on the Saturday; it was Mostert who did the business. He denied that the whole transaction of the furniture was his own, and that the introduction of his wife's name was a blind.

Re-examined by Mr. Schreiner: When he made the advance to his wife he never dreamt of insolvency. His liabilities would amount to about £8,000, and his assets, which consisted of stock-in-trade and outstanding debts, amounted to about £7,500. There would be a deficiency of about £500 in his estate. His only creditor—Mr. Wallace—knew all about the transaction of taking money out of the estate.

Carl Meiring, landed proprietor, of Oudtshoorn, stated that he was asked

by the Fouries to come in to divide the farm. Witness measured the different areas, and awarded Ockert about sixteen morgen. When Brink read out the deeds, not one of the plaintiffs said a word about the amount of £3,050, nor did they say anything about £1,900 being too little. He might have heard of misrepresentation at the meeting.

Cross-examined by Sir H. Juta: It was when he received a letter from Mostert and Annenberg that he concluded the dispute about the division on the 13th was settled.

Re-examined by Mr. Schreiner: He had no doubt that Mr. Brink read out the prices of £1,900 and £1,500. Not a single one of the heirs even said that the defendants had told him that Ockert was getting £3,050 for his share.

Johan Anderson, farmer, of Oudtshoorn, who acted as arbitrator in the division of the farm, stated that Ockert gave up his part of the farm in witness's presence. From witness's experience he valued the land which belonged to Ockert at £1,900. It was an out of the way price to speak of £200 a morgen, for the land. On Ockert's farm there were not fifty birds.

Cross-examined by Sir H. Juta: Witness was a step-brother of Mostert. He knew of no land in the Oudtshoorn fetching £200 per morgen. He knew nothing of the farmers endeavouring to extract very fat prices out of the Government.

Charles Theron, attorney, of Oudtshoorn, stated that on the 22nd September, he heard for the first time of the sale of Ockert's land. Mostert, Annenberg, and Ockert called at his office, and witness drew up the documents containing the prices. There was no suggestion of such a price as £3,050. Nothing was said of the will at that time. When he heard of the conditions of the will, he drew up a consent paper, and handed it to Mr. Mostert. Witness held Mrs. Annenberg's power of attorney, and also that of Ockert to pay out certain moneys amounting to £350 to his creditors. Stephanus told witness that he heard Ockert had sold his land, and that he would refuse to sign transfer.

Cross-examined by Sir H. Juta: Witness got the money from Annenberg and Mostert to pay Ockert's debts. The money came from Annenberg direct to pay Smit. Stephanus did not say that his brother had been "humbugged." The refusal stopped short because the defendants did not want the plaintiffs to know what they paid Smit.

Mr. Schreiner closed his case.

Cur. Adv. Vult.

Postea (April 17th).

Maasdorp, J.: It appears from the evidence adduced in this case that on the 12th day of November, 1881, Coenraad Josephus Fourie and his wife Martha Maria Fourie, who were mar-

ried in community of property made a joint will, to which a codicil is annexed by which they bequeathed to their joint children already begotten, or still to be begotten, of their marriage, and in case of predecease of one or more of them, then their lawful descendants, all the landed property belonging to their estate at their death, the heirs having the right to sell their shares or rights to one another, only so that these lands shall remain in the possession of the heirs or their lawful descendants only. Thereafter Martha Maria Fourie died, but Coenraad Josephus Fourie is still living. He seems to have adiated under the will and codicil, and the inheritance and bequests became vested in the heirs and legatees in terms of the will and codicil. The children interested in the land bequeathed under the codicil are the plaintiffs, their sister Isabella Johanna Mostert, and the defendant Ockert Josephus Fourie. After the death of their mother, the children were permitted by their father to take possession of the land bequeathed to them in separate but undivided portions, on condition that each of them paid him an annuity of £15 in consideration of his having given them the immediate occupation of the land. The several heirs accordingly took possession of their separate portions, and remained in occupation thereof until the year 1904. On the 22nd of September of that year Ockert Fourie entered into an agreement with Minnie Annenberg, married in community of property to Hirsch Braur Annenberg, and Jacobus Petrus Mostert, two of the defendants, by which he sold to them the land inherited by him under the above-mentioned codicil for the sum of £7,900, in lieu of £1,500, of which the seller accepted land held by the purchaser under an option from one Johannes J. Smith; £350 was to be paid in cash, and £50 in value, represented by a boiler and other articles. Possession was to be taken on the 16th October, 1904, and transfer to be given as soon as possible. The purchasers also undertook to pay the annuity of £15 payable by Ockert to his father. When this purchase took place, the purchasers were not aware of the restrictions upon the sale of the property contained in the codicil. When they discovered that the sale could not go through without the consent of the other heirs, they set about obtaining it, with the result that upon the 24th of September, 1904, they became the holders of a document signed by all the heirs, in which the heirs gave their consent to the sale of the property mentioned to Winnie Annenberg and Jacobus Mostert, saying they had no desire to take over or buy the property in terms of the will of their parents. Upon the cir-

circumstances attending the execution of this document depend the issues raised between the parties in this case. The plaintiffs allege that their consent was obtained by false and fraudulent representations made by the defendant Mostert, acting for himself and his co-purchaser, Winnie Annenberg, and they pray that the said written consent may be declared null and void, and that the defendants may be ordered to deliver up to them the said document; and they also ask for an order restraining the said Ockert Josephus Fourie from passing and the other defendants from taking transfer of the property. The defendants (Mostert and Annenberg) deny that any false and fraudulent representations were made to induce the plaintiffs to give their consent to the sale. The alleged representations are set forth in the eighth paragraph of the declaration, and are the following: That the defendants had bought Ockert's share in the land for £3,050, and had sold to him the property of Smith for £2,700, leaving £350 to release Ockert from his financial embarrassments, and that Smith's farm consisted of 20 morgen arable land, 400 morgen grazing land, and a large vineyard and orchard, whereas the purchase price was in fact only £1,900, to be paid upon the terms already mentioned, and Smith's farm consisted only of about six morgen arable land and 70 morgen grazing land, and was worth no more than from £600 to £700. It appears that the farm of Smith was bought by the defendants on the 27th of September, 1904, for £850, £400 of which was to go in payment of a bond on the property, £250 to be paid in cash, and £200 by a four months' promissory note. The Divisional Council value of Smith's property was £480, and as it is not unfrequently the case, that the Divisional Council valuation is not much more than half the true value, it may be taken that £850 was a fair price for the land. The defendant Mostert said in evidence that at the time he bought Ockert's ground he considered it worth from £2,100 to £2,200. In that case the defendants obtained a property worth upwards of £2,000 for one valued at £850, a cash payment of £350 and £50 value in goods, making a total of £1,250. This was an excellent bargain for them, and the plaintiffs say it was even better than that, because Ockert's property, they say, is worth £3,000. The plaintiffs do not question the amount of the actual price given as standing at £1,900, and consequently the Court has not to go into the question whether persons who have a right of pre-emption can object to the value placed upon property forming part of the purchase price with respect to which they have to exercise their option. It is quite obvious that such persons may be defeated in their rights if the purchase price is in this manner fictitiously increased. As be-

tween the parties it must be taken that Smith's property represents £1,500 of the purchase price of Ockert's land, but, taking it at that, the defendant expected to make a very good thing out of the transaction, when, unfortunately for them, they discovered that unless they obtained the consent of the other heirs they would be disappointed in their expectations. On the other hand, it is perfectly clear that the plaintiffs were very averse to having strangers coming amongst them on to the land, and would have done everything in their power to prevent it. It is not pretended by the defendants that the plaintiffs gave up their right of pre-emption, because they were indifferent in the matter, on the contrary, Mostert admits that he had the greatest trouble to induce them to give their consent. The position was, therefore, this, the plaintiffs were anxious to keep the defendants out of the property, and there was no reason to believe that if they could have done so by buying the property for themselves at a reasonable price they would have been unwilling to do it. There is no doubt that the defendants upon their own admission had bought the property at a reasonable, if not low figure. In law they were obliged to allow the plaintiffs the option of taking the farm over at the same price, before they could take advantage of their bargain, and they must have been aware that if that option had been placed before the plaintiffs, they would in all probability have adopted the purchase. It was under these circumstances that Mostert went to the plaintiffs to obtain their consent, and it was under these circumstances that the plaintiffs say he made the false representations complained of. Now it is quite clear that the plaintiffs were entitled to be informed that they could, if they wished, take over the property for £1,900, the price actually agreed upon by the defendants, and yet the defendant Mostert admits that he never told them what the price was stipulated between them and Ockert. Mostert says the true price was not mentioned because the plaintiffs must have known what it was, but there is no evidence that they did, and I fully believe their uncontradicted statement that they did not. This finding has a damaging effect upon the rest of the defendant Mostert's evidence. The price for which the plaintiffs might obtain the property, in accordance with their rights under the codicil, was all important to them, and must have been a subject of inquiry by them. I believe the question was raised, and the price was mentioned, but not the true price. The issue raised was a very serious one, and counsel on both sides, seeing the importance of it, subjected the opposing witnesses to very severe cross-examination. This necessarily occupied a considerable time, but it throws much light

upon the case, and as a result has greatly facilitated the finding of the Court upon the facts. The weight of evidence upon the side of the plaintiff, both direct and circumstantial, is so overwhelming, that I consider it unnecessary to go into a nice analysis of the conflicting testimony. One would imagine that when Mostert went to see the plaintiffs to obtain their consent to the written contract of sale, with the terms of which he would have to acquaint them, the most natural course was to take the contract with them; but this he neglected to do. Not having the document with him, the next best thing was to take Ookert, who was in his company on his way to the plaintiffs, with him, to support his application to them; but this, also, he neglected to do, the result being that he now stands unsupported by documentary or other evidence over against all the plaintiffs and several disinterested witnesses. One after another, these witnesses narrated what took place at the interviews between Mostert and the plaintiffs, and there is no doubt that, as compared with the evidence of Mostert, the probabilities are vastly in their favour. I can see no reason for doubting the credibility of Ellis, Claassen, and Stokes, who are wholly disinterested in the case, I cannot see what could have induced the plaintiffs to withdraw their consent in October, if they had given it in September, with full knowledge of all the circumstances. Nor do I believe that if they fabricated a false case in October, they could have induced men like Ellis, Claassen, and Stokes to support them in it. These are only a few of the many reasons that exist for coming to the conclusion that Mostert did, by these false representations set forth in the declaration, induce the plaintiffs to give their consent to the sale. The plaintiffs are, therefore, entitled to have it declared that the written consent obtained from them under those circumstances is null and void. Judgment is given for the plaintiffs in terms of paragraphs (a), (b), and (c) of the declaration, the plaintiff declared a necessary witness.

[Plaintiffs' Attorneys: Walker and Jacobsohn; Defendants Attorneys: Fairbridge, Arderne and Lawton.]

SUPREME COURT

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLBY.]

GENERAL MOTIONS.

W. AND G. SCOTT V. { 1905.
SCARERBANE { Mar. 10th.

This was an application for a certain rule *nisi* to be made absolute, interdicting the respondent, Antonia Scarerbane, from parting with a certain boat lying in Table Bay.

The petition of George Adie Scott stated that on the 17th August, 1904, the firm of W. and G. Scott entered into an agreement with one Theodorus Bouklas, by which they undertook to supply the said Bouklas with timber of the value of £48, for the purpose of building a boat, on certain terms and conditions. The boat was to be built and finished within a certain period by Bouklas, but he was not to have the right to sell or dispose of the said boat until he should have paid Messrs. Scott in full for all the materials supplied by them. Up to the present, Bouklas had paid nothing for the said materials. The deponent was informed that Bouklas had sold and delivered the said boat to Antonio Scarerbane (the respondent) for £80. Bouklas had disappeared from his dwelling house, and his whereabouts could not be traced.

The answering affidavit of the respondent stated that he purchased the boat, Angelo Custodier, from Bouklas, for a sum of £85. In the agreement of sale, Bouklas said that the boat was his own personal property, unmortgaged, and free from all encumbrances. As regarded this boat, he knew that a portion of the wood was old.

A replying affidavit of an employee of Bouklas, stated that he knew the wood for the boat in question had been obtained from W. and G. Scott. Counsel then formally moved for the rule *nisi* to be made final.

Mr. Bisset for applicants, Dr. Greer for respondent.

Dr. Greer argued that there was *bona fide* ignorance on the part of the respondent that Messrs. Scott had any property in the boat in question. This was a sale of wood which was afterwards transformed into a boat; the whole transaction was different from a transaction, say, in a horse. He submitted that the innocent party in this case should not be made to suffer. There was a certain amount of negligence on the part of the applicants in not taking over possession of the boat, and giving notice to the small world at the beach that it was

their property. W. and G. Scott were the persons who ought to have looked after this person who had disappeared.

Hopley, J.: If the respondent were absolutely an innocent purchaser in this matter then he is very much to be commiserated; but he has the misfortune of having bought another person's property from one who seems to be a dishonest man, and he has to suffer pecuniarily. I am afraid there is no course open to me except to make the rule nisi absolute, with leave to the respondent to bring an action during next term, costs to abide the result of such action if instituted, failing such action, respondent to pay costs.

DU PREEZ V. TERBLANCHE.

Mr. Gardiner, on behalf of the plaintiff, moved as a matter of urgency for the removal of the trial to the next Circuit Court at Oudtshoorn. Defendant's attorney consented to the application.

The cause was ordered to be removed for trial as prayed.

FISHER V. ISAACS AND PARRY.

This was a motion for an order requiring the respondents, Albert Isaacs and Edwin Parry to pay into Court the sum of £300, being the deposit stipulated for and paid by one Benny Yates, as purchaser of certain licensed premises, the Belvidere Hotel, St. John-street, of which applicant was the lessee, and for the attachment of certain money *ad fundandum jurisdictionem*, pending an action to be brought by applicant against the said Yates for completion of the contract of purchase. The petition set out that the purchaser, Yates, had left the jurisdiction, petitioner's impression being that he had gone to the Transvaal. The petitioner had given a cheque to Isaacs on account of the purchase-price, and the latter had cashed the cheque and divided the money between Parry and himself. The purchase-price was £3,150.

An answering affidavit by the respondent Parry, stated that he and Isaacs acted as brokers in the transaction. Isaacs received a cheque from Yates after the parties had agreed to the sale and purchase. The amount of the cheque was £300. The amount due on brokerage on the sale was £400, and the cheque in question was treated as a set-off against the brokerage that was due and owing. He denied that the said sum was to be deposited with the landlord, and said it was agreed between applicant and the brokers that it should be treated as a set-off against the brokerage. Deponent said that the purchaser, Yates, had not left the jurisdiction of the Court, and

that he was, to his knowledge, residing at Swellendam.

The replying affidavit of the applicant, John Fisher, stated that £300 was part of the £1,000, which was the portion of the purchase-price that was to be paid in cash. The money was to have been deposited with some outside person, and it was never agreed that it should be treated as a set-off. Deponent added that the South African Breweries and Gourlay, Cavanagh and Co would not consent to the completion of the purchase of the lease and so forth by Yates.

Hopley, J. remarked that it did not seem to him that it would be much use for applicant to obtain judgment for the completion of the purchase if the landlords would not recognise Yates as lessee.

Mr. Searle, K.C., for applicant, Mr. Alexander for respondent.

After hearing Mr. Searle in argument, Hopley, J.: This is an application calling upon the respondents, who are brokers in Cape Town, Albert Isaacs and Edwin Parry, to show cause why they should not be ordered forthwith to pay into the Court the sum of £300, being a deposit stipulated for and paid by one Benny Yates as purchaser of the Belvidere Hotel from the applicant. They are also called upon to show cause why the said money should not be attached, to found jurisdiction in an action to be instituted by the applicant against Yates for the completion of the said sale, or in the alternative, for damages and for forfeiture of the deposit money. Now, it appears that these two brokers were concerned in arranging a sale from Fisher to Yates of the Belvidere Hotel, and it seems perfectly clear from the correspondence that in consideration of their giving Fisher the price of £3,150, Fisher was perfectly willing to pay them £400 as commission. The matter was put through finally by the brokers as between Fisher and Yates on the 13th January, and on that day Yates paid a sum of £300, which, in the broker's note, is described as a "deposit," but which, as I read the broker's note, ought to be described as a cash payment of £300 towards the purchase-price. To my mind, when the £300 was paid, it passed to Fisher, and became his property, and the agreement of sale being completed and Fisher being satisfied and Yates being satisfied, it seems to me that, *prima facie*, the two brokers had earned their £400, as agreed upon. I see nothing unnatural in the statement of the respondents that Fisher agreed that they should take this sum of £300 in part payment of their commission. It seems to me that if Fisher wishes to contest this position he had better bring an action against the respondents. I do not see why they should be ordered to pay this sum of money into Court; there is no allegation that they are men of straw. On the other

hand, the application to attach £300 to found jurisdiction against Yates, it seems to me, must fail on two grounds—first of all because it is no longer clear that it is the property of Yates, and, secondly, because I am satisfied that he is out of the jurisdiction. It is said that Yates is in Swellendam, and if so there should be no attachment, whether the money belongs to him or anybody else, to found jurisdiction, which this Court already has over his person. It seems to me that, on all these grounds, the application should be refused with costs.

HARRIS V. LEE.

Ejectment—Rights of joint tenants—Acquiescence.

This was an application for an order requiring the respondent, Robert Lee, trading as Robert Lee and Co., to so adjust a certain show case that it should not encroach on the front wall of the applicant's premises. The petitioner, Alfred Harris, stated that he was a watchmaker and jeweller, carrying on business at 78, Plein-street, Cape Town, occupying the ground floor of a double-story building. The respondent occupied the upper portion of the adjoining premises, No. 80, Plein-street, and carried on the business of a photographer. Petitioner had a show case, in which he desired to place spectacles, etc., for sale, but owing to the show case of the respondent encroaching on his front wall, it was impossible for him (applicant) to put out his show case. An affidavit by Robert Brown Morrison stated that he was the landlord of both 78 and 80, Plein-street, and that the show case of Messrs. Lee and Co., photographic artists, encroached on the wall space of the applicant.

The affidavit of Robert Lee stated that his show case had stood in this place for some years, and that a show case was there when he took over the business from his predecessor. He only claimed such enjoyment of the premises as his predecessor had had for a considerable time. Applicant had entered upon his tenancy subsequently to deponent, who declared that he had in no way encroached upon the wall space of applicant.

The replying affidavit of the applicant denied respondent's allegations. Mr. Alexander for applicant submitted that it was clear, not only from the affidavits, but also from the photographs put in by the respondent, that his show case encroached on the applicant's wall space. The respondent occupied rooms upstairs, and he had no right to exhibit on the front wall of the applicant's shop.

Mr. Searle, for the respondent, submitted that it was by no means clear what were the rights of the applicant in this matter. The

point had often been mooted in this Court, but had never been decided, as to what were the rights of a person who came into possession of certain premises finding a state of things there which, to some extent, might be held to conflict with the apparent rights of another party. Counsel urged that the respondent had a right to some portion of the wall, so that he was enabled to display his goods to people in the street. The applicant had not shown a clear right to the portion of the wall where the respondent was exhibiting his show case, and where the respondent had had a show case for five years. He contended that the Court should not, on motion, grant what was really an order of ejectment, seeing the great hardship it would be to the respondent, who, for instance, had put up an arch that would have to be removed.

Mr. Alexander submitted that there had been no acquiescence on the part of the applicant in the acts of the respondent. The matter was really now a matter between the landlord and the respondent.

Hopley, J., The applicant seeks an order of ejectment against the respondent on the ground that by means of a certain show-case he is encroaching on the street surface of the party wall which divides the entrance to the premises occupied by the respondent from those occupied by the applicant. There seems to be no doubt that the respondent was a tenant some time in advance of the applicant. Respondent's predecessor had been a photographer, and he found when he went into this place a show-case on either side. It was that entrance and the show-case alongside which he took over. For some time the jeweller seems to have raised no protest, but on the contrary he set up a glass frame on which he painted, and set forth all the various details of his business, and the various departments, which stood in between the show-case and his own shop window. His own shop window seems to be very large, but in 1903 he wanted more room, and he caused a law agent to address a letter to the respondent calling upon him to remove the show-case. The respondent declined, and he seems to have been determined all along to resist to the utmost any such demand on the part of the applicant. The applicant now comes, and says that he has a perfectly clear right, and that the respondent must remove his show-case lower down. I cannot see that he has such a clear right, or that he has a right at all. I cannot say, for instance, that there is not some sort of defence which might not be raised on the ground of acquiescence, quite apart from anything in the way of prescription. Prescription, of course, could not be set up, but acquiescence might possibly be. I think that, as the applicant

knew perfectly well that this matter was contested and that there would be considerable difficulty in showing that he was entitled to a perfectly clear right, it was rash to come here upon motion. I think, therefore, that I must give no order on the present application, and direct the applicant to pay costs, save that the applicant may, if he choose, enter an action to prove his right, notice of motion to stand as summons. I think that the applicant has come to court wrongly, and that he should pay the costs.

SUPREME COURT

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

ADMISSIONS. { 1905.
{ Mar. 13th.

Mr. P. S. T. Jones moved for the admission of John Henry Bailey as an advocate.

Application granted and oath administered.

Mr. P. S. T. Jones moved for the admission of Charles James Ingram as an advocate.

Application granted and oath administered.

Mr. P. S. T. Jones moved for the admission of Basil Kellett Long as an advocate.

Application granted and oath administered.

Mr. W. Porter Buchanan moved for the admission of Wm. Charles Eaton Stent as an attorney and notary.

Application granted, and oaths administered.

Mr. W. Porter Buchanan moved for the admission of Charles Frederick William Bands as an attorney and notary.

Application granted, and oaths administered.

Mr. W. Porter Buchanan moved for the admission of Herbert Norman Attwell as an attorney and notary.

Application granted, and oaths administered.

Mr. W. Porter Buchanan moved for the admission of Arthur Vincent Crossley Bisset as an attorney, notary, and conveyancer. Mr. Buchanan stated that there had been a break of six months in the applicant's service, owing to his having visited England with a cricket team.

Notice was given to the Incorporated Law Society, who consented to his admission.

Application granted, and oaths administered.

Mr. J. E. R. de Villiers moved for the admission of Johan C. J. van Rensburg as an attorney and notary.

Application granted, oaths to be taken before the R.M. of Steynsburg.

PROVISIONAL ROLL.

PRICE V. DELBANCO. { 1905.
{ Mar. 13th.

Mr. J. E. R. de Villiers moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

OOSTHUIZEN V. FOTHERINGHAM.

Mr. De Waal moved for provisional sentence for £67, upon a promissory note, with interest.

Order granted.

KRUGER V. FRASER.

Mr. De Waal moved for provisional sentence upon a mortgage bond for £250, with interest, the bond having become due by reason of notice having been given; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

KRUGER BROS. V. FERREIRA.

Mr. De Waal moved for provisional sentence on a promissory note, with interest.

Order granted.

LIPSCHITZ AND OTHERS V. NEL.

Mr. De Waal moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

MCGREGOR V. HOFFMAN AND SAACKS.

Mr. P. S. T. Jones moved for provisional sentence on a promissory note for £716 17s. 4d., less £400 paid on account, together with interest on the capital sum.

Order granted, with interest *a tempore morae* on the balance unpaid.

HODGES AND CO. V. LINGUM.

Mr. Alexander moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

GODLONTON V. SOLOMON.

Mr. P. S. T. Jones moved for provisional sentence on a mortgage bond for £150, with interest, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable, with costs.

Order granted.

ZEEDERBERG AND DUNCAN V.
ALPEROWITZ.

Summons—Service.

The posting of a summons on the door of the Supreme Court is not sufficient service.

Mr. Pyemont moved for the final adjudication of the defendant's estate as insolvent. It was stated that service had been made by posting the summons on the door of the Supreme Court.

Hopley, J., said that there would be no order, on account of insufficient service.

Mr. Pyemont then applied for an extension of the return day until the 15th April.

This was granted, subject to fresh service of the summons.

GARVIE V. TAMBOER.

Dr. Rainsford moved for the final adjudication of the defendant's estate as insolvent. Counsel said he was not aware what service there had been on the defendant.

Final order granted, with costs, save costs of briefing counsel.

At a later stage, His Lordship said it had been brought to his notice that for some years it had been the practice in this Court for the Taxing Master not to allow to the attorneys costs for briefing counsel with returns of summonses, and, as a consequence, a practice had grown up of counsel coming into court uninstructed in a great many cases as to the returns of the summonses. That practice might have been all very well if provisional cases were still heard before two judges, so that while one judge heard the application, the other could check the returns of service. It was obviously impossible for one judge alone to do that. He personally thought that the

Taxing Master ought certainly to allow costs of briefing counsel with the returns of service. As to the orders he had made that morning, it seemed that under the circumstances he should withdraw that part, disallowing costs of briefing counsel, and that those costs should be allowed. He hoped that in the future counsel would always be briefed with the returns of the service, and that the Taxing Master would allow the costs.

VALUE SUPPLY CO. V. WILSON.

Mr. Pyemont moved for a decree of civil imprisonment upon an unsatisfied judgment of the Magistrate's Court for about £15. It was stated that the defendant lived at Victoria West.

Decree granted.

MOUAT V. EVERAERT.

Mr. W. P. Buchanan moved for provisional sentence on a mortgage bond for £500, with interest at the rate of 6 per cent. per annum from the 1st January, 1904, less £4 10s. paid on account, and that the property specially mortgaged be declared executable.

Order granted.

BOARD OF EXECUTORS V. MILLER.

Mr. P. Jones moved for provisional sentence on a mortgage bond for £1,200, with interest at 6 per cent. per annum from 1st January, 1904, £15 12s., two premiums for insurance paid, and that the property specially hypothecated be declared executable. The bond had become due by reason of non-payment of interest.

The defendant appeared in court, and stated that nine months ago he assigned his estate to Mr. Steytler, who had sent a cheque for £36, being half the amount of interest due, and the plaintiffs refused to accept it.

[Hopley, J.: If the plaintiffs paid all the interest, would you want to execute?]

Mr. Jones: We may have the trouble of coming again to court.

[Hopley, J.: I'll give him a month.]

Mr. Jones: He would have that under the rules of Court, my lord.

[Hopley, J.: I'll give him two then.]

Order granted, execution stayed for two months to give respondent time to pay all arrear interest, costs, and the insurance premiums.

BOSMAN V. BROWN.

Mr. Van Zyl moved for the discharge of sequestration granted on a provisional order.

Order granted.

SHEARER V. COHEN AND GAFFANOWITZ.

Mr. Roux moved for provisional sentence on a mortgage bond for £200, with interest from 1st November, 1903, at 6 per cent. per annum, and that the property specially hypothecated be declared executable. The bond became due by reason of non-payment of interest.

Order granted.

CELLIERS V. MINNAAR.

Mr. Van Zyl moved for provisional sentence on a promissory note for £51, with interest and costs.

Order granted.

ESTATE METELERKAMP V. VAN DER WALT.

Mr. Swift moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

GROSS V. DUNE.

Mr. Pymont moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

LITKIE V. CHRISTIANI.

Dr. Greer moved for provisional sentence on a mortgage bond for £1,500, with interest and cost of insurance; the bond having become due by reason of notice given; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

GREENBERG AND CO. V. JOSEPH.

Mr. W. Porter Buchanan moved for interest and costs in an action, in which the principal amount (£50) had been paid subsequent to issue of summons.

Order granted.

MOSES V. BROWN.

Dr. Greer moved for provisional sentence on a mortgage bond for £458 8s., with interest, the bond having become due by reason of demand duly made by registered letter; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

VERSVELD V. SCHEEPERS.

Mr. W. Porter Buchanan moved for provisional sentence upon a mortgage bond for £80, with interest, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially mortgaged to be declared executable.

Order granted.

ARKELL AND ANOTHER V. HOFFMAN.

Mr. Lewis moved for a decree of civil imprisonment upon an unsatisfied judgment to be suspended on defendant carrying out an offer to pay off the debt at the rate of £25 a month, first payment to be made on the 1st April.

Order granted, execution to be stayed, subject to payment in accordance with the defendant's offer.

ARDERNE V. KALWERISKY AND WINNITSKY.

Mr. P. S. T. Jones moved for provisional sentence on a mortgage bond for £600, with interest, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

HILL AND CO. V. SAACKS.

Mr. Swift moved for provisional sentence on a promissory note for £200, with interest.

Order granted.

BESSELL V. TWINE.

Mr. P. S. T. Jones moved for provisional sentence on a promissory note for £100, with interest.

Order granted.

BESSELL V. GRUNEBERG.

Mr. P. S. T. Jones moved for provisional sentence on a promissory note for £304 10s., with interest.

Order granted.

ESTATE GILLIS V. RAUBENHEIMER.

Mr. Du Toit moved for provisional sentence on a promissory note for £50 13s. 6d., with interest.

Order granted.

COCHRAN V. BRAND.

Mr. Giddy, K.C., moved for judgment, under Rule 329d, (1) for £1,000 money lent and advanced on a certain mortgage bond; (2) for the property at Worcester specially hypothecated to be declared executable; (3) for interest; and (4) costs. The bond, he said, appeared to have been cancelled in error. The money had not been paid as the applicant had thought. An order of Court had been granted some time ago, when the error was discovered, restraining Brand from selling the property. Counsel said that the application was somewhat unusual, and he was unable to find a case on all fours with the present one.

Order granted in terms of prayers (1), (3), and (4). No order as to prayer (2).

BAGNALL AND CO. V. SCHAPERA.

Dr. Rainsford moved for judgment, under Rule 329d, for costs, the capital amount having been paid since issue of summons.

Order granted.

DE VILLIERS AND ANOTHER V. NEWMAN.

Mr. W. Porter Buchanan moved for judgment, under Rule 329d, for £88, purchase price of certain lots of ground at Ida's Valley, division of Stellenbosch, plaintiff tendering transfer.

Order granted.

DE VILLIERS AND ANOTHER V. VISSER.

Mr. W. Porter Buchanan moved for judgment, under Rule 329d, for £33 12s., the purchase price of certain ground.

Order granted.

WOODHEAD, PLANT AND CO. V. ELBURG.

Mr. Pyemont moved for judgment, under Rule 329d, for £50, unpaid balance of moneys lent and advanced, and interest.

Order granted.

WALLANDER V. WERNBERG AND DEECKER

Mr. P. S. T. Jones moved for judgment, under Rule 329d, for (1) an order of transfer of certain lots of land sold to plaintiff for £71, of which £55 0s. 9d. had been paid, or (2) in the alternative to cancel sale and for refund of money paid.

Order granted for transfer of the land, or, in alternative, repayment of £55 0s. 9d., with costs.

STEER V. LOUW.

Mr. P. S. T. Jones moved for judgment, under Rule 329d, for £33 0s. 5d., balance of account for professional services and disbursements.

Order granted.

VIENINGS AND ANOTHER V. KRAAIFONTEIN HOTEL CO.

Mr. P. S. T. Jones moved for judgment, under Rule 329d, for £160 8s., balance of contract money for the erection of the Kraaifontein Hotel.

Order granted.

KOTZE V. BRUINS.

Mr. J. E. R. de Villiers moved for judgment, under Rule 319, in terms of declaration for delivery of a gold watch, the defendant having been barred from pleading. Counsel said that the original claim was for a watch, a family heirloom, or its value, £50. The watch had been placed in the defendant's custody for safe-keeping, and it had been detained by her against certain charges for repairs. She claimed £3 odd, and plaintiff had offered her 25s.

Hopley, J. said that there appeared to have been a good deal of unnecessary litigation in this matter. An order would be granted for delivery of the watch on payment to defendant by the plaintiff of 25s., defendant to pay the costs.

BANK OF AFRICA V. HOFFMAN AND CO. AND ANOTHER.

Mr. Searle, K.C., moved for judgment, under Rule 319, upon a declaration claiming £606, with interest, and for certain property specially hypothecated to be declared executable, defendants having been barred from pleading.

Order granted as prayed.

CAPE COLD STORAGE V. SAYERS.

Dr. Rainsford moved for judgment, under Rule 329d, for £203 13s., goods sold and delivered, with interest *a tempore morae*.

Order granted.

CAPE MARINE SUBURBS V. RECREATION SYNDICATE.

Mr. Gutsche moved for judgment, under Rule 329d, for £479 7s. 4d., money lent and advanced and disbursed for defendants, with interest *a tempore morae* and costs.

Order granted.

TABLE BAY HARBOUR BOARD V. INKSTER AND MASTER OF THE SHIP "DYNAMITE."

Mr. P. S. T. Jones moved for judgment, under Rule 329d, for £150, services rendered by the tug Sir Charles Elliot, for £64 10s., dock dues and other charges and for interest and costs.

Order granted.

GENERAL MOTIONS.

Ex parte METCALFE. { 1905.
{ Mar. 13th.

Mr. P. S. T. Jones moved as a matter of urgency, on behalf of Alfred Wills and Abbott and Charles Ritter, for the amendment of a provisional order granted in the estate of Max Schlechter, of Namaqualand, by the insertion of his full name, which had since transpired, viz., Ernst Ludovic Gustav Max Schlechter.

Order granted as prayed.

REX V. GOLDMAN.

Criminal trial on Circuit—Removal.

The Supreme Court has no power to remove a criminal trial from one circuit to another. Application should be made to the Circuit Court.

Mr. Burton moved as a matter of urgency, upon notice to the Attorney-General, for removal of the trial of petitioner from the ensuing Circuit Court at Oudtshoorn, to such court as this Honourable Court may appoint. The charge against the petitioner was of attempting to commit the crime of fraud and perjury. The ground of the application was that considerable comment, criticism, and prejudice had arisen against the petitioner in the town and district of Oudtshoorn, on account of his dealings with a certain insolvent, and he was assured that, owing to the prejudice that had existed, and did still exist, he would not receive a fair trial. Corroborative affidavits by A. J. Gill, of Prince, Vincent and Co., and Mr. Nel, Field-cornet, were read.

Mr. Nightingale appeared for the Attorney-General to oppose.

Mr. Burton said that he thought it would be apparent from a newspaper article circulated in the Oudtshoorn district that considerable prejudice existed against the petitioner. He understood that the Attorney-General intended to take the point that the Court had no

jurisdiction, and that such an application should be made to the Circuit Court where the indictment was presented. Counsel admitted that the case of *Queen v. Otto* (3 E.D. Court, 170) was against him. The 44th section of the Charter of Justice, which gave the Court jurisdiction, used the term "action or suit," and did not mention criminal indictments. He submitted, however, that under the wide general powers conferred upon the Supreme Court, his lordship had the power to order removal of the trial. He admitted, however, that he was unable to produce a precedent for this application.

Mr. Nightingale said that the indictment in this trial was filed in the Circuit Court, and the Crown relied on the 44th section of the Charter of Justice, as supported by the case of *Queen v. Otto*.

Mr. Burton said it was extremely unfortunate that the Crown should persist in the attitude which had been adopted. The air of Oudtshoorn was altogether unfavourable to the petitioner.

Hopley, J.: If the judge before whom the case comes has reason to believe that the applicant will not have a fair trial, he will be able to remove the hearing to a more convenient court. It seems to me that according to the 44th section of the Charter of Justice and the ruling of the E.D. Court in the case of *Queen v. Otto*, I cannot make any such order as I am now asked to make, in face of the opposition of the Attorney-General to such an order. The result is that I can make no order on the present application, leaving the petitioner to make an application to the proper Court, the Circuit Court at Oudtshoorn, before which the trial is now pending.

WEAKLEY V. ESTATE VAN DER WALT.

Mr. P. S. T. Jones moved, on behalf of Weakley, defendant in the action, for the removal of the trial to the Circuit Court at Colesberg, costs to be costs in the cause. Respondent's attorney consented.

Order granted as prayed.

Cochran v. Brand.

Mr. Giddy, K.C., moved for judgment, under Rule 329d, (1) for £1,000 money lent and advanced on a certain mortgage bond; (2) for the property at Worcester specially hypothecated to be declared executable; (3) for interest; and (4) costs. The bond, he said, appeared to have been cancelled in error. The money had not been paid as the applicant had thought. An order of Court had been granted some time ago, when the error was discovered, restraining Brand from selling the property. Counsel said that the application was somewhat unusual, and he was unable to find a case on all fours with the present one.

Order granted in terms of prayers (1), (3), and (4). No order as to prayer (2).

Bagnall and Co. v. Schapera.

Dr. Rainsford moved for judgment, under Rule 329d, for costs, the capital amount having been paid since issue of summonses.

Order granted.

De Villiers and Another v. Newman.

Mr. W. Porter Buchanan moved for judgment, under Rule 329d, for £88, purchase price of certain lots of ground at Ida's Valley, division of Stellenbosch, plaintiff tendering transfer.

Order granted.

De Villiers and Another v. Visser.

Mr. W. Porter Buchanan moved for judgment, under Rule 329d, for £33 12s., the purchase price of certain ground.

Order granted.

Woodhead, Plant and Co. v. Elburg.

Mr. Pyemont moved for judgment, under Rule 329d, for £50, unpaid balance of moneys lent and advanced, and interest.

Order granted.

Wallander v. Wernberg and Decker.

Mr. P. S. T. Jones moved for judgment, under Rule 329d, for (1) an order of transfer of certain lots of land sold to plaintiff for £71, of which £55 0s. 9d. had been paid, or (2) in the alternative to cancel sale and for refund of money paid.

Order granted for transfer of the land, or, in alternative, repayment of £55 0s. 9d., with costs.

Steer v. Louw.

Mr. P. S. T. Jones moved for judgment, under Rule 329d, for £33 0s. 5d., balance of account for professional services and disbursements.

Order granted.

Vienings and Another v. Kraai-Fontein Hotel Co.

Mr. P. S. T. Jones moved for judgment, under Rule 329d, for £160 8s., balance of contract money for the erection of the Kraaifontein Hotel.

Order granted.

Kotze v. Bruins.

Mr. J. E. R. de Villiers moved for judgment, under Rule 319, in terms of declaration for delivery of a gold watch, the defendant having been barred from pleading. Counsel said that the original claim was for a watch, a family heirloom, or its value, £50. The watch had been placed in the defendant's custody for safe-keeping, and it had been detained by her against certain charges for repairs. She claimed £3 odd, and plaintiff had offered her 25s.

Hopley, J. said that there appeared to have been a good deal of unnecessary litigation in this matter. An order would be granted for delivery of the watch on payment to defendant by the plaintiff of 25s., defendant to pay the costs.

Bank of Africa v. Hoffman and Co. and Another.

Mr. Searle, K.C., moved for judgment, under Rule 319, upon a declaration claiming £606, with interest, and for certain property specially hypothecated to be declared executable, defendants having been barred from pleading.

Order granted as prayed.

Cape Cold Storage v. Sayers.

Dr. Rainsford moved for judgment, under Rule 329d, for £203 13s., goods sold and delivered, with interest *a tempore morae*.

Order granted.

Cape Marine Suburbs v. Recreation Syndicate.

Mr. Gutsche moved for judgment, under Rule 329d, for £479 7s. 4d., money lent and advanced and disbursed for defendants, with interest *a tempore morae* and costs.

Order granted.

TABLE BAY HARBOUR BOARD V. INKSTER
AND MASTER OF THE SHIP "DYNMANT."

Mr. P. S. T. Jones moved for judgment, under Rule 329d, for £150, services rendered by the tug Sir Charles Elliot, for £64 10s., dock dues and other charges and for interest and costs.

Order granted.

GENERAL MOTIONS.

Ex parte METCALFE. { 1905.
Mar. 13th.

Mr. P. S. T. Jones moved as a matter of urgency, on behalf of Alfred Wills and Abbott and Charles Ritter, for the amendment of a provisional order granted in the estate of Max Schlechter, of Namaqualand, by the insertion of his full name, which had since transpired, viz., Ernst Ludovic Gustav Max Schlechter.

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Mr. Nightingale appeared for the Attorney-General to oppose.

Mr. Burton said that he thought it would be apparent from a newspaper article circulated in the Oudtshoorn district that considerable prejudice existed against the petitioner. He understood that the Attorney-General intended to take the point that the Court had no

jurisdiction, and that such an application should be made to the Circuit Court where the indictment was presented. Counsel admitted that the case of *Queen v. Otto* (3 E.D. Court, 170) was against him. The 44th section of the Charter of Justice, which gave the Court jurisdiction, used the term "action or suit," and did not mention criminal indictments. He submitted, however, that under the wide general powers conferred upon the Supreme Court, his lordship had the power to order removal of the trial. He admitted, however, that he was unable to produce a precedent for this application.

Mr. Nightingale said that the indictment in this trial was filed in the Circuit Court, and the Crown relied on the 44th section of the Charter of Justice, as supported by the case of *Queen v. Otto*.

Mr. Burton said it was extremely unfortunate that the Crown should persist in the attitude which had been adopted. The air of Oudtshoorn was altogether unfavourable to the petitioner.

Hopley, J.: If the judge before whom the case comes has reason to believe that the applicant will not have a fair trial, he will be able to remove the hearing to a more convenient court. It seems to me that according to the 44th section of the Charter of Justice and the ruling of the E.D. Court in the case of *Queen v. Otto*, I cannot make any such order as I am now asked to make, in face of the opposition of the Attorney-General to such an order. The result is that I can make no order on the present application, leaving the petitioner to make an application to the proper Court, the Circuit Court at Oudtshoorn, before which the trial is now pending.

WEAKLEY V. ESTATE VAN DER WALT.

Mr. P. S. T. Jones moved, on behalf of Weakley, defendant in the action, for the removal of the trial to the Circuit Court at Colesberg, costs to be costs in the cause. Respondent's attorney consented.

Order granted as prayed.

SUPREME COURT

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY]

TRIAL CAUSES

BOISON V. BOISON. { 1905.
{ Mar. 14th.

This was an action for restitution of conjugal rights brought by Amyas Goodwood Boison, otherwise known as Sidney Boison, against his wife, Emma Jemima Boison (born Price), on the ground of her unlawful and malicious desertion of the plaintiff.

The defendant was in England, and the notice of summons was served by edictal citation, substituted service having been allowed. It appeared that the citation had come to the notice of the defendant, but she had not entered a plea.

The declaration set out that the parties were married at the Registry Office, Mile End-road, London, England, on January 13, 1896; that in or about the year 1896 the plaintiff came to Cape Town, and defendant afterwards joined him; that the parties resided together in Cape Town until May, 1898, when the defendant unlawfully and maliciously deserted the plaintiff; and that her present whereabouts were unknown to the plaintiff. Plaintiff claimed an order of restitution, failing which, divorce.

Mr. W. P. Buchanan for plaintiff; defendant in default.

Amyas Goodwood Boison (the plaintiff) said he was known among his friends as Sidney Amyas Boison. After marriage, he and his wife lived in London about four months, and he then came out here, intending to settle here. He sent his wife a passage ticket after he had been here about nine months. They took a house at Green Point, and lived together about two years. While he was travelling up-country his wife deserted him in May, 1898.

His wife used to be always "nagging," and wanting to go home. She used to tell him that if he had sent her money instead of a passage ticket she would not have come out here. In June, 1904, he was in England, and he employed a private inquiry agency to make investigations, but he was unable to find any trace of his wife's whereabouts. Witness was aware that letters had passed between the attorneys of the defendant and the witness's attorneys. A letter from defendant's attorneys stated that they proposed to instruct Messrs. Reid and Nephew. Witness was of independent means when he was married, but he was

now engaged as a commercial traveller. His wife was a hospital nurse.

Decree of restitution granted, defendant to return to the plaintiff on or before June 15, plaintiff to tender to defendant a second-class passage to Cape Town, failing which, defendant to show cause on June 29 why a decree of divorce should not be granted as prayed, the rule to be served personally, or on the defendant's solicitor, Mr. R. Philip Upton, 5, Great James-street, Bedford-row, London.

SEALE V. DOOVEY.

This was a case which came before the Court on March 3rd, and at the suggestion of Hopley, J., stood over in order to give the parties an opportunity of arriving at a settlement. The case was now resumed.

Mr. W. Porter Buchanan (with him Mr. Roux) was for the defendant.

Mr. Buchanan stated that his learned friend, Mr. Upington, appeared for the plaintiff at the first hearing, but he was now unable to be present, owing to a case which was being heard in another Court.

Mr. Gie, of Messrs. Herold and Gie (plaintiff's attorneys), in answer to his Lordship, said that the plaintiff desired the case to be continued. Notice had been given to the defendant on the previous day that there was a possibility that this difficulty would arise, but no reply had been received from the defendant.

The case, he urged, might be postponed until next term.

Hopley, J., said that it would be a pity, it seemed to him, to have the expense of a protracted postponement, with a further hearing fee, counsel's refreshers, and so on.

Mr. Buchanan indicated to his Lordship the principal points still in issue between the parties.

Hopley, J., suggested that the parties should agree to refer the points to a competent architect or builder.

After a consultation between the parties

Mr. Buchanan intimated that they had practically agreed upon the name of Mr. Parker as referee.

At a later stage,

Mr. Buchanan produced a consent paper, signed by the parties, for submission of the matters at issue to the arbitration of any qualified architect appointed by the Court in terms of Act 29, of 1898.

An order was granted referring the matter to Mr. John Parker, failing him, Mr. Simkin, in terms of consent paper, evidence already taken and papers produced to be handed to the referee, with power to re-call any witnesses whom he may think fit.

Postea (June 28th).

Mr. Upington applied to have the award of the official referee's report made a rule of Court. The other side disputed the award, on the ground that the referee's decision was not consistent with the legal direction given by his lordship at the trial. The application was made on behalf of the plaintiff in the case, and called upon Doovey to show cause why the referee's report should not be made a rule of Court, and why the defendant should not pay the costs.

Mr. Roux put in affidavits, and contended that the referee had put a wrong construction on the contract, by holding that the plaintiff was not bound to go down to the solid for foundation, and moved to have the allowance to the plaintiff reduced, or to have the matter remitted to the referee.

Counsel having been heard in argument of the facts.

Hopley, J., said the referee had carefully gone into the matter, and had given a very clear and lucid report; but he has taken upon himself to construe a contract in a way which, no doubt, appeared to him equitable. The contract, however, must be taken as he finds it. After reviewing the facts of the award, his lordship held that by disallowing the £124 for foundations and by rectifying the claim for £44 made by the defendant to £22, which was claimed on the pleadings, there would be in favour of the defendant £102 17s., and taking that from £191 18s. 5d., the amount awarded, left a balance in favour of the plaintiff for £89 1s. 5d. for the plaintiff, both parties to pay their own costs, the reference costs divided.

PROVISIONAL ROLL.

LOGAN V. ABRAHAMSON. { 1905.
Mar. 14th.

Mr. Gutsche said that a settlement had now been arrived at, and he moved for the provisional order of sequestration to be superseded.

Provisional order superseded.

REHABILITATIONS.

Mr. J. E. R. de Villiers applied for the rehabilitation of Robert Duncan, trading as Duncan Bros. Counsel said that the trustees' report was favourable. Insolvent had been a landing and shipping agent, and his own father was a creditor for more than half the liabilities.

Granted.

Mr. Pyemont applied for the rehabilitation of Henry Strutt Taylor and Philip Barrand, trading as Barrand and Company, of Graham's Town. The trustees raised no objection to the application.

Ordered to stand over, pending production of Master's certificate.

At a later stage, Mr. Pyemont produced the Master's certificate, and the application was thereupon granted.

GENERAL MOTIONS.

Ex parte KELLY. { 1905.
Mar. 14th.

Mr. Roux moved for the cancellation of certain mortgage bond for an amount of £50, upon certain property at Zonnebloem. All trace of the bond, which was believed to have been passed in 1863 to the late Mr. Hofmeyr, auctioneer, Cape Town, had been lost. Petitioner bought the property in question in November, 1904, and he had re-sold it. The matter was one of considerable urgency; hence the application. The applicant prayed for an order cancelling the bond upon payment by him of £50 into Court, and for a rule to issue calling upon all concerned to show cause why the said sum of £50 should not be returned to him.

Order granted as prayed, rule to be returnable on the 15th April, and to be published once in the "Cape Times" and the "South African News."

BUTLER V. BUTLER.

Divorce — Substituted service — Authentication.

The Court granted a decree of divorce on the faith of an affidavit sworn by a clerk to a certain firm of attorneys in Chicago, but stated that in future all similar affidavits must be duly authenticated.

Mr. Gutsche moved for a certain rule nisi for restitution of conjugal rights, failing which, divorce, to be made absolute, the defendant (Jessie Butler), who had been served with the rule in Greenwood-avenue, Chicago, U.S.A., being in default. It was stated that defendant refused an offer of passage money to return to her husband in Cape Town, and said she did not want to return to him. An affidavit to this effect was put in, sworn by a clerk in the employ of a firm of attorneys in Chicago, before one Margaret Shortle, a notary public.

Hopley, J., said he thought there should be some certificate attached, as

to the *bona fides* of the affidavit. The matter must stand over pending further inquiries.

At a later stage,

Hopley, J., said that he had shown the document to the Chief Justice. They agreed that the document ought to be properly authenticated, and that in its present form it was somewhat irregular. However, he saw no reason to believe that the document was not authentic, and that service had not been effected on the defendant. He wanted it to be clearly understood that this was not to be a precedent for any future application where documents were not in due form. An order would be granted as prayed for divorce, and access to the child.

Ex parte MAKABUWA.

Mr. Roux moved for a rule *nisi*, under the Derelict Lands Act, to be made absolute, due publication having been given.

Rule made absolute.

Ex parte MOOS.

Mr. W. Porter Buchanan moved for a rule *nisi*, authorising the removal of a certain servitude, as a roadway, upon land belonging to petitioner to be made absolute.

Rule made absolute.

Ex parte HEMPEN.

Dr. Greer moved for a rule *nisi* releasing the petitioner's estate from sequestration to be made absolute. Petitioner's estate had been sequestered by mistake instead of his wife's.

Rule made absolute.

WILMS V. THIELE.

Mr. W. Porter Buchanan moved for a rule, temporarily interdicting certain goods and property, pending an action to be brought, to be made absolute.

Rule made absolute.

Ex parte MARAIS.

Mr. Pyemont moved for an order authorising the transfer to petitioner of certain three water erven in the division of Graaff-Reinet, bought by him, and belonging to the estate of his late wife, of which he was executor.

Order granted as prayed.

CHANNING V. CHANNING.

Mr. W. Porter Buchanan moved on behalf of Janet Channing, of Cape

Town, for leave to sue her husband, Matthew Channing, a carpenter, by edictal citation, for restitution of conjugal rights, failing which, divorce. Petitioner's husband joined a corps in Natal on the outbreak of the war in 1899, when he requested her to come to Cape Town. She had not since heard from him, and she knew nothing as to his whereabouts.

Hopley, J., said that the matter had better stand over until the petitioner had made inquiries for the corps that her husband joined. He would not grant an order at present.

BAUMGARTEN V. PAUL.

Mr. J. E. R. de Villiers moved, on behalf of the defendant in this action, for leave to sign judgment against the plaintiff for not proceeding with his action, with costs.

Order granted.

LEVY V. WYNESS.

Mr. Roux moved for leave to sue the respondent, who had been lessee of the Frontier Hotel, at Dordrecht, by edictal citation, for a sum of £250, and for the attachment of funds defendant had placed in the hands of Messrs. Dreyfus and Co., of East London, agents of the North British Insurance Co., *ad fundandam jurisdictionem*. The respondent was believed to be at Petersburg, in the Transvaal. The matter arose out of a fire at the hotel, and the insurance of the billiard tables and appurtenances, Venetian blinds, and linoleums.

Order granted, authorising the petitioner to sue Wyness by edictal citation, and the attachment of the sum of £250 in the hands of Messrs. Dreyfus *ad fundandam jurisdictionem*; rule to be served personally, failing which, one publication in the "Zoutpansberg Review" and "Star," Johannesburg, rule to be returnable on the 13th May.

SCHMIDT V. SCHMIDT.

Dr. Greer moved for an order directing the respondent, petitioner's husband to pay her a sum of £50, to enable her to institute an action for judicial separation and also for alimony. The ground of the proposed action was the respondent's cruelty towards the petitioner, his intemperate habits, and failure to supply her with means for household purposes. Respondent was now in possession of all the joint estate, and was living on the flats.

Respondent did not appear.

An order was granted directing respondent to pay a sum of £25 to the

applicant's attorney for the purposes of the proposed suit, and £6 a month as alimony, costs to abide the result of the action.

Ex parte ROSSEAU.

Mr. De Waal moved for the registration of a certain ante-nuptial contract between one Gideon Jacobus van Heerden and Louisa Krige, who were clients of the petitioner, an attorney of this court, practising at Steynsburg. The reason of the application was that the contract had not been registered within the stipulated period from the marriage, delay having been occasioned by rejection of the contract by the Registrar of Deeds on account of insufficient description of an erf donated to the intended wife under the contract.

Order granted as prayed.

COLONIAL GOVERNMENT V. SCHWARTZ.

Mr. Howel Jones moved for leave to sue the defendant by edictal citation upon certain mortgage bonds, due by reason of the non-payment of interest, and for the attachment of the property at Kenhardt *ad fundandam jurisdictionem*. Defendant was resident at Germiston, Transvaal.

Order granted as prayed, rule to be served personally, and to be returnable on the 4th May.

ROSSEY V. HOLLANDER.

Mr. W. Porter Buchanan moved for a rule *nisi* temporarily interdicting certain pictures, pending an action, to be made absolute.

Rule made absolute, costs to be costs in the cause.

Ex parte MARAIS AND WIFE.

Mr. W. Porter Buchanan moved for leave to sell certain property in the division of Bedford, to enable petitioners to pay off the liabilities of the estate, and costs of this application, and with the balance to purchase landed property, subject to the limitations, conditions, and stipulations of the ante-nuptial contract. The property was settled by the first petitioner on his wife for the benefit of any children born of the marriage; failing issue that outlived the first petitioner, the property to revert to him should his wife predecease him. The Master, in his report, said that the case showed how worthless were settlements that were made without the appointment of trustees. The parties had disregarded the terms of the settlement from the beginning.

The matter was ordered to stand over for further information

Ex parte CURTIS.

Mr. Searle, K.C., moved, on behalf of George Curtis, as Mayor of Oudtshoorn and chairman of the Town Council, for an order fixing a date within which certain claims should be filed of persons claiming transfer of certain property, the remaining extent of which had been acquired by the Town Council. Possession had been given to certain persons without a transfer having been passed, and the Town Council desired to have some finality to the matter. An order was made by the Court in 1897 giving the Council the remaining extent of the farms in question, and leaving them to settle with any other claimants. The petitioners had got transfer of the property, but they were unable to sell because this order was endorsed on the deeds.

Hopley, J., said that he did not see how he could make an order shutting out other people who might possibly have rights to these properties.

Mr. Searle said that the matter was a very old one, and he did not think the Court in making the order of 1897 contemplated that the Council should wait thirty years to obtain prescription. He quite recognised the difficult position the Court was in.

Hopley, J., said it seemed to him that there were only two ways out of the difficulty. Either the Council should promote a Bill in Parliament or sell the land, subject to an indemnity given by the Council to buyers against any possible claimants.

After hearing Mr. Searle further, Hopley, J., said that no order would be given on the present application.

O'BREY V. MASTERTON.

Mr. Roux moved on behalf of petitioner, now of Three Anchor Bay, and formerly carrying on business as a draper and outfitter at Mowbray, for leave to sue Thomas Masterton *in forma pauperis* for the filing of a liquidation account of his administration of petitioner's estate, inspection of the books of his estate, and so forth.

A rule *nisi* was granted subject to the usual certificate calling upon Mr. Masterton to show cause on the 15th April why leave should not be granted to the petitioner as prayed.

Ex parte DE KOCK.

Mr. J. E. R. de Villiers moved for an order authorising the Master to pay out to petitioner, as guardian of two children by her first marriage, certain money standing in the Guardians' Fund to the credit of the elder child, to be applied to her education at the

Huguenot Seminary, Wellington. Petitioner's second husband was dead, and she was in somewhat straitened circumstances.

Order granted, authorising the Master to pay out £50 a year for three years upon proof to the Master that the girl was attending school and making satisfactory progress.

In re THE AMOY BRICK SYNDICATE, LTD.

Mr. J. E. R. de Villiers presented the first and preliminary report of the liquidators of this company, formerly carrying on business at or near Stellenbosch, and moved for an order in terms of the recommendations of the liquidators. The amount still due from contributories was about £72.

Hopley, J., said that an order would be granted directing all claims against the company to be sent in on or before the 31st May, and the contributories to pay unpaid portions of shares on or before the 31st May.

PASTINI V. CASTA.

Dr. Rainsford moved for the appointment of a commission to take the evidence of a witness in Johannesburg. Consent was filed by the defendant, subject to the commission being made general. Counsel asked for an order accordingly.

Order granted for a commission *de bene esse* in terms of consent paper, the commissioner to be Advocate Percival Smith, failing him Advocate Saul Solomon.

DARTER V. DARTER.

Mr. W. Porter Buchanan moved, on behalf of Georgina Darter, for leave to sue her husband, Adrian Albert Darter, by edictal citation for restitution of conjugal rights, failing which divorce by reason of his malicious desertion. The parties seemed to have been of itinerant habits, and the alleged desertion took place while they were on a visit to England. Counsel, in answer to the Court, said that the petitioner resided in Cape Town, and the respondent's domicile of origin was also in Cape Town. The petitioner alleged that her husband went to America in 1903 with another woman.

The matter was ordered to stand over until to-morrow (Wednesday) for production of an affidavit with regard to the respondent's domicile of origin. *Postea* (March 21st).

Leave was granted as prayed. Citation to be served personally if possible, failing which one publication in each of two Cape Town papers. Rule returnable on June 1st.

Ex parte ROHLAND.

Mr. W. Porter Buchanan moved, on behalf of petitioner, a fish-dealer, of Faure, suing for leave to raise a bond for £250 on a certain farm belonging to petitioner's son, who was of unsound mind. The land had been cultivated by the petitioner during the lunacy of his son, to whom the land was originally granted by the Government. It was proposed to divide the proceeds of the bond between the petitioner and the other creditors.

An order was granted authorising the *curator bonis* of the lunatic to raise a bond for £250 for payment of the petitioner and other creditors of the lunatic.

Ex parte MCCALLUM.

Mr. P. S. T. Jones renewed the application in this matter for leave to sell the Royal Hotel, in the district of Alice, and produced an affidavit of the value of the property and other particulars, as directed by the Court at the previous hearing. The petitioner was acting on behalf of his son.

Order granted authorising the petitioner to sell the property for a sum of not less than £5,500 net, and authorising the Registrar of Deeds to pass transfer to the purchaser, the proceeds of the sale to be paid to the manager of the Standard Bank, Fort Beaufort, in trust for the minor, until re-invested in immovable property of a rent-producing nature or on first mortgage upon immovable property, to the satisfaction of the Master.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

PROVISIONAL ROLL.

MERRINGTON V. DAVIDSON, } 1905.
STIRLING, AND MUII. { Mar. 15th.

This was an application for provisional sentence against the defendants, in their capacity as executors of the estate of Caroline Elizabeth Muir, for £84, with interest at 6 per cent. from the 30th November, 1903, on certain conditions of sale, a sum of £84 having already been paid. The matter arose out

of the sale of certain lots of ground at Retreat, forming part of the Ilfracombe Estate.

The answering affidavit of John Muil stated that he went to the spot prior to the sale, and walked over certain ground to the left of the beacon in company with Mr Merrington. This ground, he took it, was the ground to be offered at the sale. At the sale held at Claremont subsequently, he made a number of purchases, believing that the ground was part of that over which he had walked with the plaintiff. It turned out that the land was situate on the right-hand side of the road leading from the beacon to the eastward, and consisting of sandhills. He claimed to have transfer of block C, which was to the right of the beacon.

The replying affidavit of the plaintiff stated that he told the defendant Muil that the land to the left of the beacon belonged to Mr. Powrie, and that the land on the right was his (deponent's). He denied that he pointed out to Muil the land that he had purchased.

Defendant's further affidavit denied the plaintiff's version as to what took place at the visit paid to the ground. Deponent repeated that the position of the ground with regard to the beacon as pointed out by Mr. Merrington was different from the position of the ground as pointed out by the surveyor. Mr. M. de Villiers for plaintiff; Mr. Alexander for defendant.

Mr. Alexander having been heard in argument on the facts,

De Villiers, C.J.: According to the conditions of sale, the correctness of which is assumed, the defendants bought at a public sale lots Nos. 1 to 28, block "c.c.," at £6 each. The plan has been put in upon which the sale took place, and it is clear that the whole of this property was divided into lots and blocks, and it was quite competent for every purchaser to have found out for himself what those lots were. Anyhow, the defendants bought "c.c." Now, they say that they really intended to buy "c," and the last argument is that that was an error. Well, if it was an error it certainly was not a *justus error*, because defendants ought to have inquired what lots they were buying. The real defence is that there was misrepresentation by Mr. Merrington, the plaintiff in this case, as to what lots were to be sold. The misrepresentation is alleged to have taken place before the sale actually took place. The alleged misrepresentation consists in this, that there was a certain beacon at a corner of the road, and that Mr. Merrington said he was selling the portion to the left. That seems to me extremely improbable, because it is clear from the affidavits that the property to the left of the beacon did not belong to the plaintiff. Clearly, the defendants wholly misunderstood the plaintiff. All the probabilities of the case are in fa-

vour of the plaintiff. Judgment will be given for the amount prayed. It is said that there has been no tender of transfer of the ground by plaintiff on payment of the balance of purchase price.

Counsel having been heard further on this point,

De Villiers, C.J.: I think that the plaintiff ought to have tendered transfer, and considering also that he claimed double what he was really entitled to in the summons, the Court should refuse to allow the plaintiff costs. But the Court will allow the amendment of the summons, so as to place the summons in the condition in which it ought to have been, i.e., to add the words "plaintiff tendering transfer upon payment of the purchase price." There will be provisional sentence, for £168, less £84 paid on account, with interest, each party to pay his own costs.

IMPERIAL COLD STORAGE AND SUPPLY CO. V. BARTLE AND GOUS.

Mr. W. Porter Buchanan moved for a decree of civil imprisonment against the two defendants, at one time trading in partnership, upon an unsatisfied judgment, for £138 15s. 4d., less £8 10s. 6d., paid to the plaintiff's attorneys.

Mr. P. S. T. Jones (for the defendants) said that they were prepared to make an offer on behalf of Gous of £2 per month, and for Bartle of £1 per month. Mr. Buchanan accepted the offer, subject to defendants paying costs.

Decree granted, with costs, execution to be suspended on payment of £2 a month by Gous and £1 a month by Bartle, first payment to be made on the 1st April.

CHIAPPINI BROS. V. SCHNEIDER.

Dr. Greer moved for provisional sentence upon a mortgage bond for a balance of £585 3s. 9d., with interest from the 1st January last, the bond having become due by reason of notice given. Counsel also applied for the property specially hypothecated to be declared executable.

Mr. Alexander (for the defendant) read an affidavit by Edward Barsdorf (who holds defendant's power of attorney) to the effect that if proper notice were given by the plaintiffs the defendant would be able to meet the bond. The defendant had been suddenly called upon to pay the bond. She was receiving large rents from property at Zonnebloem.

Dr. Greer read a replying affidavit by Alex. John Chiappini, who said he was still prepared not to enforce the bond, provided the defendant authorised the plaintiff firm to collect the rents, and

set them off against the bond. One reason why notice calling up the bond had been given was that the defendant had started collecting the rents of the property, contrary to a verbal agreement she had entered into with the plaintiff firm.

Counsel having been heard in argument on the facts,

Do Villiers, C.J.: The bond on which the plaintiff sues is for £600, as second mortgage on certain property. There is nothing on the face of the bond to show that it is a mere covering bond for money advanced and to be advanced, while, as a matter of fact, it is a bond for £600, being money duly lent and advanced to the bearer, upon which interest at the rate of 6 per cent. is to be paid. The bond contains the usual clause that three months' notice must be given, to the effect that £488 was claimed under the bond three months hence. In the notice to the defendant, the plaintiffs say, "Please find statement of account showing a balance due by you of £488 8s. 4d., which is covered by second bond in our favour." After the notice had been given, the parties apparently became on friendly terms again, the notice was silently ignored, the plaintiffs continued to receive the rents, and were paid 5 per cent. for collecting, and out of those rents they paid themselves the interest accruing on the bond, beside paying other claims owing by the defendant. Things went on in this way until afterwards the defendant gave her power of attorney to Mr. Barsdorf to receive these rents, whereupon the plaintiffs naturally refused to go on any longer assisting the defendant, and the plaintiffs brought an action on the bond. But they no longer treated it, in the summons, as a covering bond. In the summons they sued for the full amount of the bond, viz., £600. Clearly, there has never been any notice to the defendant to pay £600 in terms of the present summons. There has been a notice to pay £488, and, failing payment of that sum, the bond to fall due. Now, the summons calls upon the defendant to pay the full £600, for which there has been no due notice given to the defendant. It is unnecessary to go into the further question whether the plaintiffs and defendant had made a verbal agreement, such as the plaintiffs allege, viz., an agreement under which they were to continue to collect the rents; and further, whether it was in consequence of the defendant's action in connection with the appointment of Barsdorf that the plaintiffs were entitled to cease to act under this agreement, and revert to the original notice. There has been no due notice given by the plaintiffs to the defendant calling up the balance due on the bond. Provisional sentence must, therefore, be refused with costs.

MCLEOD V. MULLER AND OTHERS.

Mr. Searle, K.C., moved for provisional sentence on a promissory note for £1,617 0s. 10d., of which the first defendant was the maker and the other defendants were endorsers.

Mr. W. Porter Buchanan appeared for the defendants, and read an affidavit by Abraham Johannes Muller, of Aberdeen, who denied that he owed anything to the plaintiff on a promissory note. The plaintiff had, he said, no authority to sue on the promissory note. Counsel also read affidavits by the other defendants, both of whom declared that there was no amount owing to the plaintiff under the promissory note.

Mr. Searle read an answering affidavit by William James McLeod (the plaintiff), who entered into a detailed statement with regard to the transactions leading up to the promissory note. He averred that the amount claimed was owing.

Mr. Searle having been heard in argument on the facts,

De Villiers, C.J.: This document is, on the face of it, somewhat obscure. When the plaintiff was applied to for particulars of the account on behalf of the defendants he expressed his surprise at the application, and declined to give them a statement. He should have remembered that he was dealing with ignorant farmers, and that he had been acting for them, and that it was due to them that he should give them an explanation. It is really a matter of surprise to me that he refused to give them the explanation, which, in my opinion, was reasonably asked for on behalf of the defendants. On the whole, I have come to the conclusion that justice would be done in the present case by directing that the plaintiff should go into the principal case. He can then prove the indebtedness of all the parties, including the two sureties, under this document. In the meanwhile, I would suggest that if the defendants find, upon accounts rendered by the plaintiff, that there is an indebtedness, they should then avoid any further costs which may be incurred by tendering the amount of the indebtedness which they find to be due, instead of going into the principal case. For the present, it appears to me not to be a case in which the Court, under the ordinary procedure, would be justified in giving provisional sentence. The Court, therefore, will order the parties to go into the principal case, and the costs will be costs in the cause.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

REHABILITATIONS. { 1905.
 { Mar. 16th.

Mr. P. S. T. Jones applied for the rehabilitation of William Peter Daniel Meyer.

Granted.

Mr. P. S. T. Jones applied for the rehabilitation of Jacob Georg Buhlmann, whose estate disclosed a deficiency of £33.

De Villiers, C.J.: The insolvent ought to have kept proper books, and the trustee thinks that, apart from the fire which insolvent says destroyed his books, the insolvent had not kept a proper record. The application will be refused, with leave to apply again in six months.

GENERAL MOTIONS.

HERMANN AND CANARD V. { 1905.
 POLICANSKY BROS. { Mar. 16th.

This was an application, upon notice of motion, for an interdict restraining the respondents from selling cigarettes in packets which are colourable imitations of the packets containing cigarettes manufactured by the applicants, and which are calculated to deceive anybody intending to purchase applicants' cigarettes.

The affidavit of Nathan Canard, a partner in the applicant firm, stated that they were registered proprietors of a certain brand of cigarettes called "Sultans." The respondents, Louis and Philip Policansky, were also registered proprietors of a certain trade-mark called "Sultan." Both were registered on the 11th January, 1905. When the respondents claimed to have this mark registered, the applicants objected, on the ground that as far back as 1897 the applicants had been using the word "Sultan" in regard to cigarettes sold in South Africa. The respondent, Philip Policansky, had been in the employ of the applicants, and since he had commenced in business with his brother, he had bought large quantities of their cigarettes, the last sale being on the 6th October, 1904. The respondents were now selling their own cigarettes, in packets which were colourable imitations of packets used by applicants, and calculated to deceive anybody intending to purchase the cigarettes of the applicant firm.

The answering affidavit of Philip Policansky, stated that his firm had used the words "Sultan's Favourites" for a term of five years. He denied that the packets in which their cigarettes were enclosed were colourable imitations of those used by the applicants, and said that his firm were first in the field with the brand "Sultan's Favourite," and that it was because of the successful sales that they had had in this cigarette that the present proceedings were brought.

A replying affidavit was put in, and Mr. Gutsche for the applicants, submitted that the whole get-up of the respondents' cigarette packets showed a great similarity to those of the applicants, both in regard to the label and size of the packets. They did not say that the respondents were acting wrongfully, but they did say that the Registrar of Deeds ought not to have registered two trade marks which bore so much resemblance. For over seven years the applicants had been using the green label with the imprint "Sultan," upon their packets of cigarettes. He also submitted that the respondents were quite in error in saying that the applicants had put on the market a colourable imitation of the respondent's cigarettes, "Sultan's Favourites."

Without calling upon Mr. Burton (for respondents):—

De Villiers, C.J.: The only similarity between the two marks is that the word "Sultan" appears in them, but the respondents are registered owners of the trade mark "Sultan," so that that is not a sufficient ground for making an order in terms of the application. But, then, it is said that the word "Sultan" is printed in exactly the same way on the respondent's mark as on the applicants'. I have before me the registration of the respondents' trade mark, in which the word "Sultan" appears in that very form, but an "S," a large "S," is below the rest of the letters. Then another contention is that the trade mark is green, but the colour green is not a monopoly of one person more than another, and it does not appear to me to be any intentional imitation of the applicants' trade mark, beyond the use of the word "Sultan," which, as I have said, is common to both. There are many points of difference. For instance, there is the ornamentation of the sides. The respondents have not adopted that ornamentation, and, moreover, I find that in another respect they might have imitated the applicants' trade mark, and they did not do so. In the original there are the words "Egyptian cigarettes" at the bottom. That is exactly the same as the applicants'. But they (respondents) omitted the words, and, in the trade mark, now objected to, instead of having the words "Egyptian cigarettes" appearing on the packets, as they might

have had, they have the words "manufactured by Policansky Bros," as if to avoid an imitation, which might otherwise exist. It seems to me perfectly clear that there is no ground for the present application, and it must be refused with costs.

TURNER V. LLEWELLYN AND WIGGINGTON.

This was an application upon notice of motion, calling upon the respondents to show cause why they should not be committed for contempt in failing to obey an order by Mr. Justice Hopley to discover on oath documents relating to a certain matter at issue between the parties. Dr. Rainsford was for the applicants; Mr. W. Porter Buchanan was for the respondents.

Dr. Rainsford stated that since the notice of motion was served, a further and fuller affidavit of discovery had been made by the respondents, and the only matter now in dispute was the question of costs. At the time the further affidavit was made, the notice of motion had been served, and counsel had been briefed. Counsel read an affidavit in support of his statements by W. G. Fairbridge, of the firm of Messrs. Fairbridge, Arderne and Lawton, the plaintiff's attorneys.

Do Villiers, C.J.: The affidavit does not disclose any wilful disobedience on the part of the respondents, and it is only for wilful disobedience that the Court would commit them for contempt of Court. In filing an affidavit of discovery, they indicated in the schedule that they had certain documents. They said, for instance, that they had correspondence "between plaintiff and defendants and their respective attorneys." It would have been more formal to mention the dates, and specify more particularly the correspondence, but it is a mistake which it was natural to make, because the defendants deemed that "if once they referred to correspondence between themselves and the opposite party, that would be sufficient indication to the opposite party as to what documents they intended to produce. Well, the plaintiff was not satisfied with that, and demanded fuller particulars, upon which the defendants' attorneys wrote to their clients—their clients being some distance from here, at East London—asking for the information. Then there is a demand that it must be done by telegraph. A letter was sent in, and in due time the further particulars were given, but in the meanwhile application had already been made to the Court for attachment for contempt of Court. I think the plaintiff was in too great a hurry. The defendants' attorneys were anxious to comply with the Rules of Court, they made

a technical mistake, but it was not, in my opinion, such a mistake that respondents should be punished by the Court. The application must be refused, with costs.

KEATING V. NAZARETH HOUSE AND OTHERS.

This was an application to have a rule nisi made absolute restraining the Mother Superior of the Nazareth House from parting and otherwise dealing with a certain cheque for £200, or paying it over to one Oreste Nannucci.

The affidavit of the applicant stated that in February, 1904, he entered into a contract with the Mother Superior and Sisters of the Nazareth House, Cape Town, for the erection of a laundry block, for the sum of £2,850, and that he gave the Mother Superior authority to pay to Nannucci any money which might become due to him (applicant) on the said contract. Numerous and complicated transactions had since taken place between applicant and the said Nannucci, accounts had not yet been struck, there was a dispute, and the balance had to be ascertained. He believed Nannucci was claiming a sum far in excess of what petitioner owed him. On the 14th February, 1905, he wrote to the Mother Superior revoking the authority to pay over the said sums, and on the 16th February received a letter from her, in which she said that a cheque for £200 had already been made out payable to Mr. Nannucci, but, in consequence of the letter, this cheque had not been forwarded to Mr. Nannucci. There was a balance of £200 due to the petitioner on the contract.

The answering affidavit of Oreste Nannucci, stated that the whole of the transactions in question were between the applicant and the company of which he (deponent) was managing director, and that he could show clearly that the petitioner was indebted to the said company in the sum of £444 11s. 11d. He denied that there were any complications of accounts. Deponent held a promissory note from the petitioner for £213 8s. 2d., payable on the 28th February, 1905, leaving a balance due to deponent of £231 3s. 9d. Advances had been made to the petitioner to enable him to enter into the contract with the said authorities of Nazareth House.

Mr. P. S. T. Jones for applicant; Mr. W. P. Buchanan for respondents.

After hearing counsel on the facts, Do Villiers, C.J.: It is quite clear that the Court has not sufficient information before it to decide between the parties on the merits on this application, but it is clear that the Mother Superior ought to be allowed now to pay the money

over to the Registrar. The Court will authorise her to pay the sum over to the Registrar of the Court to abide any further order of the Court, costs of this application to stand over, any costs which the Mother Superior may reasonably have incurred, for which in any event she is not to be held liable, to be paid by whichever party is ultimately held to be in the wrong.

Mr. Jones asked if those costs would include the double briefing of counsel on the other side?

De Villiers, C.J.: I think they are wholly unnecessary costs. There is no reason why this lady should have appeared at all.

Ex parte LAWRENCE AND CO.

Mr. J. E. R. de Villiers moved, as a matter of urgency, for an interdict restraining one Barnard Philips from paying out to one Per Krawitz certain moneys, being the latter's share in a certain partnership, pending an action to be brought by the petitioners in the Magistrate's Court. The said Krawitz, who formerly carried on business at 34, Caledon-street, Cape Town, was indebted to the petitioners in the sum of £37. Krawitz had been away from this colony for a period of four years, and there was reason to believe that when the partnership had been liquidated he would again leave the jurisdiction of the Court.

De Villiers, C.J.: Under the special circumstances the Court will grant a rule, but it will not make an order, the rule to be served on Krawitz and Philips to show cause on the 15th April why an order should be made as prayed, rule to operate as an interim interdict, with leave to either of the respondents to apply in the meantime for the discharge of the order.

RASSON V. BECK.

Mr. J. E. R. de Villiers (for the applicants) moved as a matter of urgency for a commission to examine one Arnold Francois Stewart, who was about to leave this port by the *Buergermeister* for Marseilles.

De Villiers, C.J., said that a commission *de bene esse* would be granted, saving all just exceptions hereafter, the commissioner to be Mr. Advocate De Waal.

NORDEN V. KETS.

This was an application upon notice of motion for a rule *nisi* to be made absolute, restraining the respondent from proceeding with the execution of a certain writ under which he had

attached applicant's goods and chattels, rule to operate as an interdict in the meantime.

The matter, it appeared, arose out of a sale of certain licensed premises at Kuil's River, and had been standing over, pending the decision of an appeal in the action brought by Bosman, Powis and Co. against Norden, to determine the construction of a broker's note. That appeal had now been decided, and the judgment given in favour of Norden in the action had been upheld.

Mr. P. S. T. Jones was for the appellant, Joseph Benjamin Norden; Mr. Searle, K.C., was for the respondent, Johannes Simon A. Kets.

Counsel having been heard in argument on the facts,

De Villiers, C.J.: The Court has not now to consider whether Kets has acted in a very considerate manner, but the question is, has he acted according to the law? There is nothing to show that he has acted illegally. He has acted upon his strict rights, and although the Court did grant a rule *nisi* for the purpose of preventing the possibility of injustice being done to the applicant, the Court did not, by granting that rule *nisi*, intend to intimate that Kets had acted in any way improperly. By law, he is entitled to proceed to execution, but, considering that the appeal was still pending, and that the result of that appeal might be to place the applicant in a better position to carry out his part of the contract, the Court virtually—that is the effect of it—postponed the putting into effect of that judgment. The applicant now has succeeded in the appeal, and it appears now that he will be prepared, which he was not before, to carry out his part of the contract. Mr. Steytler, in refusing to advance the full sum which he promised to advance to the applicant, acted as the secretary of his Board, which was to lend the money independently of Kets. Kets was not in any way responsible for it. It so happens that Mr. Steytler was also the agent of Kets, but that does not alter the fact that Mr. Steytler, in lending the money, was acting in an entirely different position. Under these circumstances, I am of opinion that the rule should be discharged, and as to the costs, these must be paid by the applicant.

COWLING V. STABLEFORD AND CO., LTD.

Mr. P. S. T. Jones moved, in terms of section 141 of the Companies Act, for leave to continue a certain action which the applicant was bringing against the respondent company. As a matter of fact the defendant company had called the applicant's attention to the matter.

Order granted as prayed.

Ex parte BELL.

Mr. P. S. T. Jones moved for leave to raise a sum of £1,000 on mortgage, for the benefit of his minor children.

Order granted in terms of the Master's report, loan to be raised for the purpose of defraying all liabilities to the satisfaction of the Master, including costs of this application.

VAN NIEKERK V. FABER.

Mr. Searle, K.C., moved for an order extending the return day of a certain citation. Defendant, when the original application was made, was believed to be in German South-west Africa, but a letter had since been received from him from Germany stating that he would come back to this colony in March or May.

Return day extended until the 11th May.

DONAGHY V. DONAGHY. { 1905.
Mar. 10th.

Marriage — Bigamy — Decree of nullity.

The Court refused to grant a decree of nullity of marriage on motion; though the respondent had been convicted of bigamy by intermarrying with the applicant, his wife being still alive.

This was an application upon notice calling upon the respondent, Frederick Donaghy, to show cause why the marriage purporting to have been entered into between himself and the petitioner on the 10th September, 1901, should not be declared null and void, and the record cancelled. Respondent appeared in person.

De Villiers, C.J., remarked that it was unusual to cancel a marriage on notice of motion.

Mr. Searle (for applicant), admitted that it was unusual. The petitioner in this case appeared to have been unfortunate in her matrimonial relations. She was first married to one Slate, from whom she obtained a divorce, and then she married the respondent, who was at the time also married to someone else. He was convicted of bigamy and was now serving his sentence on the Breakwater. His sentence was 15 months' imprisonment.

[De Villiers, C.J. (to respondent): Do you appear to oppose this application?]

Yes, my lord.

[De Villiers, C.J.: On what grounds?]

At the present time, having still three months to serve, I have no means of obtaining legal assistance, but when I receive from petitioner the moneys belonging to me, I can engage an attorney. The petitioner was well acquainted with her position all along, and I would like the matter adjourned until the end of my term.

[De Villiers, C.J.: If you admit that you were already married at the time there can be no defence.]

Respondent said that, as to costs, he was unable to pay anything.

Mr. Searle, replying to his lordship, said he would not press for costs against the respondent.

Respondent: I was led to believe that the second marriage would be valid, providing the first wife did not set foot in South Africa.

[De Villiers, C.J.: That makes no difference. If you are married it does not matter where your wife is. Fortunately that is not the law.]

I thought it was under the Roman-Dutch law, sir.

[De Villiers, C.J.: Oh, dear no.]

Respondent went on to say that he claimed a ten per cent. commission for managing the petitioner's property, for £60 in cash, and wished to have an order for that and also for his private property.

[De Villiers, C.J.: I am afraid you will have to proceed by action.]

Respondent further stated that he had been advised that he could obtain a divorce from his first wife on the grounds of her insanity. It had been his intention to have made the petitioner his lawful wife as soon as that was done, but he was arrested before.

Mr. Searle said it was put before the Court at the trial that respondent's first wife was in an asylum in Ireland. He was informed that the petitioner did not know Donaghy was already married when she entered into this marriage.

De Villiers, C.J., said if the respondent objected to the present application on notice of motion he could do so, and a summons would be served upon him, but that would lead to much more expense.

Respondent said he would prefer that the matter should stand over until he was liberated in three months' time.

[De Villiers, C.J.: It may be less than that.]

Respondent: No, my lord, there is no mitigation on a fifteen months' sentence. Perhaps Mr. Justice Hopley did not think of that at the time.

[De Villiers, C.J.: Well, he can be communicated with.]

De Villiers, C.J.: No order will be made until the respondent is liberated from gaol. This is too important a matter to be decided on motion. The man says he has a claim in reconven-

tion. He may have a claim for costs in the action. It is clearly a case which should not be decided on motion, but by action. There will, therefore, be no order on the application.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

GENERAL MOTIONS.

BUCHER V. CADER AND { 1905.
HASSAN. { Mar. 17th.

This was an application by Francois L. C. Boucher to have a rule *nisi* made absolute, calling upon the respondents, Cader and Hassan, to show cause why they should not be interdicted from paying over certain moneys to one Abdol Mahomet, until the debt due to the petitioner from Mahomet had been discharged. Mr. P. S. T. Jones was for the applicant; Mr. Alexander was for the respondents.

From the affidavits, it appeared that the applicant alleged that there was a sum of £32 10s. due to him under a promissory note given by Mahomet; that Mahomet had sold certain business he had lately carried on in D'Urban-road, Mowbray, to the respondents; that respondents owed to Mahomet a balance of £93 8s. on the sale of the business. Mahomet, in his answering affidavit, now repudiated the promissory note.

De Villiers, C.J., remarked that it was a matter of daily occurrence that they had trouble with these Indians. They commenced business, and then, when they got into difficulties, they sold out, and the creditors found that their assets were gone.

Mr. Alexander submitted that the applicant's remedy was not against the respondents, but against Mahomet, to whom respondents now owed no liability.

Mr. Jones submitted that the affidavits filed on behalf of the respondents were not to be relied upon, and that the evidence was not sufficient to show that the money had been paid to Mahomet.

De Villiers, C.J.: Not a word is said by the respondents in their affidavits in regard to the more important allegation made by

the petitioner in his affidavit that they had expressly promised to delay the payments in order that he (the petitioner) might get the amounts as they fell due. In the absence of any denial by them of their promise, I prefer to believe what the petitioner stated in his affidavit, and I entirely disbelieve what they state in their affidavits. It is too prevalent a thing with these Indian traders that, as soon as they are in difficulties, as soon as a summons is served upon them, they immediately find some compatriots who are prepared to purchase the property from them and take an obligation upon themselves, without really meeting the obligation towards the creditors. This appears to me to be one of those cases. If the respondents had been prepared to show that it was not such a case, I should certainly have expected from them a far fuller affidavit than they have made. They fail entirely to meet the most important allegation made by the petitioner in his affidavit. I take it that they still have the money in their hands, and that they still owe the money to the defendant Mahomet, and that being my opinion the rule must be made absolute, with costs.

PAMA V. FREMANTLE.

This was an application for an order extending the time within which an appeal might be prosecuted, the time allowed under the rules having expired on the 7th March. The matter originally came before the Magistrate's Court at Matatiele on the 20th October last, when judgment was given for the defendants. This judgment was appealed against in the Eastern Districts Court on the 7th December, and the judgment of the Court below was thereupon reversed to one of judgment for the plaintiff. The present applicant, Fremantle, desired to appeal to the Supreme Court from the decision of the Eastern Districts Court. Mr. P. S. T. Jones was for the applicant; Mr. W. Porter Buchanan was for the respondent.

After the affidavits had been read, and counsel had been heard in argument,

An order was granted extending the time for prosecution of the appeal until the end of the May term, costs to be costs in the cause.

BRUMMER V. ESTATE STEYN.

Mr. P. S. T. Jones moved, on behalf of the petitioner, Barend Jacobus Brummer, for an order compelling the respondent to sign a certain transfer. The point at issue between the parties was as to the dividing line between two farms. Mr. Jones said

that the respondent had sworn an affidavit, in which she put forward her version, and said that she did not desire any litigation, and left the matter to the decision of the Court.

Rule nisi granted, calling upon the respondent to show cause why an order should not be made as prayed, rule to be returnable on the 20th April.

DEVIS V. McDONALD.

Mr. J. E. R. de Villiers moved, on behalf of Leon Devis, for an order compelling respondent to disclose particulars of a claim in reconvention for the sum of £91 16s. 9d., made by the respondent in an action now pending in this Court in which the applicant was the plaintiff. Mr. W. Porter Buchanan was for the respondent. The plaintiff claimed £51 11s. for salary; the defendant admitted liability for salary and certain board and lodging to the amount of £31 10s. 9d. In reconvention, however, the defendant said that the plaintiff had falsely and fraudulently claimed for amounts for personal expenses largely in excess of what he had actually spent.

Mr. De Villiers said that no dates or amounts as to the alleged overcharges were given, and that plaintiff was thereby embarrassed.

Mr. Buchanan said that there was no Rule of Court to enable such an application as this to be made. The charge of the defendant related simply to board and lodgings.

De Villiers, C.J.: It is worth while considering whether the Court should not frame rules to meet a case like the present. Cases undoubtedly arise in which, quite independently of the rules of Court, it would be advisable that the Court should have and exercise the power of ordering particulars being given. But no such rule is in existence yet. I do not say that the absence of such a rule would have justified the Court in cases where it is perfectly clear that a party is unable to plead properly owing to the vague and embarrassing nature of his opponent's pleadings or owing to the absence of details—I say a case might arise in which the Court would order particulars to be given for the purpose of enabling a party properly to plead. In the present case, however, no such application was made to the Court before the plaintiff replied to the plea. Now, having pleaded, he comes and asks for his particulars. In my opinion it is not a case in which the Court should go out of its way to assist the plaintiff, seeing that he did not himself apply to the Court by exception or otherwise before he filed his replication to the plea. It is quite true that now the plaintiff will have to be prepared, in order to meet

his case, with particulars as to these expenses of personal board and lodging, but it does not seem to me to be such a very wide range for him to go over. The Court will make no order on the application, question of costs to stand over until after the trial.

MIDDLETON V. WATERCHUTE CO.

Award of arbitrator—Costs.

This was an application to have a certain award of an arbitrator made a Rule of Court, subject to an amendment of the last paragraph, so as to provide for the costs being paid by the respondents.

The applicant erected by contract the waterchute at the recent Cape Town Industrial Exhibition. The arbitrator in his award made no order as to costs.

The affidavit of the applicant, Fossey John Middleton, a builder and contractor, stated that he and the respondents subscribed to a certain deed of submission, dated the 10th February, and on the 27th February an award was made and published, pursuant to the said submission. The respondents had taken up the award and paid the costs thereof, as well as the costs of the shorthand writers' services, hire of room, etc. Deponent had substantially succeeded in the claim, and he submitted that the costs mentioned in the last paragraph of the award should have been made in his favour. He asked that the respondents should be ordered to pay the costs.

[De Villiers, C.J.: What does the deed of submission say?]

Mr. Searle, K.C. (for the applicant): The deed of submission says that the matter of costs is in the discretion of the arbitrator.

[De Villiers, C.J.: How can the Court interfere?]

Mr. Searle said he believed the Court could only interfere in a very special case. He would call his lordship's attention to the case of *Wynberg Municipality v. Cape Town Council* (9 Juta 412). He might shortly state the claims that were made and the amounts awarded. In the deed of submission, the whole claim of the applicant was £1,122 12s., made up of certain six items. On the other hand, the respondents claimed against the applicant £1,538, made up of five items, quite different from those of the applicant. The award of the arbitrator was for £1,026 9s., on the applicant's claim, and for £30 on the respondent's counter-claim, so that the applicant recovered a balance of £996 9s., i.e., he recovered within £130 of his whole claim.

The answering affidavit of Joseph C. Jones, secretary and managing director

of the respondent company, stated that the company submitted that the award was not valid, inasmuch as the arbitrator had awarded the applicant £420 as hire of certain machinery, whereas the hire of the said machinery formed no part of the said submission. He also urged that the award was against the weight of evidence. Mr. W. P. Buchanan (for the respondents) opposed the award being made a Rule of Court, and said that they were desirous of applying for a fresh arbitration, or for the dispute between applicant and themselves to be dealt with by this Court. Counsel said that the arbitrator, in his award, stated that he had, in assessing the amount due to the plaintiff included a sum of £420 as cost of the hire of the said machinery and plant for Messrs. Cunningham and Gearing. Counsel pointed out that the machinery belonged to Cunningham and Gearing, and that the applicant had no right to the sum of £420 or any portion thereof. He urged, further, that the referee's award of bonus to the applicant was based on a miscalculation as to the contract between the parties.

Mr. Searle said that Cunningham and Gearing were really sub-contractors under the applicant, and the sum of £420 had to be paid by somebody. Clearly this matter was included in the submission, because it was part of the applicant's contract price of £1,875. The company said they preferred not to deal with Cunningham and Gearing directly, and the applicant therefore engaged Cunningham and Gearing to fix the machinery, and also hired the machinery at a certain rate.

De Villiers, C.J., observed that if the arbitrator had said nothing as to the reasons for his award, they would probably have heard nothing further about this matter.

Mr. Searle: The whole thing arises from the way the arbitrator put it.

Mr. Buchanan said that the respondent's position was that they did not want to pay for the hire of the machinery twice over.

Mr. Olive (the arbitrator) was called, and in answer to the Court, said that in the contract price of £1,875 the amount of £420 for the hire of machinery was included. The defendant company counter-claimed £420, and said that the machinery was theirs. In his award he stipulated that Messrs. Cunningham and Gearing were to be entitled to recover £420 from the applicant, and to take the machinery away.

Witness, on being questioned by Mr. Buchanan, said that as arbitrator he objected to giving details showing how his award of £1,026 in favour of the applicant was arrived at. His object in putting this clause into the

award was to make it clear that the Waterchute Company would not be liable to Messrs. Cunningham and Gearing for the hire of the machinery.

Mr. Searle, on the question of costs, cited the case of *Wynberg Municipality v. Town Council of Cape Town* (9 Juta 412), and submitted that the applicants, having succeeded almost on the whole of their claim, were entitled to costs.

De Villiers, C.J.: This is an application to have an award made a Rule of Court, subject, however, to a condition that the award as to costs is not to stand, but that the respondents, the Waterchute Company, should be ordered to pay those costs. I am clearly of opinion, however, that as the parties have left the question of costs to the arbitrator, it requires a very clear case of impropriety on the part of the arbitrator to justify the Court in altering his award. It is true that, according to the ordinary practice of this Court, the applicant would have had his costs, considering that he recovered a very large proportion of the amount claimed by him, and that the respondents recovered a very small proportion, but still they recovered some proportion, and I am unable to say that it was such a gross error on the part of the arbitrator as to justify the Court in amending the award in the manner asked for. But the respondents again object on other grounds, the chief ground being that a sum of £420 was wrongly awarded by the arbitrator, and that the decision upon that point had not been referred to the arbitrator by the deed of submission. There is no doubt that the clause relating to this sum of £420 is exceedingly ambiguous, and there is much force in Mr. Buchanan's argument that it might be read as if it were a matter quite outside the deed of submission, and as if the amount of £420 was practically ordered to be paid twice over. On going more fully into the case, however, it is quite clear that the arbitrator simply expressed himself wrongly. He wanted to give a reason—he made a mistake by giving reasons. If he had simply satisfied himself with saying that so much was due, no question would have arisen—he wanted to make this award perfectly clear, and instead of making it clear, he made it perfectly obscure. The object, I think, was to leave no doubt upon the question as to who was to pay Cunningham and Gearing. That being the case, I consider that the objection to the £420 falls to the ground. As to the two other objections, they are really objections the Court cannot entertain. If there were no evidence here in support of

the decision of the arbitrator, it might be considered a question of such gross impropriety as to justify the Court in interfering, but then there is some evidence in support of the decision of the arbitrator on both the points. The Court will not now consider it part of its duty to go into the evidence, in order to ascertain whether the decision is against the weight of evidence. The objections, therefore, in my opinion, fail to the ground, and the award should be made Rule of Court, with costs of the opposition.

Mr. Buchanan: Does your lordship allow costs of opposition against us? [De Villiers, C.J.: Oh, yes. Of course, there would have been some costs even if there had been no opposition. The costs occasioned by the opposition are to be paid by the respondents.]

[Applicants Attorneys: Tredgold, McIntyre and Bisset; Respondents Attorneys: Van Zyl and Buissinné.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ADMISSIONS.

{ 1905.
Mar. 21st.

Mr. Roux moved for the admission of Wm. Duncan Campbell as an attorney and notary. Counsel said that the papers were in order, except that no birth certificate was attached, but it was clear that the applicant was of full age.

Application granted, oath to be taken before the R.M. of Steynsburg.

Mr. W. Porter Buchanan moved for the admission of Claud Merrington as a conveyancer.

Application granted and oath administered.

Robert Greening asked for leave to mention the matter of his suspension from the roll of attorneys, and applied for re-admission.

The Registrar informed his lordship that the application had not been set down.

Applicant: The order of suspension gave me leave to apply after the 16th March.

[De Villiers, C.J.: Yes, but that does not dispense with the necessity of setting it down.]

Applicant: I could not set it down, because to-day is not a motion day.

Mr. Searle, K.C., said that he was instructed by the Incorporated Law Society to apply for a postponement of any hearing of this application for a month. The Law Society would have to make certain inquiries in the matter, and it would be necessary to obtain some evidence from Natal. Applicant was suspended in Natal in June, 1904.

Applicant: That was in consequence of the order made by this Court. The adjournment of the hearing, my Lord, will increase my suspension to thirteen months.

[De Villiers, C.J.: I am afraid I cannot give you any special facilities. The case has not been set down for to-day, and the only available day will be the first Thursday of next term, when the application will be heard.]

Mr. Searle said that Mr. Greening had not yet paid the costs of the last application of the Law Society.

De Villiers, C.J., said he thought the applicant should first pay the costs of that application.

Mr. Greening asked if the application could be allowed to stand over, subject to his paying the costs of the last application.

[De Villiers, C.J.: Yes.]

Mr. J. E. R. de Villiers mentioned the application of Mr. Fletcher for admission as an attorney of this Court.

Mr. Searle, K.C., said that the Incorporated Law Society were not at present prepared to offer any opinion with regard to the application.

[De Villiers, C.J.: I think the matter had better be set down in the ordinary way, on a date on which motions are heard. The Registrar has had no notice of this application. I would also say that I have continually had to make remarks about the Law Society not taking a definite stand. They come and cast doubts, and then leave the responsibility with the Court. If they think the man should be admitted let them raise no objection. If they think he should not be admitted then let them say so. Let the matter stand over till the first Thursday of next month.]

GENERAL MOTIONS.

MOKADOM V. HASSAN. { 1905.
Mar. 21st.

Mr. W. Porter Buchanan moved, on notice, calling on respondent to show cause why the judgment given in the trial cause on the 20th October, 1904, at the suit of the plaintiff, and by reason of the defendant's default of appearance, should not be set aside and defendant allowed to purge his default and defend the action, and why costs should not be paid by respondent. Counsel read an

affidavit by Said Hassan, of Kimberley, and late of Mafeking, who said that he did not owe the plaintiff, Ismael Mokadom, the money claimed by him in the summons, and that the plaintiff had wrongly procured judgment against him. Further affidavits were read to the effect that the plaintiff had admitted having obtained judgment against the applicant in mistake.

Mr. Roux read a replying affidavit sworn by the man holding the plaintiff's power of attorney, the defendant being at present in India.

Counsel having been heard in argument on the facts,

De Villiers, C.J.: The question is whether sufficient cause has been shown for setting aside the judgment given against the defendant. That judgment was given was as far back as October last year, and now, in March, 1905, an application is made to set aside the judgment on the ground that the amount was not due. I must say that if the application had been made immediately after judgment had been given there would have been strong grounds for granting it, seeing that the statement that the £31 was in respect of a guarantee is not specifically denied. But the plaintiff does not, in his affidavit, repeat his claim for £31, and he makes the further statement that the several letters were written by him to the defendant before the summons was issued, and he got no answer to any of them. That statement is not denied by the defendant. Well, plaintiff makes further statements as to the defendant having disposed of his business and absconded from Cape Town, which statements are also not denied. Anyhow, I am not satisfied that there is sufficient cause shown, the lapse of time is so great, and, moreover, the statement as to the defendant's illness is not supported by any affidavit of a medical man. There is, therefore, not sufficient cause shown, and the application must be refused, with costs.

VOGEL V. VOGEL.

Mr. P. S. T. Jones moved, on behalf of the petitioner, Mrs. Vogel, for leave to sue her husband, Rudolph Vogel, by edictal citation for restitution of conjugal rights, failing which divorce. The petitioner said her husband carried on business in partnership as a manufacturer's agent in St. George's-street, Cape Town. Respondent was now believed to be in Holland.

Leave granted to sue as prayed, citation to be returnable on the 12th June, and to be served on the defendant personally.

ESTATE RUSSELL V. RONDEBOSCH MUNICIPALITY.

This was an application upon notice of motion calling on the respondent Municipality to show cause why they should not be ordered to sanction the sale of certain property in that Municipality, on the Glendarragh Estate, belonging to the estate of the late Wm. Alfred Russell, according to the plan of sub-division submitted to them for approval, or, in the alternative, why the applicant should not be entitled to sell the same without the sanction of the Municipality.

The affidavit of Mr. Gother Mann stated that the Council refused to sanction the plan, on the ground that it did not show roads of sufficient width to satisfy them. The Council had no right to demand that the roads should be widened at the expense of the estate.

The answering affidavit of A. W. Sawkins, Mayor of Rondebosch, stated that there were two roads adjacent to the estate which the Council held to be secondary or branch roads within the meaning of their regulations. One of these was known as the Lovers' Walk. The regulations specified that such roads should be of a width of not less than 30 ft. It was because the applicants did not show roads 30 ft. wide that the Council refused to sanction the plan of sub-division.

The replying affidavit of Mr. Mann stated that the Council was trying to obtain land from the estate for the benefit of the ratepayers at large without paying for the same.

Mr. J. E. R. de Villiers was for the applicant; Mr. Searle, K.C., was for the respondents.

Having heard Mr. De Villiers in argument,

De Villiers, C.J.: The 7th section of the Act 41 of 1899 makes it unlawful "for any owner of property to sell such property in subdivided portions without having first submitted the plan of such sub-division to the Council and obtained the sanction of the Council thereto." The applicants desired to sub-divide their property, and they submitted a plan of such sub-division to the Council, and now this Court is appealed to, as if it were a Court of Appeal, from the decision of the Municipal Council. The Court has never arrogated to itself the position of a Court of Appeal in such cases. The proper tribunal to decide whether the sub-division is to be allowed or not is the Council. Of course, if the Council acts improperly, if it acts illegally, or, I may say, if it acts wholly unreasonably, the Court would have the power to interfere upon general principles, quite independently of the Act, but a clear case to that effect must be made out, and certainly, in the present case, no such clear case has been made out. It may well be that, if the

judges were Municipal Councillors, in this particular case they might have acted differently, but that is not the point of view from which they should regard the matter. The question is, has the Council acted within the limits of the law without such impropriety as would justify the Court in interfering? It is clear that if a person sub-divides his property for the purpose of a sale he must do so with the object of selling it to persons who intend to build upon the different lots. Therefore, the very sub-division implies a large addition to the buildings in the place, and when there is a considerable addition to the buildings the necessity arises for increasing the width of the roads. In regard to one of these roads, the Lovers' Walk, which has hitherto been 22 ft. in width, the Council now insists upon its being 30 ft. wide. The owners, of course, can avoid any interference by the Council by simply not sub-dividing, but, if they sub-divide, then they must comply with the requirements of the Municipality, and it does not seem to me by any means an unreasonable requirement, when these lots are sub-divided so as to become small lots, that a road, which up to the present has been 22 ft. wide, should be 30 ft. It does not seem to me to be so wholly unreasonable as to justify the interference of the Court. The same remark applies to the continuation of the old road. The old road is to be 30 ft., but at one portion of it the applicants propose to retain it at its former width, which is less than 30 ft. I am not prepared to say that it is such an improper requirement, or such a grossly unreasonable requirement as to justify the Court in assuming the position of a Court of Appeal from a decision of the Municipal Council. In my opinion, the application should be refused with costs. The costs, I suppose, will come out of the estate, seeing that the application is made on behalf of the estate.

WILSON AND CATHCART V. YOUNG.

Mr. P. S. T. Jones moved for an order in terms of the report of the special referee in an action in which the applicant claimed a sum of £224 10s as balance of a building contract, and also a lien upon the building, pending the payment of such sum as might be found to be due. There was no appearance for the respondent. The matter had been standing over for production of an affidavit of service upon respondents, which was now read.

Order granted in terms of the report of special referee.

Ex parte LAZARUS AND OTHERS.

Mr. P. S. T. Jones moved for the appointment of a *curator ad litem* for the

petitioners' minor sister, Marie Lazarus, in an action arising out of certain matters relating to the estate of the late Laurence Lazarus, of Cape Town and London.

Order granted, appointing junior counsel of the plaintiffs in the action (Mr. Jones) as *curator ad litem* to the minor Marie.

DEUTSCHES HAUS AND CO. V. JULIE DOSE AND OTHERS.

Mr. Searle, K.C., moved for a rule *nisi* temporarily interdicting Julie Dose, widow of Louis Dose, a provision merchant, of Cape Town, and others, from disposing of the proceeds of certain policy of insurance in the Economic Life Insurance Company until the balance of an alleged debt due to the petitioners, amounting to £449, shall have been paid. Recently, left the said policy of life insurance as security for a certain debt.

Counsel having been heard in argument,

De Villiers, C.J.: I see no reason for altering the view which I held at the time the application was made to me in Chambers. If the proceeds of the policy belong to the estate, in which case the applicants should make their claim in the ordinary course against the estate, the Court would, by ordering this money to be paid to the petitioners, be giving them a preference against the other creditors of the estate. If the proceeds belonged to the widow, I should be loth to hold that, because of an unguarded statement made by her to the applicant at a time when her grief must have been very recent—it is said that more than a month had elapsed, but certainly not more than six weeks.

Mr. Searle (interposing): Less than a month.

De Villiers, C.J.: Very well, I should say that is recent enough, and I consider that it is not clear to my mind that there was a binding contract made by the widow under those circumstances, by which she is bound to forego her rights in the estate to the policy and pay a sum over to the applicants, who would have no claim against her. At all events, it is a case in which she ought to have notice of the application before the Court makes an order upon her. A rule *nisi* might have the effect of leading the parties to suppose that the Court is of opinion that there is a *prima facie* case against her, but I do not think there is a *prima facie* case against her. Therefore, there will be no order.

DONAGHY V. ESTATE HABLUTZEL.

This was an application upon notice of motion brought by Elizabeth Sarah Donaghy, daughter of the late Hendrik

Pieter Hablutzel, for an order directing the Board of Executors as executors testamentary in the estate of her father to pay out certain money. Mr. Searle, K.C., was for the applicant; Mr. Uppington was for the respondents.

From the affidavits it appeared that the testator directed, by clause 3 of his will, "that for the purpose of preserving my tomb-stone and keeping the vault in order and repair, and the surroundings decent, I wish my executors to use a sum from my estate which, when invested, shall produce yearly £60, to be used and appropriated as my executors and administrators shall decide on, for the upkeep and maintenance of the vault of myself and family." Under the will two daughters were excluded from participating in the estate except as to a life interest. It was admitted that, under the clause, a sum of £159 had accrued as interest accumulated and not used. Petitioner said that the grave-yard where the vault was situated was now closed. She claimed that, as one of the heirs, she was entitled to an eighth share of the accumulations of the said sum, and also to one-eighth of such portion of the said sum as shall not be used and appropriated in the future. The Board of Executors, while not appearing to oppose the application, felt that under the terms of the will they would not be entitled to make a distribution such as the petitioner asked for, unless so directed by an order of Court.

De Villiers, C.J.: The testator apparently thought that more would be required for the up-keep and maintenance of the vault and tomb-stone of himself and family than has, in fact, been required. Since his death the up-keep has cost considerably less than £60, and the question is, who has to get the balance? Well, clearly the heirs. There is no one else who can claim it. The heirs being in the position of residuary legatees, they are entitled to any portion which lapses, and this is practically a lapse of a portion of a legacy, so that, in my opinion, the applicants would be entitled to receive so much of the amount as has not been expended by the executors. Then, as to those who have only a life interest, although that does not form part of the application, I may at once say that they would be entitled to treat the annual balance also as a part of the interest which has been accruing during the year, and to them, therefore, would be payable an eighth share each of such balance. The executors were, in my opinion, quite justified in not consenting to this application without an order of Court. But I have no hesitation now in making the order, costs to come out of the estate.

Ex parte WARNER.

Mr. P. S. T. Jones said that this matter had been standing over pending a report by Mr. Stanford, the Assistant Chief Magistrate of the Transkeian Territories. The application was for leave to sell certain property of a native, the late William Rambani, in the district of Queen's Town, to his son, Edward William Rambani, and for an order directing how the proceeds should be disposed of. Mr. Stanford, in his report, said that it was possible to administer this estate according to native law, which, under the peculiar circumstances of the case, would in his opinion be the fairest way of distributing the proceeds of the sale.

Order granted in terms of Mr. Stanford's report.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

SPECIAL CASE.

MASKEW V. ESTATE MAS- { 1905.
KEW. { Mar. 22nd.

Joint will—Husband and wife—
Massing of joint estate—
Confirmation by survivor of
joint will.

The testators, being husband and wife, made a joint will, by which the testator instituted as his heirs the testatrix and his children by her, and the testatrix instituted the testator and her children by him, and of a previous marriage, and they directed that the survivor was to remain in full and free possession of the whole of the joint estate. The testator died first, and after him his son William, who left one child, namely, the plaintiff. The testatrix made a will, revoking all former wills, except the joint will.

Held, that even if there was no such massing of the joint

estate as to make the joint will binding on the survivor after adiation, the effect of the recognition by the testatrix of the joint will was to shew that she intended by her separate will to treat the first will as binding and to deal only with her after acquired property, and that the plaintiff was entitled to the share of the joint estate, which would have accrued to her father if he had survived his mother.

Held further, that under the joint will the survivor was entitled to deal with her child's portion as her own, and that it consequently forms part of the property disposed of by her separate will.

This was a special case stated by Dorothy Maskew, assisted by her mother, the widow of Wm. Henry Maskew, against the executor testamentary in the estate of the late Maria Maskew, widow of Wm. Wilson Maskew, for a determination by the Court of the rights of the plaintiff under the joint estate of William Wilson Maskew and Maria Maskew.

The special case was stated in the following terms:

1. The plaintiff is Dorothy Maskew, duly assisted and represented by Irene Ellen Maskew, widow of the late William Henry Maskew, in her capacity as mother and natural guardian.

2. The defendant is George William Steytler, in his capacity as secretary to the Colonial Orphan Chamber and as such the executor testamentary of the estate of the late Maria Maskew, widow of the late William Wilson Maskew.

3. The said William Wilson Maskew, and his wife Maria Maskew were married in community of property, and on December 8, 1887, they executed the mutual will copy whereof is annexed hereto marked "A."

4. Under the said will the testator instituted as his heirs the testatrix and his children in equal shares, and the testatrix appointed as her heirs the testator together with her children by the said marriage and by a previous marriage.

5. The testator died on December 20, 1893, leaving him surviving his widow, the said Maria Maskew, and the following children, Maria Maskew, William Henry Maskew, Francis Hortensia Vester Maskew, and Frederick Thomas Charles Maskew, and leaving the said will unrevoked.

6. The said Maria Maskew, adiated under the said will received benefits thereunder, and remained in possession of the whole of the joint estate, as it was provided in the said will that she might do.

7. Shortly after the testator's death an account of the whole joint estate was framed by the executors of the said will, no sum was therein awarded to any of the heirs, but the gross balance of the joint estate was shown therein, the survivor being stated therein to be entitled to a life interest on the said balance.

8. The said William Henry Maskew died on April 12, 1903, leaving one child, the plaintiff, surviving.

9. The testatrix, the said Maria Maskew, died on July 31, 1904, leaving her surviving two children by her first and three by her second marriage.

10. The said Maria Maskew left at her death a further will executed on June 16, 1903, in which she revoked all former testamentary dispositions save and except the aforesaid joint will, and made certain bequests to her children by both marriages, a copy of the said will is hereunto annexed marked "B."

The plaintiff contends:

11. That the said Dorothy Maskew is entitled under the said joint will to the share of the joint estate to which the said William Henry Maskew would have been entitled had he survived the testatrix.

12. That the child's portion bequeathed to the testatrix by the testator forms part of the said joint estate, and should be distributed under and in accordance with the said joint will.

The defendant contends:

13. That there is not effected any massing of the joint estate by the mutual will of the testator and testatrix.

14. That the last will of the testatrix, dated June 16, 1903, must in law govern and determine the distribution of her entire estate, including the half of the joint estate and the portion inherited by her from the testator.

15. That under her last will the testatrix has made no provision for the plaintiff.

Wherefore the parties pray for judgment in terms of their respective contentions with costs.

Mr. Searle, K.C., for plaintiff; Sir H. Juta, K.C., for defendant.

Mr. Searle said that if it were clear under this will that the two estates were massed then he submitted that the plaintiff's first contention would be substantially proved. He submitted that the intention under the first will was to give the testatrix, Mrs. Maskew, merely a usufruct. She herself seemed to have treated it as a life interest.

De Villiers, C.J. (interposing) said that as regarded the first contention he should like to hear Sir Henry Juta. The

second contention seemed to be rather more doubtful, because what struck him was that the testator left Mrs. Maskew a child's portion absolutely.

Mr. Searle said that in the second will Mrs. Maskew did not purport to deal with a child's portion. She did not take a child's portion out of the joint estate, and put it away to be dealt with separately. The intention under the will, it would be gathered, was to benefit even more remote descendants in the direct line than the children of the testator and testatrix. He urged that the account and the fact that no mention was made of the child's portion in the second will would appear to support the second contention of the plaintiff.

Sir H. Juta submitted that there was no meaning with regard to the William Maskew's share of the inheritance. The whole will must be read together, and in order to give it any meaning at all they must construe it to mean that Mrs. Maskew confirmed her previous will, so far as she had not altered it by the second will, and that she confirmed what she had said in the first will except so far as the dispositions in the second will were contrary to the first will. He claimed that Mrs. Maskew had the right when she made the second document to make any will she chose.

De Villiers, C.J.: According to the special case the testator's wife, Maria Maskew, adiated under the will, and she seems to have recognised—I gather that from the admission in the special case—the joint will as one binding upon her. Accordingly when she proceeded to make her separate will after the death of her husband, the very first provision in that will was: I, Maria Maskew, widow of the late William Wilson Maskew, do hereby revoke all former testamentary dispositions made by me save and except the joint will made by me and the said late William Wilson Maskew, bearing date the eighth day of December, 1887, and since lodged in the Master's Office, Cape Town." I take the fair and true meaning of this to be that she, the testatrix, now recognises that will to be binding upon her, and it is upon this basis that she proceeds to make her subsequent dispositions. It is unnecessary therefore to consider whether there has been such a meaning of the joint estate as to make the joint will binding on the survivor after adiation. So far as the children are concerned, the testator and testatrix both agreed, whatever they may have disagreed about, that those children should be the heirs. The testator wished the children of his wife to be his heirs; the testatrix wished the children of her husband, that is the testator, to be her heirs. Therefore, there is, in regard to the children, a joint desire on the part of the testators to make them the heirs, and, in my opinion, that is what the testatrix intended by

her will when she said that she does not revoke it, and practically confirms it. If that view of the case be correct, then it would follow, in my opinion, that the plaintiff, who is admitted to be the only daughter of one of the children of the testator, should take the share which the father was entitled to. It is true that her father died before her grandmother, his mother, but it appears to me that this was entirely a usufructuary disposition. The testatrix was intended to have the usufruct of the whole of the estate, and therefore the inheritance of the father of the plaintiff did vest in him before the death of the testators, and she therefore is entitled to step into his shoes upon his death, and to claim his share of the joint estate.

The next point is, what forms part of this joint estate; in other words, was the testatrix entitled under the will to her child's portion? In my opinion, the point is perfectly clear. The testator instituted as his heirs the testatrix and his children in equal shares. The use of the word "testatrix" would have been wholly futile, would have meant nothing, if the plaintiff's contention be correct. The Court, therefore, finds: (1) That Wm. Henry Maskew was one of the heirs of the testators, under the joint will of the testators, and that the plaintiff is entitled to the share which would have accrued to him if he had survived his mother; and (2) that the child's portion bequeathed by the testator to the testatrix forms part of the estate which she was entitled to dispose of by her subsequent will. Costs to come out of the joint estate.

[Plaintiff's Attorneys: Reid and Nephew; Defendant's Attorneys: Van Zyl and Buissiné.]

STABLEFORD V. JOHNS.

Mr. Alexander moved, on behalf of William Stableford, general agent, Cape Town, for an order directing the respondent, Percy Johns, forthwith to deliver to the applicant the goods enumerated in the auctioneer's statement, annexed to his affidavit. Mr. W. Porter Buchanan was for the respondent.

Mr. Buchanan took the objection that the applicant should proceed by action, and not by motion.

From the affidavits it appeared that the respondent was arrested on a certain charge, and that some negotiations took place between the applicant and respondent as to finding a bail bond. The applicant said that he undertook, on his own securities, to provide bail in the sum of £300. Subsequently a sale of the respondent's furniture took place at his house at Mowbray. The applicant said that in order to protect his own interests he bought a quantity of the goods, which

would otherwise have been knocked down at very low prices. He also said that he made other disbursements on behalf of the respondent in connection with his trial before the Magistrate's Court. The respondent now refused to let him have delivery of the goods which he had bought. The respondent denied several of the allegations made by the applicant.

During the reading of the affidavits,

De Villiers, C.J. interposed, and said it was clear that the case was one in which the plaintiff should bring an action, seeing that there were so many disputed points between the parties. The Court would direct the applicant to proceed by action, notice of motion to stand for summons, and costs to abide the result.

RESSEY V. HOLLANDER.

Mr. J. E. R. de Villiers was for the applicant Hollander; Mr. W. Porter Buchanan was for the respondent, Ressey.

From the affidavits it appeared that the parties had carried on a panoramic show at the recent Cape Town International Exhibition. The present respondent, Ressey, alleged that the applicant had taken away certain sets of pictures to which he had no right, and, upon a representation to the Court that Ressey was about to leave for Durban, Natal, he obtained a writ of arrest, and afterwards obtained an interdict against Hollander, the writ being then suspended. The present question before the Court was as to who should pay the costs of the writ of arrest.

De Villiers, C.J.: The defendant, the present applicant, has already been released, and the only question the Court has now to decide is as to who is to pay the costs of the arrest. The affidavit made by the plaintiff for the purpose of procuring the arrest, states that "the defendant told me personally this morning he was leaving for Durban, Natal, today, at 4 p.m., and, in proof of his statement, I visited his boarding-house, and found all his goods packed ready to be sent off." On the other side, the defendant positively denies having made such an admission, and he denies that his goods were packed, and he produced his father to support him that there was no such packing, and his landlady, who makes an affidavit to the same effect, that the goods had not been packed, and that she had no conception of the defendant leaving. Under these circumstances, the weight of the evidence is entirely in favour of the defendant. It appears to me that the plaintiff was somewhat hasty in these proceedings. We find that not only did he obtain a writ of arrest, but

he also obtained an interdict. Having discharged this double-barrelled gun at the defendant, I think, at all events, he should pay the costs of the one application, which was wholly unnecessary, and which is not supported by real facts. The writ will be discharged, with costs.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

IN CHAMBERS.

MOTION.

DOWELL V. POLAND. { 1905.
 { Mar. 27th.

This was an application, on notice of motion, to set aside a certain writ of arrest against the applicant, Poland, on the ground that he was not indebted to the respondent in the amount claimed or any portion thereof. Mr. W. Porter Buchanan was for the applicant, Arthur Poland; the respondent, George Dowell, of 4, Savings Bank Buildings, Cape Town, appeared in person.

Mr. Buchanan read the affidavit of the applicant, Dowell, on which the writ against his client was issued under date of the 24th March. The affidavit stated that the respondent was indebted to the applicant in the sum of £150, amount of money lent and advanced from time to time by him to meet respondent's bills. Deponent had reason to believe that the applicant was about to leave this colony, having booked a passage by the steamship Devon, which is due to sail for Buenos Ayres on the 26th inst. The plaintiff was unable to discover that the applicant had any other security for the said debt. Mr. Buchanan proceeded to read a lengthy affidavit by the applicant denying that he owed the respondent any money whatever. No demand had been made upon him in respect of any debt until he was served with the writ of arrest, nor had it ever previously been suggested to him that he owed the plaintiff any sum. They were formerly intimate friends, but owing to the fact that respondent had recently spoken disparagingly of him behind his back to a lady, to whom he was engaged, their relations had been strained. He had stayed with the

plaintiff at various boarding houses and hotels, but it had always been as a guest of the plaintiff, whom, in return, he had assisted in his business, both in clerical work and in obtaining orders. It was his intention to proceed to Buenos Ayres with Miss Neva Carr Glynn, to whom he was engaged, with the intention of getting married there as soon as possible. He intended afterwards to return to the Colony. The plaintiff had demanded from him that he should pay his fare so that he also could proceed to South America, but witness had refused to do so and had declined to have anything further to do with him. Counsel also read supporting affidavits by Fredk. Charles Kippes and Miss Neva Carr-Glynn, of the Saxe and Nelson Comedy Company.

Respondent said that he had only been served with copies of the affidavits that morning and he had had no opportunity of replying to them. He, however, made a statement to the Court, in which he undertook to pay the applicant's expenses from the day he met him. When he met him applicant was staying at the Royal Hotel, Plein-street, whence he was ejected because he could not pay his bills. Witness produced certain bills which he had since paid on behalf of the applicant and Miss Neva Carr-Glynn. There were hotel charges in connection with the Metropole Hotel, Somerset Strand. He had kept the applicant four months in Mill-street, paying his board and lodgings, also for clothing, boots, etc. Applicant did absolutely nothing in return for him; he was without occupation and was going away to South America for pleasure. The bills showed actually £75 paid for the applicant, but there was also money advanced. Witness took no promissory notes from the applicant because he did not know at that time what sort of a man he was. Applicant had told him repeatedly that he was expecting money from Home and from Johannesburg and that he would repay witness.

Cross-examined: He denied that he wanted to go to Buenos Ayres. He had never stated that he would swear Poland's life away if he did not pay his fare to Buenos Ayres nor had he threatened to shoot him. He was not animated in these proceedings by spite. On one occasion Mr. Poland and Miss Carr-Glynn had a quarrel at the dinner table and the former struck Miss Carr-Glynn in the face and knocked the soup spoon out of her mouth. Witness told him that if he did not leave the lady alone he would settle with him (applicant). Applicant then turned round and blackguarded him. He denied that he had been standing treat for the applicant. The quarrel was not occasioned by witness having made disparaging remarks about applicant behind his back. Applicant wished Miss Glynn to say a certain thing to witness in applicant's

presence but she would not say it.

[De Villiers, C.J.: What do you mean?]

That I had said to Mr. Kippes that I knew more about Miss Glynn than applicant did.

Applicant, in answer to his lordship, said that he had been engaged to be married to Miss Glynn about six months.

[De Villiers, C.J.: How is it you are not married yet?]

Witness: It has been left over and left over for one reason and other.

[De Villiers, C.J.: But you take this lady away from the rest of the company?]

Witness said that Miss Glynn would be performing at the Tivoli, apart from the Saxe and Nelson Company.

Answering further questions, witness said that he was intending to marry Miss Glynn in South Africa. He would not, however, get married until he returned to this country.

[De Villiers, C.J.: What is Miss Glynn?]

Witness: She is a leading member of the Saxe and Nelson Operatic Company. During further statements, witness said that the respondent had told him that he was making £250 a month. Witness did a good deal of work for the respondent; he obtained a considerable number of orders for clothing on his behalf. The orders were executed in England. Respondent, he considered, had sworn the affidavit out of viciousness. Witness had been under arrest since Friday.

De Villiers, C.J.: This application came before me in Chambers, but I pointed out that, according to the affidavit, there was a debt due, and defendant was about to leave the Colony, and that, therefore, an application should be made to the Registrar in the ordinary course, and upon that affidavit the Registrar was quite justified in issuing a writ of arrest, because the affidavit was apparently in order. But on going into the facts of the case, it appears to me that that affidavit was somewhat recklessly sworn. There is a statement that the defendant is indebted to the plaintiff in the sum of £150, "being the amount of moneys lent and advanced from time to time by me to meet his bills." When the plaintiff is examined he is unable to prove, at all events, £150 to be due. He produces some accounts, and it is quite consistent with these accounts that the defendant's statement may be correct, that he was throughout the guest of the plaintiff. The two bills are produced, one for £7 4s. and the other for £6 14s. 3d., which are duplicates, not originals. These show that there were moneys paid by the plaintiff for the defendant. As I say, it is quite consistent with these bills that the defendant may have been the guest of

the plaintiff. He swears positively that he was the guest, and, looking at all the facts of the case, I consider that the balance of the testimony is in favour of the defendant, and I must bear in mind in this connection the conduct of the plaintiff in regard to the arrest. Whatever else is in doubt in the matter, one thing is perfectly clear, that at the last moment the plaintiff was willing to forego any claims if the defendant would take him with him to South America. When the Sheriff's officer was waiting to arrest the defendant, the plaintiff came to the defendant in his room at the Kimberley Hotel, and said "Look here, what are you going to do about my going with you to South America? Am I going or not?" To this defendant replied, "I want nothing more to do with you whatever." Upon this the plaintiff said "All right, I have a gentleman downstairs who wants to see you." Plaintiff called up the Sheriff's officer, who placed the defendant under arrest. After hearing the defendant's own version of it, I am satisfied that that is really what occurred, and it appears that the plaintiff has used the Rule of Court as a means of enforcing an extremely doubtful claim. I am inclined to think that he treated the defendant throughout as his guest, and that, now that he has quarrelled with the defendant, he seeks to show by this means that there is a debt due to him from the defendant, and as a means of detaining him here for the purpose of enforcing payment of this doubtful claim. At all events, it is a process where the liberty of the subject is concerned, and the Court should not be the means of depriving any person of his liberty upon a claim of so extremely doubtful a character. For these reasons I am of opinion that the writ should be discharged. I depend upon the defendant's statement that he intends to return to this colony. I hope he will carry that out, so that the plaintiff may have an opportunity of bringing his action hereafter, not that I think he may be able to get much by that action, even should the defendant be fortunate with his speculation at Buenos Ayres in regard to cattle. I am satisfied that there is no debt owing, and, having that opinion, I think that the defendant should not be deprived of his liberty. The writ will, therefore, be discharged, costs of this application to abide the result of any action which may afterwards be brought. If such action is not brought after the return of the defendant to this colony, then in the ordinary course the defendant may apply to this Court for his costs. The writ will stand in place of a summons.

APPENDIX.

NOTE.

The Editor regrets to state that the following important judgments were received too late to follow the respective cases in this report to which they refer :—

MUNICIPALITY OF ADENDORP V. KINGSWELL.

Measdorff, J. : It appears in this case that in November, 1855, one Adendorff, the owner of a farm in the neighbourhood of Graaff-Reinet, called "De Erf" was desirous of establishing a village on his farm. For that purpose he caused a portion of this land to be laid out by a surveyor in lots or erven, which he sold at public auction on the 24th of November, 1855. Amongst the conditions of sale were the following, which are the only ones material to the issues in this suit: "II. Every purchaser or owner of any erf shall have right to the grazing lands as hereinafter stipulated, and the said grazing lands shall be used by the owners or occupiers of "De Erf," or the future owners also. IV. The grazing land above mentioned, shall consist of all the ground, not being arable land situate on the right or western side of the Sunday River, and shall be exclusively for the use of the occupiers of "De Erf," or any of the occupiers of the ground thereof and owners of erven, and no one shall have the right to accept or allow strange cattle to graze, and every erf shall have the right to keep eight oxen and twelve sheep on the said grazing land. V. No one shall have the right to cut wood on the ground of "De Erf," or damage the growing trees in any way; owners of erven shall, however, be entitled to firewood, by which must be understood dry thorn-wood, and that only on the left or eastern side of the river, as far as the village extends." The village established in 1855 was called Adendorp. On the 5th of November, 1856, another portion of the farm was laid out in erven or lots of ground, and sold at public auction, constituting what are called in this case, the villages of Rouvierville and Retreat. The grazing rights of the erfholders in these villages were similar to those of Adendorp, but their right to firewood is expressed in the following terms: "V. Any owner shall have the right to cut wood as far as his ground or erf extends on both banks of the river, but they shall in no way damage any growing thorn trees, and no one shall cut wood, or in any way damage the trees, along the water-furrow." I have given the conditions respecting the right to firewood of the erfholders of the village of Adendorp in full, not because

it is material to the issues directly, but for the light it is said to throw on the condition pertaining to Rouvierville and Retreat. It is admitted that the complaint of the former erholders in this respect cannot be maintained, because the village of Adendorp had no right to firewood on the west bank of the river, and the operations on the part of the defendant, which was complained of, were confined to that bank only. But a comparison of the conditions has given rise to the contention that whereas the erholders of Adendorp had no right to interfere with any growing trees, but were to be contented for firewood to take only dry thorn-wood; the erholders of Rouvierville and Retreat, on the other hand, were entitled to cut wood, so long as they did not damage any growing thorn trees. This is almost a larger right than the plaintiff's seemed at one time to contend for, but I think it must be taken, now that it was agreed at the trial that every erholder of Rouvierville and Retreat was entitled to cut wood other than growing thorn trees, and in the case of thorn trees they could take dry or dead wood. This right could be exercised by each owner only opposite his own erf on both banks of the river. It was contended for the defendant that the right should be strictly confined to the immediate banks of the river, and not extend inland. But it appears to me, after hearing the description of the country given by the witnesses, that a belt of trees runs along both banks of the river, wider in some parts and narrower in others, but never very wide, and I think the conditions has reference to the whole of the belt, as distinguished from the trees on other parts of the farm. These, therefore, were the grazing rights of the erholders of Adendorp, Rouvier and Retreat, and the full rights of those of Rouvier and Retreat. A Municipality was thereafter established, embracing the three villages mentioned, called the Municipality of Adendorp. The Commissioners of that Municipality appear as plaintiffs in this case to vindicate the common rights of the inhabitants, and it is admitted by counsel for the defendant that they are entitled to take up that position, in accordance with the cases decided in this Court. In 1901 the defendant purchased the farm "De Erf," which is subject to the above-mentioned servitudes in favour of the erholders, and he obtained transfer on the 21st day of September, 1901. His main object in the transaction was to make a profit out of the firewood growing on the land, and he says himself, "Before buying, I made a thorough inspection of the property, with a view to ascertaining whether the wood-cutting upon upon the land would recoup me for

the purchase." At that time, in consequence of the restrictions imposed under Martial Law, the inhabitants of the town and district of Graaff-Reinet were hindered in their movements about the neighbourhood, and experienced great difficulty in obtaining fuel for ordinary daily use. Any person, who was allowed facilities by the military authorities in this respect, enjoyed a fair prospect of making a good thing out of the sale of firewood. Such facilities were allowed to the defendant, and he was not slow to take advantage of them. The more fuel he could place upon the Graaff-Reinet market during a time which was a close season to most of the inhabitants, the better for him. He says, "I told the woodcutters to cut all wood fit for fuel." Myburgh says, "I was employed in cutting wood for the defendant for about a year. I cut everything suitable that I came across. I cut every kind of bush, if it was suitable. In the matter of bushes, I would not cut anything under one-and-half or two inches in diameter." Cornelis Swanepoel, who was also employed by the defendant to cut wood, stated, "I was told to cut all I could find. The defendant's instructions to me were to cut right and left as you go. I was leaving young trees of about two inches in diameter, but I was told to cut them down." The wood brought into Graaff-Reinet is described by Smith, who bought it for his bakery, and says, "The defendant supplied me with all sorts of wood—plum, witgat, quarri, and others. Some of it was very thin, but we were glad to get anything at that time, as Martial Law was preventing people from coming in with the wood. It was all green wood with which I was supplied. I had never previously bought green plum-tree wood. It is very seldom cut, unless land is being cleared for sowing purposes." This gives a pretty clear idea of the instructions given by the defendant to his workmen, and of the way the work was performed. It seems to me that even if the defendant were acting wholly within his rights in what he did, it would be a very sad day for the country if any large number of farmers were to deal with their land in the way he dealt with his; and disastrous results would follow from the consequent denudation of the country. Fortunately so strong a temptation as existed in this case does not often occur. I am not surprised that Mr. Booysen, a neighbouring farmer, was so shocked when he saw the bank of the river being stripped bare, that he eagerly enquired whether no means in law could be discovered to stop the work. These remarks are only made in passing, because, if the defendant acted within his legal rights, no one has in law a right

to complain, and all the Court has to ascertain is if any injury was done by the defendant to the erfholders represented by the plaintiffs for which they are entitled to redress. It was urged that the defendant was not engaged in any worthless or wanton destruction, and for my own part I must say that all that actuated the plaintiff were the commercial and financial considerations of making as large a profit as possible within the exercise of what he regarded as his legal rights. He bought the land for £225, sold about 1,000 loads of wood for something like £2,000, more than half being clear profit, and then resold the property to the Adendorp Municipality for £610, agreeing to forego half the purchase price if the Municipality eradicated the prickly on the land within 12 months. The character of these financial transactions does not affect the legal issue between the parties. The Court has now to decide if the defendant in cutting wood on the farm injured the erfholders in the rights to firewood and grazing under the conditions mentioned above. The plaintiffs complain that the defendant wrongfully and unlawfully cut down and removed all the veld bushes, thorn trees, and other trees and shrubs of every sort growing on the property in violation of the rights of the erfholders, and thereby destroyed the grazing ground thereon. The complaint of the plaintiffs is twofold, first in respect of their loss in firewood: second, in respect of the damage to the grazing. As to the former, the defendant in his plea, after stating that the erfholders at times exceeded their lawful rights in cutting wood, admits that he cut down and removed certain firewood on the west or right bank of the river in respect of which the erfholders of the villages of Rouvierville and Retreat had certain rights of cutting wood in terms of the said conditions, and in respect of any damages suffered by them in this respect he tenders the sum of £25. It was contended at the trial that this tender was not intended to be restricted to this part of the case, but in view of my decision in the case that point will not be of any importance. It was admitted at the trial that the defendant in cutting down all the trees opposite Rouvierville and Retreat acted under a misapprehension, and in ignorance of the fact that the rights attaching to these erven were larger than those belonging to Adendorp in that they extended to the opposite bank of the river. In my opinion the conditions in respect of firewood does not deprive the owner of the property from making a reasonable use of the trees growing on the banks of the river, and from cutting them down as he may from time to time require them, and even selling them as firewood if he

were desirous of doing so. But he must respect the rights of the erfholders while exercising his own. They were entitled from time to time to collect dry wood, and even to cut down trees other than thorn trees, which I take to be mimosa trees. These rights must run together, and whether they are exercised reasonably is a relative question dependant always on the special circumstances of each case. But it is not difficult to decide that when the defendant laid bare the banks of the river, as he is in my opinion proved to have done, he wrongfully deprived the erfholders of substantial benefits to which under the conditions of sale they were entitled. Evidence was produced to prove that in time trees would spring up again, but this must necessarily be a process of some years, and the erfholders in the meantime suffer loss for which they have a right to compensation. That some pecuniary loss has been sustained in this respect by each of the erfholders of Rouvierville and Retreat has in my opinion been proved, and the accumulation of dry wood left after the wood-cutting by defendant has not compensated them for their loss, but on the other hand I am satisfied upon the evidence that after the manner in which the erfholders have exercised their rights in the past the annual yield of firewood under the conditions would not have been large. I cannot accept the view that the wood so obtained would have satisfied their daily requirements. The materials provided for assessing damages suffered by the erfholders of Rouvierville and Retreat through loss of firewood is extremely meagre, but it would seem that the belt of wood opposite their erven skirted the river for about 3,000 yards, and extended some distance from the banks, and during the year they collected a fair quantity of firewood, the loss of which they will experience for a number of seasons. I think £100 damages should be allowed in this respect. This is certainly not excessive, but only a rough estimate can be made upon the evidence adduced. The other branch of the case dealing with the grazing rights of all the erfholders is practically the more important of the two to the plaintiffs, but in view of the evidence produced it presents very little difficulty. There is abundant evidence to prove that the defendant in his wood-cutting operations destroyed an immense quantity of bushes and shrubs which constitute the bulk of the pasturage on the slopes of the hills. On the one hand I am of opinion that although the large trees may at certain seasons afford excellent herbage, they do not the less retain the character of firewood which the defendant was entitled to cut down in a reasonable manner; but on the other, although among the bushes or shrubs

mentioned some thicker stumps may be found fit for firewood, they nevertheless were regarded by the parties and must be taken to form the grazing for stock provided for in the conditions of sale. It appeared that the erfholders would have a right to place 1,724 small stock and 1,043 head of cattle on the land, and at its best the land could not support more than 1,000 sheep and 100 head of cattle. They would therefore be entitled to the full and undiminished pasturage on the property. The defendant admits that from 250 to 300 loads of wood were cut in the kloofs and ridges. A large proportion of this must have consisted of the stumps of shrubs and bushes, of which very many would be required to make up one load, each of these stems must have carried a fair amount of foliage, and their destruction must have largely reduced the herbage on the land. I quite believe the witnesses who say that the shrubs in question, growing on the rugged stony hillsides take a considerable time to recover after being cut down. Some substantial damages must have been sustained by the erfholders through the consequent deterioration of the veld, and in this case also the loss must extend over several seasons. But here also no measure is afforded by which the damages can be nicely estimated, but when it is borne in mind what the defendant made in the sale of wood taken from this portion of the land, I am of opinion that £200 would be a reasonable sum to allow the plaintiffs in this part of the case. Judgment will be given for the plaintiffs for £300 damages with costs, the Commission declared necessary witnesses.

[Plaintiffs' Attorneys: Michau and De Villiers; Defendants' Attorney: Trollip.]

FOURIE AND OTHERS V. MOSTERT AND OTHERS.

Maasdorp, J.: It appears from the evidence adduced in this case that on the 12th day of November, 1881, Coenraad Josephus Fourie and his wife Martha Maria Fourie, who were married in community of property made a joint will, to which a codicil is annexed by which they bequeathed to their joint children already begotten, or still to be begotten of their marriage, and in case of predecease of one or more of them, then their lawful descendants, all the landed property belonging to their estate at their death. The heirs having the right to sell their shares or rights to one another, only so that these lands shall remain in the possession of the heirs or their lawful descendants only. Thereafter Martha Maria Fourie died, but Coenraad

Josephus Fourie is still living. He seems to have adiated under the will and codicil, and the inheritance and bequests became vested in the heirs and legatees in terms of the will and codicil. The children interested in the land bequeathed under the codicil are the plaintiffs, their sister Isabella Johanna Mostert, and the defendant Ockert Josephus Fourie. After the death of their mother, the children were permitted by their father to take possession of the land bequeathed to them in separate but undivided portions, on condition that each of them paid him an annuity of £15 in consideration of his having given them the immediate occupation of the land. The several heirs accordingly took possession of their separate portions, and remained in occupation thereof until the year 1904. On the 22nd of September of that year Ockert Fourie entered into an agreement with Winnie Annenberg, married in community of property to Hirsch Braur Annenberg, and Jacobus Petrus Mostert, two of the defendants, by which he sold to them the land inherited by him under the above-mentioned codicil for the sum of £7,900, in lieu of £1,500, of which the seller accepted land held by the purchaser under an option from one Johannes J. Smith; £350 was to be paid in cash, and £50 in value, represented by a boiler and other articles. Possession was to be taken on the 16th October, 1904, and transfer to be given as soon as possible. The purchasers also undertook to pay the annuity of £15 payable by Ockert to his father. When this purchase took place, the purchasers were not aware of the restrictions upon the sale of the property contained in the codicil. When they discovered that the sale could not go through without the consent of the other heirs, they set about obtaining it, with the result that upon the 24th of September, 1904, they became the holders of a document signed by all the heirs, in which the heirs gave their consent to the sale of the property mentioned to Winnie Annenberg and Jacobus Mostert, saying they had no desire to take over or buy the property in terms of the will of their parents. Upon the circumstances attending the execution of this document depend the issues raised between the parties in this case. The plaintiffs allege that their consent was obtained by false and fraudulent representations made by the defendant Mostert, acting for himself and his co-purchaser, Winnie Annenberg, and they pray that the said written consent may be declared null and void, and that the defendants may be ordered to deliver up to them the said document; and they also ask for an order restraining the said Ockert Josephus Fourie from passing and the

other defendants from taking transfer of the property. The defendants (Mostert and Annenberg) deny that any false and fraudulent representations were made to induce the plaintiffs to give their consent to the sale. The alleged representations are set forth in the eighth paragraph of the declaration, and are the following: That the defendants had bought Ockert's share in the land for £3,050, and had sold to him the property of Smith for £2,700, leaving £350 to release Ockert from his financial embarrassments, and that Smith's farm consisted of 20 morgen arable land, 400 morgen grazing land, and a large vineyard and orchard, whereas the purchase price was in fact only £1,900, to be paid upon the terms already mentioned, and Smith's farm consisted only of about six morgen arable land and 70 morgen grazing land, and was worth no more than from £600 to £700. It appears that the farm of Smith was bought by the defendants on the 27th of September, 1904, for £850, £400 of which was to go in payment of a bond on the property, £250 to be paid in cash, and £200 by a four months' promissory note. The Divisional Council value of Smith's property was £480, and as it is not unfrequently the case, that the Divisional Council valuation is not much more than half the true value, it may be taken that £850 was a fair price for the land. The defendant Mostert said in evidence that at the time he bought Ockert's ground he considered it worth from £2,100 to £2,200. In that case the defendants obtained a property worth upwards of £2,000 for one valued at £850, a cash payment of £350 and £50 value in goods, making a total of £1,250. This was an excellent bargain for them, and the plaintiffs say it was even better than that, because Ockert's property, they say, is worth £3,000. The plaintiffs do not question the amount of the actual price given as standing at £1,900, and consequently the Court has not to go into the question whether persons who have a right of pre-emption can object to the value placed upon property forming part of the purchase price with respect to which they have to exercise their option. It is quite obvious that such persons may be defeated in their rights if the purchase price is in this manner fictitiously increased. As between the parties it must be taken that Smith's property represents £1,500 of the purchase price of Ockert's land, but, taking it at that, the defendant expected to make a very good thing out of the transaction, when, unfortunately for them, they discovered that unless they obtained the consent of the other heirs they would be disappointed in their expectations. On the other hand, it is perfectly clear that the plaintiffs were very averse to having strangers coming amongst them on to

the land, and would have done everything in their power to prevent it. It is not pretended by the defendants that the plaintiffs gave up their right of pre-emption, because they were indifferent in the matter, on the contrary, Mostert admits that he had the greatest trouble to induce them to give their consent. The position was, therefore, this, the plaintiffs were anxious to keep the defendants out of the property, and there was no reason to believe that if they could have done so by buying the property for themselves at a reasonable price they would have been unwilling to do it. There is no doubt that the defendants upon their own admission had bought the property at a reasonable, if not low figure. In law they were obliged to allow the plaintiffs the option of taking the farm over at the same price, before they could take advantage of their bargain, and they must have been aware that if that option had been placed before the plaintiffs, they would in all probability have adopted the purchase. It was under these circumstances that Mostert went to the plaintiffs to obtain their consent, and it was under these circumstances that the plaintiffs say he made the false representations complained of. Now it is quite clear that the plaintiffs were entitled to be informed that they could, if they wished, take over the property for £1,900, the price actually agreed upon by the defendants, and yet the defendant Mostert admits that he never told them what the price was stipulated between them and Ockert. Mostert says the true price was not mentioned because the plaintiffs must have known what it was, but there is no evidence that they did, and I fully believe their uncontradicted statement that they did not. This finding has a damaging effect upon the rest of the defendant Mostert's evidence. The price for which the plaintiffs might obtain the property, in accordance with their rights under the codicil, was all important to them, and must have been a subject of inquiry by them. I believe the question was raised, and the price was mentioned, but not the true price. The issue raised was a very serious one, and counsel on both sides, seeing the importance of it, subjected the opposing witnesses to very severe cross-examination. This necessarily occupied a considerable time, but it throws much light upon the case, and as a result has greatly facilitated the finding of the Court upon the facts. The weight of evidence upon the side of the plaintiff, both direct and circumstantial, is so overwhelming, that I consider it unnecessary to go into a nice analysis of the conflicting testimony. One would imagine that when Mostert went to see the plaintiffs to obtain their consent to the written contract of sale, with the

terms of which he would have to acquaint them, the most natural course was to take the contract with them; but this he neglected to do. Not having the document with him, the next best thing was to take Ockert, who was in his company on his way to the plaintiffs, with him, to support his application to them; but this, also, he neglected to do, the result being that he now stands unsupported by documentary or other evidence over against all the plaintiffs and several disinterested witnesses. One after another, these witnesses narrated what took place at the interviews between Mostert and the plaintiffs, and there is no doubt that, as compared with the evidence of Mostert, the probabilities are vastly in their favour. I can see no reason for doubting the credibility of Ellis, Claassen, and Stokes, who are wholly disinterested in the

case, I cannot see what could have induced the plaintiffs to withdraw their consent in October, if they had given it in September, with full knowledge of all the circumstances. Nor do I believe that if they fabricated a false case in October, they could have induced men like Ellis, Claassen, and Stokes to support them in it. These are only a few of the many reasons that exist for coming to the conclusion that Mostert did, by these false representations set forth in the declaration, induce the plaintiffs to give their consent to the sale. The plaintiffs are, therefore, entitled to have it declared that the written consent obtained from them under those circumstances is null and void. Judgment will be given for the plaintiffs in terms of paragraphs (a), (b), and (c) of the declaration, the plaintiffs being declared necessary witnesses.





"Cape Times" Law Reports.

CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

SUPREME COURT

[Before the Chief Justice (the Right
Hon. Sir J. H. DE VILLIERS, P.C.,
K.C.M.G., LL.D.).]

MOTIONS.

Ex parte HEATLIE. { 1905.
Apr. 4th.

Mr. W. Porter Buchanan moved for a rule nisi restraining Elias Adamstein from collecting or receiving rents from the tenants of certain property known as York Buildings, Hanoverstreet, Cape Town, to be made absolute. Counsel said nothing had been said about the service and the rule was handed over to the Sheriff for service. There were affidavits from a clerk in the office of the Sheriff and from Mr. Harant, the attorney acting for the applicant, to the effect that although every effort had been made to effect personal service, they were unable to do so, although it was known that the respondent was in Cape Town.

[De Villiers, C.J.: Has he not a last known place of residence?]

Mr. Buchanan: No, my Lord, it is not known where he resides. He had a place at Richmond, but the order has been returned from there, the respondent having left for Cape Town. A copy of the rule had been served on William Henry Low, partner in the firm of Syfret, Godlonton and Low, who were acting for the respondent, but Mr. Low said he had no power to accept service and that he was not acquainted with the respondent's whereabouts, although the respondent had been in the office a few days previous. In the petition there was an allegation to the effect that an irrevocable power of attorney had been granted to Mr. Heatlie to collect the rents and

there was a further allegation to the effect that the attorney had written to Mr. Heatlie withdrawing the power and Mr. Heatlie replied that he could not do so. The respondent, it appeared, was keeping out of the way in order that the rule could not be served on him. The respondent had collected rents from the tenants, but none of them knew his address. Under the circumstances the question was whether his lordship would order substituted service, or whether the service on Mr. Low would be considered sufficient, seeing that he was acting for the respondent in the matter.

De Villiers, C.J.: It would appear that the respondent is keeping out of the way, and the order will be made, but the right will be reserved to the respondent to apply for a discharge of the order. He is sure to become aware of this order being made, and then, if he can show good cause he can apply for the discharge of the order. For the present the Court will grant the order as prayed, with liberty to the respondent on good cause being shown, to apply for the discharge of the order.

Ex parte MUIRHEAD.

Mr. P. S. T. Jones moved on behalf of the petitioner, as trustee in the insolvent estate of William Whittaker, for an order requesting the Courts in Rhodesia to aid and be auxiliary to this Court for the purpose of recognising an order of this Court for the sequestration of the said insolvent estate. The petitioner, it appeared, had sold a certain farm belonging to the estate situate in the district of Gwelo, but he had now discovered that he could not give transfer thereof owing to the fact that the assets in the estate in Rhodesia had not been vested in petitioner as sole trustee.

De Villiers, C.J., asked counsel under what Act the application was brought?

Mr. Jones replied that the application was made under 46 and 47 Victoria (cap. 52). Aid such as was now sought was granted in the case of *Hands v. Mackie and Co* (14. C.T.R., 499).

De Villiers, C.J., observed that 118th section seemed to be wide enough to cover the application and an order would be granted as prayed.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

MOTIONS.

CORTESE AND WEBSTER V. { 1905.
BOND AND TUCKER. { Apr. 5th.

Mr. Gardiner moved as a matter of urgency for an order directing the respondents F. R. Bond and W. J. Tucker, to deliver to applicants possession of certain premises known as 24, Dorpstreet, Cape Town. The affidavit of one of the applicants (Mr. Cortese) stated that they entered into an agreement of purchase and sale with the respondents whereby the applicants disposed of certain engineering business with mechanical appliances, in Cape Town, to respondents. The agreement provided *inter alia* that the *dominium* in the property should not pass to the respondents until the latter had paid the last of the four instalments of the purchase price. The respondents had failed to meet the second instalment of £250. It now appeared that there were no assets in the estate of the respondents. Applicants wished to get back the premises, of which they were lessees, and carry on the business. There was an intention, it seemed, to surrender the estate of the respondents.

Mr. Gardiner (for the applicant): We wish to get back to these premises and carry on our business, subject to any rights of the creditors. Here the premises were sold under a suspensive condition. Such a condition is good in law—see *Quirk's Trustees v. Assignees of Liddle* (3 Juta 322).

[De Villiers, C.J.: In that case the word "sold" was used; your contract is simply that *dominium* shall not pass until the purchase price shall have been paid.]

I submit that the two cases are very similar.

[De Villiers, C.J.: Do you claim forfeiture?]

We do not at present; but we may do so when the trustee shall have been elected. We are fully prepared to undertake not to dispose of the plant. See also *Harmer v. Rylands* (4 Juta 225).

De Villiers, C.J.: As between the applicants and the respondents the applicants would seem to be entitled to an order such as is prayed for, but any such order should not prejudice the creditors of the respondents. The creditors are not before the Court and we do not know what they might urge against the permanent possession on the part of the applicants of the premises. The Court will, therefore, grant the order as prayed, without prejudice to the rights of the respondents' creditors, the applicants undertaking not to remove any of the machinery or mechanical appliances on the premises, pending a further order of the Court.

Costs against the respondents.

[Applicant's Attorney: G. Trollip; Respondents' Attorney: W. G. Coulton.]

MC MULLEN V. TRUTER.

Mr. P. S. T. Jones moved upon notice calling upon the respondent, Truter, to show cause why a writ of arrest against the applicant should not be suspended upon payment of £3 per month and why respondent should not be ordered to pay the costs.

Mr. Lewis was for the respondent.

An affidavit by the applicant, D. John McMullen, stated that in January, 1904, a civil warrant of arrest had been issued against him, to be suspended on payment of £3 a month and £53 on the 1st April. He had paid the instalments of £3 a month but his financial position would not enable him to carry out his promise to pay £53 on the 1st of April. He found that, owing to the general stagnation of trade, he had great difficulty in obtaining his fees. He also had other creditors against his estate. His income from his practice showed a considerable falling off last month as compared with twelve months ago.

Applicant was called. In answer to the Court he said that from the beginning of October next he thought he would be able to pay higher instalments, he would not say whether it would be £53. He thought he would be able to promise, with confidence, to pay £13 a month from the 1st October.

Cross-examined: He was unable to make that offer date from the present month. There were three other demands against him. His practice was at the top of Hanover-street, adjoining the Walmer Estate, Woodstock. He had paid £900 out of the £1,400 that

he had owed, so that he was still indebted in the sum of £500.

The decree was further suspended, pending the payment of £3 per month until the 1st October, from which date an additional sum of £10 to be paid each month, until the capital and costs, including costs of this application, shall have been paid.

REX V. JANSEN.

{ 1905.
Apr. 4th.

**Medical and Pharmacy Acts—
Chemists' and druggists'
assistant practising as chemist
and druggist.**

The appellant, who was not duly licensed as a chemist and druggist, prepared medicine, as it was his habit of doing, according to the prescription of a medical practitioner, during the temporary absence of his employer S., who was duly licensed and was the owner of the chemists' shop in which the appellant was employed.

Held, that the appellant was guilty of a contravention of the 35th section of Act 34 of 1891.

This was an appeal from the Court of the Resident Magistrate of Cape Town, the appellant having been convicted of a contravention of section 35 of Act 34 of 1891. The charge against the appellant was that on the 11th November, 1904, he did wrongfully and unlawfully, without the licence in that behalf and contrary to the provisions of section 35, Act 34, 1891, practise as a chemist and druggist, and did dispense, sell, and deliver to one John James Kelly, a detective in the urban police, a certain bottle of medicine which had been prescribed by a medical practitioner. Mr. Schreiner, K.C. (with him Mr. Howell Jones) was for the Crown.

Mr. Schreiner said that the case was one of great importance to the medical profession, because it raised the question of whether an assistant of a duly licensed chemist may or may not dispense medicine, except under the actual eye of the chemist standing at his side, the assistant not being himself registered. Our law differs materially from the English law of 1868, section 15, under which a chemist's assistant must be himself registered. It is not so with us; and the question now raised is whether an unlicensed assistant may or

may not dispense medicines save under the eye of a licensed principal. These proceedings are taken under Act 34 of 1891, section 35. With this Act must be read sections 3 and 8 of Act 7 of 1899. Sections 50 and 51 differ very much in their terms from those of the English Act. They allow an assistant to sell poisons, under certain restrictions. Surely, if he may sell poisons, he may likewise sell any other drugs. I quite admit that the principal is responsible, should the assistant, owing to the negligence of his employer, be guilty of any misfeasance. Had the employer to stand at the elbow of his employee during the whole time that the latter was engaged in making up a prescription; no doubt the employer would be directly liable. Should this conviction be upheld, every chemist must close his shop so often as he leaves it, if only for the space of five minutes. The English law, though more stringent than our own, does not go quite as far as this—*Pharmaceutical Society v. Wielden* (62 L.T., 727), in which, see judgment of Hawkins, L.J.

[De Villiers, C.J.: Does not the Act of 1891 make a distinction between selling poisons and practising as a chemist? The appellant is not charged with selling poisons, but with practising as a chemist.]

I contend that he was not practising. [De Villiers, C.J.: What is the meaning of "actual personal supervision?" What do you mean by "actual"?)

True and *bona fide* supervision. Section 45 places restrictions on the sale of poisons.

[De Villiers, C.J.: Many hardware merchants sell poisons.]

Only those named in the Act.

[De Villiers, C.J.: Arsenic is the very first named in section 46.]

A general merchant may not sell that without a certificate from the Resident Magistrate.

[De Villiers, C.J.: How does that affect you?]

I use that fact merely as an *a fortiori* argument.

[De Villiers, C.J.: I do not see how you can get over the word "actual" in the Act. If a chemist may be absent from his business for an hour, why may he not be absent for twenty years?]

The analogy of the case of articulated clerks would go to show that two such cases would differ very widely. The terms of the Poisons' Act show that an unqualified assistant may, under certain conditions, without the actual presence of the chemist or druggist, dispense poisons and *a fortiori* he need not be actually present when drugs of a non-noxious character are compounded *Bona fide* and personal supervision does not necessarily mean actual presence.

[Maasdorp, J.: The English case you have cited shows that "personal super-

vision" means under the very eye of the licensed chemist.]

In that case the chemist would sell. The Cape Act does not go so far as the English Act. See also section 11 of Act 7 of 1899. A dentist's assistant is not on the same footing with a chemist's assistant.

[De Villiers, C.J.: A chemist's assistant may sell many things without practising as a chemist, e.g., he may sell milk and soda.]

A man does not practise simply because he makes up a prescription in his employer's absence.

[De Villiers, C.J.: How long may the employer be absent?]

The Court must judge each case on its own merits.

Mr. H. Jones (for the Crown) was not called upon.

Without calling upon Mr. Jones, De Villiers, C.J.: There is much to be said against the policy of certain portions of the Medical and Pharmacy Act, but the Court has to deal with the question whether there has been a contravention of a certain section of the Act. I quite agree with Mr. Schreiner that the appellant could not be convicted of a contravention of the 35th section of Act 34 of 1891, unless he had practised as a chemist and druggist. His general practice was to dispense and prepare medicines, according to the prescriptions of medical practitioners, during the temporary absence of his principal, Mr. Strange, who was a duly licensed chemist and druggist. On the occasion in question he did the same thing, and, in my opinion, he practised as a chemist and druggist in the same way as a dentist's assistant, who drew or filled a tooth, would be practising as a dentist. The Magistrate was, therefore, bound to convict the appellant, unless such practising took place "under the actual personal supervision and control of some duly licensed chemist and druggist." Can the Court possibly hold that the appellant was under the actual personal supervision and control of his principal if the principal were eating his lunch at the time in his own house away from the shop? It may be hard upon the employer, and upon his assistants, and even upon the public, that the licensed chemist and druggist should have to personally supervise the compounding of the medicine, but the Legislature has so willed it, and, until the Act is amended, it must be carried out by all concerned. Much has been said about the 8th section of the subsequent Act, the Act of 1899, where it is said that every shop shall be conducted and under the *bona fide* and personal supervision of some registered chemist and druggist. But I cannot see that this section can be held to repeal the 35th section of the previous Act. Then the Court has been referred to the 50th section of the Act of 1891, which

refers to the sale of poisons. I do not understand that in this particular case there was a sale of poison, and the defence has not been raised that under the 50th section the appellant was entitled to sell poisons. I do not wish it to be understood, that the Court thinks it is against public policy that this prohibition should exist, because we know that dentists, have happened through prescriptions, have happened through prescriptions being improperly made up. I am of opinion that the appeal should be dismissed.

Maasdorp, J., concurred.

[Appellant's Attorneys: Friedlander and Du Toit.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon Mr. Justice MAASDORP.]

REVIEW.

NTIKINCA V. NGCANI. { 1905.
Apr. 6th.

Review—Gross irregularity.

In an application by the plaintiff for review of a civil judgment of a Transkeian Magistrate on the ground of gross irregularity, it appeared that the record of a previous judgment between the parties had been sent to the Magistrate by the Chief Magistrate and had been admitted as evidence, and that the only other evidence given in the case fully supported the plea of the defendant.

Held, that even if there was some informality in the manner in which the record had been put in, the plaintiff, who had not cross-examined the defendant's witnesses and had produced no evidence in support of his own case, was not entitled to have the proceedings set aside.

This was an application calling upon the Assistant Resident Magistrate of

Engcobo to show cause why a judgment which he had given in the case of *Ntlanza v. Ngweni* should not be set aside.

The applicant in the Court below had brought an action to recover £60, value of certain crops of mealies. The defendant pleaded *res judicata*, and further stated that the land on which the corn was growing had been duly and legally allotted to him, which allotment was confirmed by the Chief Magistrate; that defendant ploughed portion of the said ground and he grew crops thereon; that the plaintiff or his agents wrongfully ploughed up the said ground, and, although warned not to do so, he went on the said land and planted mealies. The case was dismissed, and defendant allowed his witnesses' expenses.

The Magistrate, in his reasons for judgment, said that he took the evidence of the defendant upon the special plea that the matter had already been settled, and found that the pleas were substantiated in every particular. The defendant had had the land duly allotted to him under proclamation. This really was a land claim, the settlement of which was provided for by Proclamation 125 of 1903.

Mr. P. S. T. Jones was for the appellant; no appearance was entered for the respondent.

Mr. Jones submitted that the case should be sent back to the Magistrate to enable the plaintiff to lead his evidence, not on the special plea, but on the case generally.

De Villiers, C.J.: This is an application for a review of the proceedings of the Court below, on the grounds of gross irregularity. The alleged gross irregularity consists in the Magistrate having admitted a letter from the Chief Magistrate enclosing a record of a previous decision between the same parties. If there had not been evidence quite independently of this informality, this Court might have interfered. I do not wish to suggest in this case that the record which was put in was informal; there is no evidence upon it; we do not know the nature of that record, but, to all appearances, it was a correct copy of the decision of the Land Court. But I think we may leave that out of consideration, and consider whether there was sufficient evidence to justify the Magistrate in finding for the defendant. The defendant himself gave evidence in this case, and no questions were put to him in cross-examination. He states that the land in respect of which the plaintiff claims damages had first been ploughed by him (the defendant), and after he had sowed, the plaintiff came there and ploughed the land, and now he claims damages because the defendant reaped the crops. Surely the defendant was entitled to reap the crops. Not only has the plaintiff's agent or attorney not cross-examined the defendant, but

he produced no evidence whatever to rebut the evidence of the defendant. Consequently, the evidence was all one way, and the Magistrate dismissed the summons. Apart altogether from the record which has been referred to, there was abundant evidence to justify the Magistrate in giving judgment. The application for review, must, therefore, be dismissed.

Maasdorp, J., concurred.

[Appellant's Attorney's: Fairbridge, Arderne and Lawton.]

REX V. BOUWERS. { 1905.
Apr. 6th.

Town Council—Regulations.

The Town Council of Cape Town has no power to make regulations fixing the charges to be made by drivers of cabs outside the limits of the Municipality, or compelling the drivers to take fares outside such limits.

This was an appeal from a judgment of the Assistant Resident Magistrate of Cape Town, who had convicted the appellant, Sidney Bowers, a cab-driver, of contravening regulation 350 of the Corporation of the City of Cape Town, framed under the provisions of Act 26 of 1893, and had sentenced him to pay a fine of £2.

The appellant in the Court below was charged with contravening section 549 of the Cape Town municipal regulations in that he, being a registered driver of cab No. 271, plying for hire on the appointed stand in Adderley-street, Cape Town, did, on or about the 22nd December, 1904, wrongfully and unlawfully refuse to accept as a fare one F. G. Thompson, of Cape Town, aforesaid, or, otherwise, the said Sidney Bowers did contravene section 350 of the aforesaid regulations in that upon the date and at the place aforesaid he, being a driver of the said registered cab, did wrongfully and unlawfully refuse or neglect to drive the said cab from Adderley-street to Irvington-road, Sea Point, such place being within the schedule of fares laid down by the Corporation of the city of Cape Town, when requested to do so by F. G. Thompson. The court below found the appellant guilty of the alternative charge and sentenced him to pay a fine of £2.

From the record it appeared that Mr. Thompson went to the respondent on one of the cab-ranks in Adderley-street and asked him to drive him to Sea Point by the hour. The defendant refused to go, and said that he could not be compelled to go outside the municipal regulations boundary.

Mr. Upington (for the appellant) said that the contention of the appellant was that the municipality had only jurisdiction within its own limits, that it had no authority to draw up a schedule of fares for places outside its own limits, and that it had no authority in issuing licences to drivers of hackney carriages to impose conditions on those licences which, if embodied in a regulation, would be *ultra vires*.

In this case it was clear that the cabman was acting on principle, and that there was nothing contumacious in his conduct. Mr. Upington was proceeding to address the court further, when their lordships interposed, and

De Villiers, C.J.: The Town Council of Cape Town has very large powers under the Act, but certainly has not the power to regulate the fares of cabs plying outside the Municipality. It can only act within the limits of its own jurisdiction, and fix the rates within those limits, but it has no power to fix rates beyond. If it had the power, where is it to stop? The Town Council may then fix the fares to Paarl or Stellenbosch or Worcester. Is a cabman then to be compelled to take his fare those distances because the Town Council has chosen to make a regulation of this kind? It is clear to me that in this case the regulation is beyond the powers of the Council, and that the cabman was justified in refusing a fare who wished to take him beyond the limits of the Council's jurisdiction. Where he is asked to take a fare beyond those limits a special arrangement must be made with the cabman. I am of opinion, therefore, that the appeal should be allowed, and the conviction quashed.

Mr. Upington said that the notice of appeal also asked for costs against the Corporation.

De Villiers, C.J.: It is not usual to allow costs in criminal cases, but certainly in a case of this kind, where the prosecution is not at the suit of the Crown at all, but at the suit of a corporation, the Court has departed from the practice, and has allowed the costs. In the present case, the Town Council was so clearly wrong that I think the Court would be justified in ordering the costs of the appeal to be paid by the Town Council.

Maasdorp, J., concurred.

[Appellant's Attorney: Hirschberg.]

REX V. JOOS.

{ 1905.
Apr. 6th.
" 7th.

Slaughter house—Local authority
—*Ultra vires*.

This was an appeal from a judgment of the Assistant Resident Magistrate of

the Cape, who had convicted the appellant of a contravention of section 2, Government Proclamation No. 278, of December 22, 1902. Mr. Alexander was for the appellant, a butcher in Somerset-road, Cape Town; Mr. Howel Jones was for the respondent.

The appellant had been charged in the Court below with having, on February 31, 1905, wrongfully and unlawfully killed or caused to be killed a certain animal, the flesh of which he intended to sell, upon premises which were not a place registered as a slaughter-house, and situate at Maitland. The premises, it appeared, were outside the Municipal limits, and situate in the district of the Cape Divisional Council. Appellant had held a licence for the premises, current for the early part of last year, until December 31, 1904. The defendant was found guilty of the charge, and fined 5s.

Counsel having been heard in argument,

(*Cur. Adr. Vult.*

Postea (April 7th).

De Villiers, C.J.: The appellant was charged before the Magistrate at Uitvlugt with having killed or caused to be killed certain animals, of which the flesh was intended for sale, on his premises, the same not being a place duly authorised as a slaughter-house by the local authorities. He was found guilty, and sentenced to a fine of 5s. Against that conviction he now appeals. The main ground upon which the appeal rests is that the regulations framed by the Governor, and upon which the Divisional Council rely, are *ultra vires*, and that the Governor had no power in regard to the area within which the appellant's slaughter-house is situated to authorise any Divisional Council or any local authority to fix the place where slaughter-houses are to be situated or to prevent them from being placed where the appellant chose to place them. The Governor has the power under the other section, "on the recommendation of the Medical Officer of Health or the representative of any urban authority directly concerned, to make regulations for the following purposes." The first is for regulating slaughter-houses. I need not read the rest, because the words "for regulating slaughter-houses" are, in my opinion, quite sufficient. In order properly to regulate slaughter-houses, it appears to me that the Governor should have also the power to issue regulations by which the local authority, whichever it may be—I shall consider directly which the local authority is—the Governor should have the power to authorise a local authority to approve of the places where these slaughter-houses are to be situated. There would be very little benefit in fixing the mode in which the slaughter-house should be carried on, because a

butcher might choose to go into a densely-populated part, taking a small place situate between houses to erect a slaughter-house there, and that would certainly be most deleterious to the health of those concerned. In my opinion the second regulation was entirely within the powers of the Governor. The regulation is as follows: "No person shall kill, or cause to be killed, any cattle, sheep, goats or pigs, of which the flesh is intended for sale, in any place other than a slaughter-house duly authorised and approved for the purpose by the regulations of any local authority directly concerned, etc.; provided that no slaughter-house shall be authorised or approved by the local authority in any situation, where any drain, or filth from such slaughter-house may be liable to pollute any source of water supply." This proviso shows how important it is that the regulations should also embrace the question as to where a slaughter-house is to be situated. Well, it appears that the appellant has not received any authority from any body, either from the Maitland or the Woodstock Municipality, or from the Divisional Council, to erect a slaughter-house at the place where he has erected it. The question now arises which is the local authority which should give approval of that slaughter-house? It clearly is not the Maitland Board, because the premises are not situated within the jurisdiction. It does not appear that there is a Village Management Board, nor does it appear that the Governor has ever exercised the power given to him by the 13th section of the Act of 1897 to carve out a portion to be under the jurisdiction of the Divisional Council outside the Municipal limits, and declare it as an additional urban area. Then the only local authority that remains is the Divisional Council. Mr. Alexander has argued that by the Act of 1897 the 208th section of the Divisional Council Act of 1889 has been repealed. Under that section the Divisional Council was the local authority. But he has omitted to call the attention of the Court to the fact that 35th section of the Act 23 of 1897 gives very much larger powers to the Divisional Council than it had under any of the previous Acts, and, in my opinion, the 35th section of the Act 23 of 1897 is wide enough to embrace Divisional Councils. Reading that section with the second regulation of Proclamation No. 270, I am clearly of opinion that the local authority directly concerned, mentioned in the regulation, is the Divisional Council, and that body alone. It cannot be any other body, and therefore, in my opinion, the Divisional Council properly assumed the power to regulate the slaughter-houses within its jurisdiction, and to indicate places where these slaughter-houses should be allowed, as part of the regulating which was with-

in its jurisdiction. I am of opinion, therefore, that the Magistrate was right in his judgment, and the appeal must be dismissed.

Maasdorp, J., concurred.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

REX V. LE GRANGE. { 1905.
Apr. 7th.

Liquor Licensing Acts—Selling to native—Permit.

The appellant, having been charged in a Magistrate's Court with having on divers days during the month of January, 1905, sold liquor to natives, who had no permit from their master, in contravention of a condition in his licence, it was proved that the natives showed permits from their mistress, in whose service they were for the greater part in each week, and that some permits were given by an adult daughter of their mistress, but it was not clear that any of the permits was given on days on which the natives were not in service or that those given by the daughter were acted upon on any of the days mentioned in the summons.

Held, that a conviction of a contravention on each of the days specified in the summons could not be supported, and that as it would be difficult for the Court of Appeal, without some further evidence, to ascertain on which particular days there might have been a contravention, the conviction should be set aside.

This was an appeal from the judgment of the Resident Magistrate of

Prince Albert, who had convicted the appellant, Jacobus le Grange, of a contravention of sections 1 and 2, Act 28 of 1898, and sentenced him to a fine of £1. The charge against the accused was that he had sold certain bottles of brandy on divers dates during January, 1905, to certain Hottentot women who were then not in possession of proper permits as required by the endorsement on his licence to retail wines and spirits. Dr. Greer was for the appellant and Mr. Howel Jones was for the Crown.

Dr. Greer submitted that on the facts, as disclosed before the Magistrate, he had wrongfully convicted the accused. Sections 1 and 2 of the Act gave no Licensing Court the power to endorse any conditions on the licence short of total prohibition, and it was admitted that on this licence there was endorsed a condition that "no liquor be sold to natives as defined by the Act except they have a note from their master, or, in the case of unemployed natives, from the Magistrate or a J.P." No question arose as to the genuineness of the signatures on the notes handed in by the two women. The point turned upon the question whether Ganna Louw, a washerwoman employed on certain days of the week by a Mrs. Strip, was, properly speaking, in the service of the lady who had signed the notes. He submitted that there was no evidence whatever of any guilty intention on the part of the accused. The Magistrate also raised a point as to the signatures on the permits, but he (counsel) submitted that Bessie Strip signed the permits on behalf of her mother and with her full consent and approval.

Mr. Jones submitted that the strongest point against the accused was that with regard to these permits which were given by Miss Strip, the accused contravened the Act. There was no evidence whatever that Mrs. Strip had any knowledge whatever of the notes given to the two women by her daughter. The notes were simply signed "Strip." It was the accused's duty to satisfy himself as to the *bona fides* of the notes, and he had contravened the section by accepting notes which were not duly signed by the employer of these natives.

Dr. Greer argued that Miss Strip was the agent of her mother, and that the latter, in her evidence, had approved of what her daughter did. The conditions of the licence were not so stringent as to signature as his friend would have them believe, or he might have gone further and contended that Mrs. Strip had no authority to give permits at all, because the endorsement only mentioned "a note from their master."

De Villiers, C.J.: there was a general charge against the appellant of having during the month of January, 1905, contravened sections 1 and 2 of Act 28 of 1898, in that he

did sell liquor at divers times to certain two native women in contravention of the following conditions endorsed on the licence, i.e., "that no liquor be sold to natives as defined by the Act, except they have a note from their master, or in case of unemployed natives, from the Magistrate or a J.P." It appears that the two women in question were natives and that they were employed from time to time by a Mrs. Strip. One of them was employed daily except Mondays, and another was continually employed but not quite so regularly, and from time to time permits were given by Mrs. Strip and her daughter to these women. It would appear that on the greater number of occasions on which permits were given, these women were in the service of Mrs. Strip, but it would also appear that on some occasions they were not in her service. That may be inferred from the evidence, although that point is not perfectly clear. But the Magistrate has found apparently that in every case in which there was a sale there was a contravention. Clearly, the Magistrate was wrong, because on the face of it, when these women were in the service of Mrs. Strip, the sales were perfectly legitimate. She was the mistress, and she or her daughter gave the permits. Now, the difficulty in the present case is to separate the illegal cases from the other. The Magistrate has found the accused generally guilty. Now that conviction is clearly wrong, and the point is now whether the Court, sitting on appeal, should endeavour to pick out from the evidence which of these cases should be separated and which should not. I think great care should be exercised in criminal cases to have it made perfectly clear as to what particular offence a person is found guilty of. In the present case, it seems to be clear that the accused has been found guilty of offences where there has been no offence at all. Considering that the Magistrate erred in convicting the appellant on the whole charge, and that it is by no means clear that there has been a contravention of the Act within the period specified in the summons, I consider that the safer course is to allow the appeal and set aside the conviction.

Maasdorp, J., concurred.

HEX V. CROZIER. { 1905.
Apr. 7th.

Public place — Shop — Abusive words.

The use of abusive words by a person in a shop towards another person, who at the time is also in the shop, does not constitute a contravention

of the 10th section of Act 27 of 1882.

This was an appeal from a decision of the A.R.M. of Namaqualand, by which the appellant was fined in £2 or ordered to undergo fourteen days' imprisonment, for using threatening and abusive language with intention, and committing a breach of the peace, to one Henry Molyneux, a Field-cornet, at O'okiep.

Mr. P. S. T. Jones was for the appellant, and Mr. Howel Jones appeared for the Crown.

The language complained of was used in the store of the Cape Copper Co., at O'okiep. When the complainant came into the store the appellant said to him: "Are you one of the crowd of scoundrels who went to the Cape Police on the raid last week? You ought to be ashamed of yourself. You are a d—rogue." Counsel said the point of the appeal was that the words complained of were used in the store and not in a public place as required by the 10th section of the Act 27 of 1882, which distinctly set out that the language must be used in a street, road, or public place, or licensed public house. Counsel submitted that the evidence showed that the words were used in the store, and, that not being a public place, the accused was entitled to an acquittal. Counsel cited Review cases, where it was held that if the language were used in a shop no conviction could be sustained.

The Chief Justice: What evidence is there that the parties were outside the store?

Mr. H. Jones: There is no evidence except the evidence that the appellant was standing for a time on the threshold of the door. Counsel then read the Magistrate's reasons, which set out that the store was open to the public daily, and he did not regard it as a private house.

De Villiers, C.J.: It is clear from the reasons read by Mr. Jones that the Magistrate regarded a shop as a public place. In one sense it is public because, presumably, the shop-keeper invites the public to enter for the purpose of buying his wares, but he is at perfect liberty at any time to close the place and turn out his customers. The 10th section of the Act makes it an offence to use any threatening, abusive, or insulting words, or behaviour, with intention to provoke a breach of the peace in any street, road, public place, or licensed public house. A licensed public house is specially mentioned. If the contention is correct that a shop is a public place, it is clear that it was not necessary to mention a licensed public house at all. In my opinion a shop does not fall within the designation, and the only

other question is whether the words were used in such a way as to be addressed to or by a person in a public place. In the case of Brown, the person to whom the abusive words were addressed was in the street, and it was properly held that the words were used in a public place, because it was intended to reach the person outside. In the present case both parties were inside the shop, and, therefore, the words were not used in a street, road or public place. I think that the Court is bound to hold that the Magistrate erred, and the appeal must be allowed and the conviction quashed.

Maasdorp, J., concurred.

[Appellant's Attorneys: Van Zyl and Buissiné.]

REX V. BINDEMAN.

Theft—Forgery.

The appellant, being an agent employed by R. to collect a debt for him, received payment of the debt by means of a crossed cheque made in favour of R. The appellant being about to be arrested on a decree of civil imprisonment, wrote the name of R. on the back of the cheque and gave it to K., who received payment of the amount. K. devoted a few shillings towards payment of fool for the appellant and kept the balance for him.

Held, that the appellant had been properly convicted of theft of the cheque and forgery of R.'s name.

This was an appeal from a conviction by the A.R.M. of Cape Town, in a case in which the accused was charged with theft, forgery and uttering a forged instrument. Mr. Burton was for the appellant, and Mr. Howel Jones appeared for the Crown.

Mr. Burton said the alleged theft was in respect of a cheque which was made payable to Radus, and it was alleged that the appellant, to whom it was sent, appropriated it, forged the name of Radus on the back and caused it to medium of one Kinsley. Counsel having read the record in the Court below, said that whatever was done by the appellant was done in a state of great excitement. He had just been arrested, and among the letters handed to him was one containing the cheque. He was entitled to receive a letter on behalf of Radus, and although Radus said he revoked that authority by a

verbal communication, there was no written communication sent to the appellant's office. Assuming for the moment that he did endorse the cheque, the appellant was in any case entitled to receive it. Perhaps, in a foolish moment, when he was in a hole, he did so with the intention of merely taking his just charges out of it. There was not the slightest evidence that he intended to retain the bulk of the money. If he wrote the name it was with the intention of getting a few shillings to buy food. The Magistrate might have considered the circumstances of the case, and found that the man was merely endeavouring to get temporary assistance.

De Villiers, C.J.: The cheque was sent by Cillie in a letter addressed to the appellant, but the cheque was made out in favour of Radus or order. The applicant, on the receipt of that cheque, seems to have been in great trouble. There was a writ of civil imprisonment against him. He was about to be arrested, and in his excitement he apparently endorsed this cheque, not in his own name, but in the name of Radus. He put it into a letter addressed to Ditcher, and gave the letter to Kinsley. Kinsley went to Ditcher with this cheque and got the money from him, and he utilised portion of that money for the purpose of supplying the appellant with food while he was in gaol. It is clear from this statement of facts that the appellant had no right to the cheque, although the cheque was in a letter addressed to him. The cheque was in favour of Radus, and to the order of Radus, and the only person entitled to the cheque was Radus. The applicant in appropriating that cheque to his own use was guilty of theft, and in endorsing the name of Radus, without any authority from him, he was clearly guilty of forgery, and the forgery was committed for the purpose of enabling him to get a very small proportion of this money to get food for himself in gaol. Still the forgery was committed. It is not suggested by the appellant's counsel that he had any authority from Radus to endorse the cheque for him. On the contrary the defence is that he never endorsed it at all. There is no evidence to show that Kinsley is the man who forged the cheque. He would derive no benefit from it. The only person to derive any benefit from the cashing of the cheque was the appellant, and there seems to be no motive which would induce Kinsley to forge a cheque. The only person who could have committed this forgery is the appellant. As to the sentence, I must say I consider, under all the circumstances of the case, that the sentence was somewhat severe. The man was undoubtedly in an excited state. He was to derive little benefit from the cheque. The only benefit would be a few shillings to buy food. There are

circumstances in this case which would justify the Government in considerably mitigating the sentence. That, however, is a question which the Court has not to deal with. The only question is whether the conviction is right, and in my opinion the conviction was right.

Maasdorp, J., concurred.

Mr. Howel Jones: Your lordship's remarks will be conveyed to the Attorney-General.

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

REVIEW.

REX V. McLAUGHLIN. { 1905
Apr. 15th.

Lashes—Previous conviction—
Act 43 of 1885.

Maasdorp, J., said that, as Judge of the week, the case of Rex v. McLaughlin, which had been heard by the Assistant Resident Magistrate of Cape Town, had come before him, the accused having been charged with storebreaking with intent to steal, and with theft. Accused pleaded not guilty, but was found guilty, and sentenced to twelve months' imprisonment, with hard labour, and to receive twelve cuts of the cane. By the Act 43 of 1885, under which this case was remitted by the Attorney-General, lashes or cuts could only be inflicted in case of previous convictions being proved to have taken place within three years. The only previous conviction proved in this case took place in 1889, and consequently did not come within the terms of the section. The sentence must therefore be amended by expunging the words "and to receive twelve cuts from the cane."

ADMISSIONS.

Mr. Struben moved for the admission of Frederick Meyer as an attorney and notary.

Application granted and oaths administered.

Mr. W. Bisset moved for the admission of William Forbes Laurie as an attorney, notary, and conveyancer.

Application granted and oaths administered.

Mr. Close moved for the admission of Harry P. Ward as an attorney and notary. Counsel asked that the application should be granted, subject to production of birth certificate.

Ordered to stand over pending production of certificate.

Mr. P. S. T. Jones moved for the admission of Norman O. Norton as an attorney and notary.

Application granted, oaths to be taken before the Resident Magistrate of East London.

Mr. Alexander moved for the admission of Michiel J. H. Keet as an attorney and notary.

Application granted and oaths administered.

Mr. Van Zyl moved for the admission of Lancelot Dixon Crowther as an attorney, notary, and conveyancer.

Application granted, oaths to be taken before the Resident Magistrate of East London.

Mr. Alexander moved for the admission of Edwin van R. Schlemmer as an attorney and notary.

Application granted, oaths to be taken before the Resident Magistrate of Kokstad.

Mr. J. E. R. de Villiers moved for the admission of Jacobus R. de Wet as an attorney and notary.

Application granted and oaths administered.

Mr. Close moved for the admission of Fred. Solomon Webber as an attorney and notary. Counsel stated that Mr. Webber was an enrolled attorney of the Transvaal, and he applied under the reciprocal arrangement.

Maasdorp, J., said that it was very desirable that applicants should appear personally when the application was made. The Court had decided that, whenever possible, the applicant should appear before the Court. The matter would, therefore, stand over until the applicant placed before the Court reasons why he did not attend before the Court.

PROVISIONAL ROLL.

TURNBULL V. STEWART. { 1905.
Apr. 15th.

Sir H. Juta, K.C., moved for a writ of civil imprisonment upon an unsatisfied judgment of this Court for £150, with interest, less £57 11s. 6d., paid on account, and for £50, less a certain sum paid on account, and for costs, amounting to £21 12s. 3d.

Defendant said that he was without means and employment. He had been engaged as a chemist's assistant at £17 a month.

Sir H. Juta cross-examined the defendant in regard to his transactions since he came out to the Colony a little over twelve months ago, and an interest that he had had in a business at Malmesbury.

[Maasdorp, J. (to Sir H. Juta): You seem to have killed the goose before you could get the egg.]

Sir H. Juta: I am not so sure that the egg is not under the straw, my lord, and that it may not be hatched when this case is over.

Ordered to stand over until Thursday next, the defendant to produce the documents connected with the contracts he had entered into.

MCAUGHTON V. ROWE AND WELSH.

Provisional sentence—Lease.

Mr. P. S. T. Jones moved for provisional sentence upon a lease for £396, rent due, less £15 paid on account. Counsel admitted that the plaintiff had sued under a wrong lease and that a subsequent lease was entered into, upon which the summons should have been issued. There was, however, still a certain sum due, and in the affidavits the defendants also set up a verbal agreement.

Mr. Searle (for the defendant): I admit that the lease on which we are sued is not the original lease.

Mr. Jones: The two leases should be read together.

[Maasdorp, J.: You sue on a liquid document, is anything required for your case beyond that?]

We wish to put in certain affidavits.

Mr. Searle: The document on which the plaintiff sues is not in Court; and, therefore, provisional sentence cannot be granted on it. Possibly there may be certain liabilities, but certainly there are none on the summons based on the document now put in.

[Maasdorp, J.: You must prove your case, Mr. Jones.]

The defendant admits his liability for a certain amount. The first lease was only held in suspension by the second lease. The first lease was to come into full force unless the terms of the second lease were complied with, and they never were complied with. I submit that judgment should be given for such amount as may be found due to us.

Provisional sentence refused, with costs.

SEDGWICK V. CALITZ.

Mr. Van Zyl moved for provisional sentence on a mortgage bond for a sum of £43 3s.

Order granted.

LAZARUS V. DUMBELLA.

Dr. Greer moved for provisional sentence on certain conditions of sale for £116, balance of the purchase price of certain property, and £25 rent.

Defendant asked for an extension of time, until she had completed her term of imprisonment.

Order granted as prayed.

GIBSON V. HOFFMAN AND CARMELTZ.

Mr. Du Toit moved for provisional sentence on certain conditions of sale for £435, with interest and costs.

Order granted.

ROSS V. STELLENKAMP.

Dr. Greer moved for provisional sentence on a promissory note for £100, balance due, with interest.

Order granted.

NIGRINI V. VAN ROOYEN AND WIFE.

Mr. Watermeyer moved for provisional sentence on a promissory note for £491 9s. 10d., less £140 paid on account, with interest and costs.

Defendant asked for stay of execution for two months, stating that he was prepared to consent to judgment. There was sufficient property to satisfy the claim.

Order granted as prayed.

ROODT V. BOTHA.

In this matter judgment had been obtained against the first two defendants in the original motion in March last, and the action against the third defendant stood over (15, C.T.R. 235). The claim was for £254 10s., and the judgment was now sought against the third defendant, who acted as surety to the promissory note.

The affidavit of the defendant set out that he agreed to act as surety on condition that he received 270 sheep. Counsel said he was not relying now on the question of the sheep, but on the delay in excussing the principal debtors, and he contended that the suretyship had lapsed.

An answering affidavit was put in.

Mr. Alexander was for the plaintiff and Mr. Gardiner was for the defendant.

[Maasdorp, J.: You cannot press for provisional sentence.]

Mr. Alexander: Oh yes. The defendant was a surety and provisional sentence has been given against a surety. We gave him due notice. Had we gone to him before December 16th he might have objected that we had

not excused the principal. He had not renounced the *beneficium excussionis*, and if he was not liable after December 16th he was not liable at all. [Maasdorp, J.: If you have put a meaningless clause into your contract that is your misfortune.]

Should your lordship be against me on this point, I should like to be heard on the question of costs, as to which I refer to *Forster v. Van Wyk and Another* (11 C.T.R. 386).

[Maasdorp, J.: Mr. Gardiner, have you any authority to show that a surety cannot be sued unless the principal has been excused?]

Mr. Gardiner: I have only *Herding v. Le Rey* (12 Juta).

Mr. Alexander (in reply): The point as to excussion of the principal has been raised only incidentally in one affidavit. It should have been pleaded specifically.

Maasdorp, J.: In this case the defendant is sued upon a promissory note made by Botha and Schoemann in favour of Mrs. Roodt, and his liability is alleged to rest upon the endorsement made by him to this note. The endorsement is to the following effect: "As surety until 16th December," signed, J. A. Botha. Now several legal points have been raised in this case as to the position of a surety where provisional sentence is claimed, but it is unnecessary to go into any of these matters, except the effect—the legal effect of the endorsement itself upon this note. The defendant consented to become surety and be liable as surety until 16th December, 1904. After that date his liability lapsed, and he is no longer liable for anything that took place between parties, which constitutes some agreement by which his liability is extended. Such matters ought to be brought before the Court in another form. The Court can only deal with the written document, and upon that document there is no liability on the part of J. A. Botha as surety or otherwise. The provisional sentence will be refused with costs.

CILLIERS V. SACON.

Mr. P. Jones was for the plaintiff and Sir H. Juta, K.C., was for the defendant. The application was for provisional sentence on a promissory note for £300. Sir H. Juta read the affidavit of the defendant, which set out that the plaintiff had purchased a piece of ground from him for £2,889, and when the plans were ready the £300 could be deducted from the purchase price.

Mr. P. Jones read a replying affidavit of the plaintiff to the effect that the defendant did not keep to the terms of the purchase made in December, 1902, and he had subsequently cancelled the sale. Possession was not given in

May, 1903, as promised. The purchase had been cancelled by reason of the delay in surveying the ground.

Masendorp, J.: The plaintiff sues the defendant upon a promissory note, in which the defendant promises to pay the plaintiff £300, with interest at the rate of 5 per cent. per annum, on the 3rd August, 1903. The defendant sets up a defence which is contained in one paragraph of his affidavit, to the following effect: "The said Cilliers has purchased a piece of ground from me, for which he owes me the sum of £2,889." Now, if there was a debt actually due by the plaintiff to the defendant, it is in ordinary operation, and, as a set off, the defendant could bring that up as a defence against any claim by the plaintiff. But it is clear from the documents put in that the sale has taken place, and a date has not yet arrived upon which the purchase price can be claimed by the defendant. Even if this contract does go through, notwithstanding the dispute now set up by the plaintiff, the actual due date has not arrived, and consequently there is no sum of money which the defendant can set up against the legal claim of the plaintiff, and provisional sentence must be given, with costs.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Sir JOHN BUCHANAN.]

APPEALS.

REX V. ROSSOUW.

1905.
} Apr. 17th.

Trespass—Assault.

This was an appeal from the judgment of the R.M. of Springfontein, in convicting the appellant, Hermias Albertus Rossouw, of an assault upon a farmer named Andries Francois Engelbrecht, and sentencing him to a fine of £3, or one month's imprisonment with hard labour.

The appellant had been charged, along with his brother, Gideon Josias Rossouw, with assaulting the complainant by catching hold of him and throwing him to the ground. Both

the accused pleaded not guilty, and the charge against Gideon was dismissed, while the appellant was found guilty.

From the record it appeared that there had been a dispute between the complainant and the accused in regard to the boundary line of a farm on which all the parties lived. Certain cattle of the accused were on the land which complainant said was his, and he went there for the purpose of impounding them, whereupon the alleged assault took place. The complainant said that he had had to pay £26 by way of medical expenses. The land on which the cattle were found was claimed by the accused under a recent survey, but the complainant said that he had not agreed to the survey, and that the land formed part of his farm. One of the witnesses, called by the complainant, said she put mustard plasters on him, and filed him with medicine, a piece of information which, Mr. Burton incidentally observed might account for the complainant's condition. The defendant's version was that the complainant was aggressor, and that no more violence was used than was necessary to prevent the complainant from impounding the horses and mules, which had been driven on the land to graze.

Mr. Burton was for the appellant, and Mr. Howel Jones was for the Crown.

Mr. Burton said the affair seemed to have been a storm in a tea-cup, and the matter did not seem to be one of great importance. The appeal was raised on two grounds: (1) That the verdict is against the weight of evidence, and (2) that if appellant used any force against the complainant he did so in defending the rights of property which he claimed. Apparently both the parties claimed a piece of ground which, upon a survey, had been awarded to the appellant, and apparently, instead of going to law about the matter, they came to this stupid struggle on the day in question.

De Villiers, C.J., said it appeared that the accused commenced the trouble, because he drove horses and mules on land which had been cultivated by the complainant.

Mr. Burton said that the complainant originated the trouble, because he went on to the land which had been awarded by the surveyor to the appellant to impound his cattle on land that he had no right to.

Without calling upon Mr. Jones,

De Villiers, C.J.: The Magistrate in this case seems to have given the benefit of every doubt that could possibly arise to the accused. He seems to have allowed for a certain degree of exaggeration in the evidence given by the complainant, and accordingly he acquitted Gideon, as he was not quite satisfied that Gideon had taken part in the assault. Then as to the chief offender, Mias, the Magistrate seems not

to have believed that the assault was quite so serious as the complainant had made it out to be, but after making every allowance, the Magistrate came to the conclusion that upon the evidence an assault had been committed, and I confess I do not see what other conclusion he could possibly have arrived at. Upon the evidence of the accused himself, he had no right to seize hold of the plaintiff in the way he did. I am of opinion that there is no ground for this appeal, and the appeal must be dismissed and the conviction confirmed.

Buchanan, J., concurred.

PRINCE V. WEBSTER. { 1905.
Apr. 17th.

Purchase and sale—Agent—Ratification—Estoppel.

The defendant's daughter, being about to be married, ordered a wedding cake from the plaintiff and directed it to be sent to the house of the defendant. The wedding did not take place, owing to the disappearance of the bridegroom, but the cake was not returned by the defendant, and an account was sent to him by the plaintiff for the price of the cake. The defendant did not repudiate his liability, but went in search of the bridegroom. A second and third account were sent to the defendant, and it was only after receiving the third account that the defendant denied having ordered the cake. In the meantime the cake had deteriorated in quality.

Held, that although the defendant had not authorized his daughter to pledge his credit, he should, under all the circumstances, be held to have ratified her act, and therefore to be liable for the price.

This was an appeal from a judgment of the Resident Magistrate of East London in an action brought by the present respondent against the appellant to recover £3 10s. for goods sold and delivered to the defendant, at his special instance and request, on or about the 9th July, 1904, viz., one wedding cake, £2 10s., and assorted cakes, £1. The Court below gave judgment for the plaintiff for the amount claimed with costs.

From the record it appeared that the goods had been delivered at the defend-

ant's house in readiness for his daughter's marriage with one Donovan. The marriage, however, did not take place, for on the eve of the ceremony Donovan disappeared and was believed to have gone to Cape Town. Defendant, when applied to for payment of the account, said that he was hunting for the bridegroom. Plaintiff said that it was customary for the prospective father-in-law to pay for the cake, while the defendant held that Donovan should pay for it.

The Magistrate, in his reasons for judgment, said that the defendant should have returned the articles, instead of which he kept them until a portion went bad. The action of the defendant in keeping the cake months after Donovan had disappeared deprived the plaintiff of an opportunity of realising the value by other means.

Mr. Gardiner was for the appellant; Mr. Alexander was for the respondent.

Mr. Gardiner submitted that the allegations in the summons had been borne out. The Magistrate had not found that the defendant had bought, but that Donovan had bought. Neither did the defendant buy, nor did he authorise his daughter to pledge his credit. The Magistrate seemed to think that defendant should have returned the cake, but, in strict law, defendant could not have returned the goods, the property in the goods having passed to Donovan. The plaintiff should have sued Donovan for these goods.

Mr. Alexander submitted that the defendant was, by reason of his subsequent conduct, estopped from setting up the defence that the goods were sent to Donovan's order. It was an important circumstance in this case that the daughter did not live with her father, and that the cakes were to be delivered at her father's house. The accounts were sent at the end of each month to Prince, and not to Donovan. It would have been simple for the defendant to have explained that Donovan had gone, and offered to return the cake to Webster. It was only when the matter was brought into court that Prince set up the defence that Donovan was liable for the cakes. The defendant did not seem to have been anxious that the wedding should take place, and, in fact, objected to it, so that he would not be likely to assist in catching Donovan.

Buchanan, J.: If the bride could not catch Donovan, I doubt whether the confectioner could have done so.

Mr. Gardiner said that the wedding cake should not have gone bad in three months, because he believed it was usual to keep a portion for the first christening. Replying on the argument, Mr. Gardiner said it was true that the accounts were sent to the appellant, but they were afterwards sent on to Donovan. The plaintiff seemed to have gone on a custom that it was

usual for the bride's father to pay for the cake, but that custom had not been proved. He failed to see how the law of estoppel applied in this case.

De Villiers, C.J.: The defendant's daughter was about to be married to one Donovan, and she and Donovan together went to the plaintiff's confectioner's shop and there ordered a wedding cake to be sent to the house of the defendant. The day after, the defendant's daughter thought it would be better that there should be a smaller wedding cake, and other small cakes and sweets, and asked the plaintiff to substitute these for the original wedding cake. That was agreed to, the price (£3 10s.) being the same in each case. The articles were sent to the defendant, but, unfortunately, the wedding did not come off; the bridegroom disappeared, and, after the day on which the wedding was to have taken place, the plaintiff sent an account for the cakes to the defendant. I take it from the evidence that the account must have been made out in the name of the defendant. That seems to me the fair purport of the evidence. The defendant did not at once repudiate the liability, but he endeavoured to find out the bridegroom, apparently with a view of getting him to pay the money, but by not answering the plaintiff it would appear to me that he recognised his liability. Now, this was a case of a wedding to be celebrated in the house of the defendant. His daughter was to get married. The ordinary course is for the bride's parents to be at the expense of providing the entertainment, and, in my opinion, it would require very little evidence of ratification on the part of the father under circumstances like the present to induce the Court to hold that he should be regarded as the purchaser of the cake. After the end of the next month, another account was sent to the defendant. He did not then repudiate the account, but still sought to find Donovan, and it was only after the third account had been sent that the defendant repudiated his liability. But, in the meantime, some of the cakes went bad. According to the plaintiff the defendant told him (plaintiff) that he had eaten the cakes. The daughter, however, does not agree with this; she says two cakes went bad. But, whichever statement we take, the plaintiff might have got back his cakes if he had known the defendant repudiated liability; so, at all events, some of the articles which had been delivered went bad, and the plaintiff was debarred from getting them back, because he was left under the impression at the time that the articles had been ordered by the defendant, and not by Donovan. Now, I take it there is sufficient proof of a ratification by the father of the acts of his daughter in ordering the cake to be sent to his house to justify the Court in holding that there was a contract, rendering the defendant liable to pay for

the wedding cake. I am of opinion, therefore, that the appeal must be dismissed with costs.

Buchanan, J., concurred.

[Appellant's Attorneys: Silberbauer, Wahl and Fuller; Respondent's Attorneys: Walker and Jacobsen.]

NOONAN V. MEYER.

{ 1905.
Apr. 17th.
" 26th.

Purchase and sale—Stolen property—Refund of price—Eviction.

Certain cattle which the plaintiff had purchased from the defendant were claimed by one M., from whom they had been stolen, whereupon the plaintiff handed them over to M., and informed the defendant of what he had done.

Held that, upon proof by the plaintiff in an action against the defendant for a refund of the price, that as the cattle had been stolen and that the defendant would have had no valid defence to a suit at the instance of M., the plaintiff was entitled to succeed, although there had been no judicial eviction.

This was an appeal from a judgment of the Resident Magistrate of Kokstad in an action brought by the present respondent for the return of £25 10s. purchase price of certain cattle bought from the appellant. The Magistrate gave judgment for the plaintiff for the amount claimed with costs.

From the record in the Court below it appeared that the cattle had been sold to the respondent, Meyer, by the appellant for £25 15s. and that subsequently a question arose as to the real ownership of the animals. It was said that the animals had been stolen from the estate of one John Macdonald before they came into the possession of Noonan, who had bought them from a native. The respondent delivered up the cattle to the representatives of the estate of Macdonald upon application being made to him. Appellant said that he should not have done so especially as he (Noonan) had offered to refund to him the sum of £25 15s. if the cattle were handed back to him. The ground of the appeal was that the plaintiff should not have parted with the cattle until he had been evicted from possession.

Mr. P. S. T. Jones was for the appellant; Mr. Gardiner was for the respondent.

Counsel having been heard in argument,

(Cur. Adr. Full.

Postea (April 26th).

De Villiers, C.J.: This is an appeal against a judgment of the Resident Magistrate of Kokstad in an action whereby the plaintiff claimed from the defendant the refund of the price of certain three head of cattle, which the plaintiff had bought from the defendant, but had subsequently returned to McDonald on discovering that they had been stolen from McDonald.

It was proved to the satisfaction of the Magistrate and of this Court that the cattle sold to the plaintiff were stolen cattle, but it is not suggested that the defendant stole them or even knew that they have been stolen. He had himself bought them from one Tsean, and it had not even been proved that Tsean was himself the thief. On behalf of the estate of McDonald, the cattle, when discovered in the plaintiff's possession, were claimed from him. If, upon this claim being made, the plaintiff had forthwith informed the defendant of the claim, and called upon him to defend any suit that might be brought by McDonald's estate for the restoration of the cattle, the burden of defending such suit would have been thrown on the defendant, and if such a suit proved successful, the plaintiff would have had a clear right to recover the purchase price, the consideration for the payment of it having wholly failed. Under the Roman law, the vendor warranted undisturbed possession, and the purchaser could not bring an action on the warranty until he had been judicially deprived of such possession. (See Code 8, 45, 3.) The plaintiff, instead of waiting until it had been decided by a Court of law that the cattle belonged to someone else than the vendor, handed them over to the true owner upon being perfectly satisfied that they had been stolen from him, and the question for decision is whether the Court below was right in holding that, by our law, a purchaser is entitled to a refund of the price if he clearly proves in the action for such refund that a suit by the owner would have established his ownership, and deprived the purchaser as well as the seller of the right to the possession of the thing sold. Groenewegen (*De Leg. Abr.*), in his commentary on the passage of the Code just cited, seems to regard the rule there laid down as applying only to cases in which the purchaser sought to enforce the stipulation, express or implied, for a penalty, which, under the Roman law, attached in case of eviction. He adds that, as the stipulation had in his time fallen into disuse,

the learned discussions of the commentators had also become useless and superfluous. Voet, on the other hand, in the Title of Evictions 21, 2, 30, and 34), treats the subtleties of the Roman Law as still in force in his time, but he admits (21, 2, 22) that if one who has suffered eviction without having given notice to his vendor can, taking up the character of the evicting party himself, assert that the latter's right was certain, and can show a manifest want of right on the part of his vendor, he is considered entitled to the same recourse against the vendor as if he had given timely notice of the suit. Among the authorities cited by Voet is Grotius (*Intr.* 3, 15, 4), who says that when a purchaser's title to the property is judicially interfered with, either wholly or in part, he is bound to give timely notice to the seller, who will be bound to take up the case for him; otherwise the purchaser will lose his recourse against the seller, "unless the property beyond all doubt belonged to another." Another writer cited by Voet is Van Leeuwen, who, in his *Censura Forensis* (1, 4, 19, 14), after saying that on failure of notice the purchaser has no recourse against his vendor, makes an exception in cases where the right of the evicting party is obvious, and it is clear that the seller had no right, or the purchaser undertakes to prove this. The difficulty of the present case arises from the fact that the plaintiff's right to the cattle has never been judicially interfered with, and that, instead of waiting for an eviction, he handed over the cattle to the true owner without the consent of his vendor. It appears to me, however, that on principle the plaintiff should not be deprived of his recourse against the defendant, provided that he could clearly establish the right of McDonald to recover the cattle. The plaintiff took a very serious risk upon himself when he delivered the cattle to the person whom he believed to be entitled to vindicate them. The safer course would have been to retain them, after giving notice to the defendant of the owner's claim, and thus to throw upon the defendant the onus of defending his right as against such owner. By himself delivering up the cattle to the owner, the plaintiff took upon himself the whole burden of proving, not only that the cattle had been stolen, but that the defendant would have had no valid defence against any suit at the instance of McDonald. But, if once the plaintiff succeeds, as he did in the Court below, in establishing such proof, it would, to my mind, be a needless formality to insist upon two actions being brought for the purpose of asserting the plaintiff's right to a refund of the purchase price. An opportunity was afforded to the defendant in the Court below of raising

every defence which he would have had to any suit by McDonald for the recovery of the cattle. He has wholly failed in establishing such a defence, and there can be no valid reason why the plaintiff, after proving that a suit at the instance of McDonald must have resulted in an eviction, should not be in the same position as if an eviction had actually taken place. I am of opinion, therefore, that the Magistrate was right in giving judgment for the plaintiff, and that the appeal must be dismissed, with costs.

His Lordship added that his learned brother Buchanan, who sat with him in the case, agreed in the judgment.

[Appellant's Attorneys: Findlay and Tait; Respondent's Attorneys: Faure, Van Eyk and Moore.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

DU PLESSIS V. HAUPT- { 1905.
FLEISCH. { Apr. 17th.

Promissory note — Accommodation—Consideration.

Mr. Lewis moved for provisional sentence on a promissory note for £1,684 9s. 4d. for value received, with interest and costs.

Mr. Searle, K.C., appeared for the defendants, and put in affidavits, which set out that when the first defendant's wife, to whom he was married in community of property, died, he and his brother, the second defendant, were appointed as co-executors testamentary in the joint estate. The plaintiff got notice that the estate was in liquidation, and that a sale would be held in April, but, owing to the continuance of a severe drought, the sale had to be deferred. The first defendant believed if he were given time all his creditors would be settled with in full. The whole of the plaintiff's claim was due by the joint estate of his wife and himself, and not by himself and the second defendant. The second defendant signed the note as an accommodation note.

Counsel having been heard in argument,

Maasdorp, J.: The plaintiff in this case sues the defendants upon a promissory note dated 28th August, by which the makers promise to pay to the plaintiff the sum of £1,684 9s. 4d. The defendants appear, and they put in affidavits, in which one of the defendants sets up the defence that the debt, for which he

made the promissory note, is really a debt due upon the joint estate of himself and his wife. Even if that were so, if he takes the debt upon himself, he becomes liable upon that note whatever other parties are liable in other respects. I am not quite satisfied it is a joint debt—that it is a debt of the joint estate. There are no details set forth to prove in what respect that debt in the joint estate arose, and there seems to be some evidence that the note was made in respect of the indebtedness on account of certain moneys, which the first defendant held in trust for the plaintiff. But, however that may be, upon the face of the promissory note as it now stands, the first defendant is clearly liable, notwithstanding the allegations contained in his affidavit, which contend on behalf of the second defendant that he was only an accommodation maker of this note for the accommodation of the first defendant, and with the knowledge of the plaintiff, and that therefore he is not liable. But such a defence cannot hold in law. He accommodates the other maker, so as to further secure the plaintiff's consideration to the other party. That is sufficient, and plaintiff is entitled to recover the money from him, notwithstanding the fact that he became an accommodation party for the purpose of accommodating one of the other parties. The provisional sentence will be given with costs.

FIELD AND CO. V. SHEAR.

Mr. Pyemont moved for provisional sentence on three promissory notes for £30, £30, and £25, with interest and costs.

Granted.

WILSON, SON AND CO. V. PFUHL.

Dr. Greer moved for provisional sentence for £339 4s. 7d. on a promissory note, with interest and costs.

Granted

NANNUCI, LTD. V. KEATING.

Mr. Close was for the plaintiff, and Mr. Struben was for the defendant. Mr. Close moved for provisional sentence on a promissory note for £213 8s. 2d.

Mr. Struben put in certain affidavits, in which the defendant disputed certain accounts, and counsel submitted that the dispute could not be settled now. The defendant had interdicted the plaintiffs from receiving certain moneys from the Sisters of Nazareth in respect of a certain contract, and then the committee said that the dispute could not be settled between the parties on a motion. It was only fair to the defendant, on the allegations made, that judgment

should be refused, and that the plaintiff should be ordered to go into the principal case.

Mr. Close said the note was given for specific goods, and it was on an entirely separate transaction. The interdict was granted, he understood, pending an action to be brought by another party, and the onus lay as much on his learned friend's client to bring the action as it did with his. Counsel submitted that the defendant would not be prejudiced now by the granting of provisional sentence.

Maasdorp, J.: The plaintiff sued the defendant on a promissory note for £213, and the defendant appears to oppose the granting of the provisional sentence on the ground that the position of the parties is now such that a promissory note upon which he is sued becomes merely an item in a general account, and consequently a separate action should not be allowed on the note. He contends that the plaintiff should be compelled to go into the whole of his account. It appears to me from the allegations contained in the affidavit of the defendant himself that this promissory note was intended to be devoted to the payment of his account for cement and tiles purchased from Frank Clarke and Co. Well, if there was such a distinct transaction, the plaintiff is entitled upon this promissory note to sue for the promissory note as being in respect of such transaction. It is contended on behalf of the defendant that there is an indebtedness to Clarke, and that the moneys that were received in discounting the note ought to have been paid for this indebtedness to Clarke, and I think he himself misconceives his position. Clarke simply acted as agent, and there is no indebtedness to Clarke. The matter now has been taken out of the hands of Clarke, and the plaintiff demanded payment of the money direct. I think this ought to be treated as a separate transaction, without producing any complication in any further case, and provisional sentence will be given for the plaintiff, with costs.

THWAITES V. HANEKOM.

Mr. Long, for the plaintiff, moved for provisional sentence on a mortgage bond for £425, with interest and costs, and to have the property specially hypothecated declared executable.

Maasdorp, J., said that a special application would have to be made, as the money was attached in respect of another suit.

Granted.

CAIRNCROSS V. LIZAMORE.

Dr. Rainsford moved for provisional sentence on a mortgage bond for £300,

with interest and costs, and that the property specially hypothecated be declared executable.

Granted.

GRAAFF V. BROOMBERG.

Mr. Upington moved for provisional sentence for £3,000 on a mortgage bond, with interest and costs, the bond having become due by reason of non-payment of interest and £6 18s. 9d., premium and stamps, and that property specially hypothecated be declared executable.

Granted.

GOODMAN V. ZWAIGENHAFT.

Mr. Gutsche moved for provisional sentence on a mortgage bond for £1,300, with interest and costs, the bond having become due by reason of non-payment of interest and that property specially hypothecated be declared executable.

Granted.

CLARK V. LANG.

Mr. D. Buchanan moved for provisional sentence on a mortgage bond for £500, with interest and costs, the bond having become due by reason of non-payment of the capital, and that the property specially hypothecated be declared executable.

Granted.

DEMPEERS V. SNEL.

Mr. De Waal moved for provisional sentence on a mortgage bond, with interest and costs, the bond having become due by reason of non-payment of interest, and that the property be declared executable.

Granted.

FETCHERS AND OTHERS V. DIAMOND.

Dr. Rainsford moved that the provisional order of sequestration in the defendant's estate, granted on 20th March, should be made final.

Granted.

LAWRENCE V. BERNSTEIN.

Mr. Sutton moved for the final adjudication of the defendant's estate as insolvent.

Granted.

ZEEDERBERG AND DUNCAN V. ALPEROWITZ.

Mr. Pyemont moved for the final adjudication of the defendant's estate as insolvent.

Granted.

WINNE V. MEYER.

Mr. Pyemont moved for the final adjudication of the defendant's estate as insolvent.
Granted.

STRONG, TROWBRIDGE AND CO. V. FORSYTHE.

Mr. Swift moved for the final adjudication of the defendant's estate as insolvent.
Granted.

THORNE V. BATAILLOU.

Mr. M. Bisset moved that the provisional order of sequestration in the defendant's estate be made final.
Granted.

CAPE COLD STORAGE V. SAYERS.

Dr. Rainsford moved that the provisional order of sequestration in the defendants' estate be made final.
The defendant appeared in court, and said he had no objection.
Granted.

VAN EYN WINE AND SPIRIT CO. V. EMDIN AND CO.

Mr. W. Bisset moved that the provisional order of sequestration be made final against the defendants' estate.
Granted.

BOWERS V. ARANDSE.

Mr. Alexander moved for a decree of civil imprisonment on an unsatisfied judgment of the Supreme Court against the defendant, who was co-defendant in recent divorce proceedings.

The defendant appeared in Court, and being asked by His Lordship what he had to say, replied, "Not guilty." Proceeding, he said there was no date on the summons, and he knew nothing about the case. At present he was earning six shillings a day as a farrier.

Cross-examined by Mr. Alexander: At present he was living with the defendant in the recent case.

Order granted, to be suspended on the defendant paying £2 a month, the first payment to be made on the first of next month.

FLETCHER V. HURWITZ.

Mr. Sutton moved for provisional sentence on a mortgage bond for £1,100 and £4 6s. premiums, etc., with interest and costs, and that the property specially hypothecated be declared executable.

Granted.

MOORREES V. HOSIASOHN.

Mr. Russell moved for provisional sentence for £150, being the first, second, and third instalments on a mortgage bond, and that property specially hypothecated be declared executable.

Order granted, with the exception of the latter claim, on which execution will not issue until a writ is taken out and a return of *nulla bona* made thereto wholly or in part.

MARTIN BROS. V. NORTON.

Mr. Watermeyer moved for the provisional sentence on a promissory note for £80 10s., with interest and costs.
Granted.

ORLANDINE V. STEYDOM.

Mr. Gutsche moved for provisional sentence on a mortgage bond for £750, with interest and costs, less £13 paid on account. The bond became due by reason of non-payment of interest. Counsel also asked that the property specially hypothecated be declared executable, and for leave to attach the rents.

Order granted, the rents declared executable, and to be paid to the Sheriff.

VAN DER BYL V. TAAHAR AND OTHERS.

Mr. De Waal moved for provisional sentence on a mortgage bond for £300 and interest, at the rate of 8 per cent. The bond had become due by reason of non-payment of the capital. Counsel also asked that the property specially hypothecated be declared executable.

Granted.

SWANEPOEL V. HEINEMANN.

Mr. J. E. R. de Villiers moved for provisional sentence on a mortgage bond for £3,000, with interest and costs, and that the property specially hypothecated be declared executable.

Granted.

ESTATE MASKEW V. VAN HEERDEN AND ANOTHER.

Mr. Watermeyer moved for provisional sentence on a bond of £1,050, and costs, and that the property specially hypothecated be declared executable.

Granted.

KAAL V. FORTUIN.

Mr. Van Zyl moved for provisional sentence on a mortgage bond for £240, with interest, and that the property specially hypothecated be declared executable.

Granted.

HEWITT V. VILJOEN.

Mr. De Waal moved for provisional sentence on a mortgage bond for £250, with interest and costs, and that the property specially hypothecated be declared executable.
Granted.

SIIQUA V. PAYNE.

Mr. Alexander moved for provisional sentence for £200 on two promissory notes, with costs.
Granted.

CUNNINGHAM AND ANOTHER V. ORR.

Mr. P. Jones moved for provisional sentence for £24, on certain conditions of sale, being the balance of the purchase price of £60 for land at Hout Bay.

The defendant appeared in person, and said he had paid £51 out of the original price of £60. He was willing to give them back the property.
Order as prayed.

DE VILLIERS V. MYBURGH AND ANOTHER.

Mr. J. E. R. de Villiers moved for provisional sentence on a promissory note for £1,006, with interest and costs.
Granted.

HEYNS V. ARMSTRONG.

Dr. Rainsford moved for provisional sentence on a promissory note for £25, less £5 paid on account, with interest and costs.
Granted.

BURMEISTER V. PLEHN.

Mr. Gutsche moved for the final adjudication of the defendant's estate as insolvent.
Granted.

WELLS V. SCHLECHTER.

Mr. P. Jones moved for the final adjudication of the defendant's estate as insolvent.
Granted.

VAN ZYL AND BUISSINNE V. SIEG.

Mr. P. Jones moved for the final adjudication of the defendant's estate as insolvent.
Granted.

ZACKON V. SAACKS AND HOFFMAN.

Mr. P. Jones moved for the final adjudication of the defendants' private and partnership estates as insolvent.
Granted.

MILLS V. YOUNG.

Mr. P. Jones moved for the final adjudication of the defendant's estate as insolvent.
Granted.

ARDERNE V. BIDEN.

Mr. P. Jones moved for provisional sentence on promissory notes for £525 18s. 4d., £515 13s., £520 15s., £542 18s. 4d., and £300, with interest and costs.
Granted.

MUSSETT V. NAPPER.

Mr. Jones moved for provisional sentence for £25 on certain acknowledgment of debt, and £10 on an IOU, with costs.

Mr. Burton, for defendant, put in affidavits which showed that one Harry Stevens agreed to advance the money to the defendant, and on the back of the document appeared the name of Musset. If Musset appeared to him to be anything, he was a surety.

Order refused, with costs.

At a subsequent stage, when Mr. Burton mentioned the matter of the defendant's arrest on a writ, Maasdorp, J., ordered that the writ be discharged, and that the defendant be released from custody.

AFRICAN HOMES TRUST CO. V. SEBBA AND ANOTHER.

Mr. J. E. R. de Villiers moved for provisional sentence on a mortgage bond for £850, with interest, and that the property hypothecated be declared executable.
Granted.

SCOTT V. KIRBY.

Mr. Lewis moved for a decree of civil imprisonment against the defendant. The defendant appeared in court, and said he never received the first summons. The plaintiff was aware that the defendant had changed his residence. The first intimation he had was when he saw the newspapers.

Maasdorp, J.: You will have to re-open the whole matter if you prove that you had not proper service.

Defendant: All right, my lord.

Maasdorp, J., ordered the application to stand over until 13th May, the question of costs also to stand over.

GENERAL MOTIONS.

VAN NIEKERK V. WILL AND { 1905.
OTHERS. { Apr. 17th.

Mr. Close appeared for the plaintiff, Mr. Gardiner for Will, and Mr. P. Jones for the second defendant.

Mr. Gardiner applied for a postponement of the trial *sine die*, on the ground that the defendant Will, who was making every effort to locate important witnesses, would be prejudiced if forced to go to trial on the date for which it was fixed.

Mr. Close pointed out that certain of his witnesses had already travelled considerably over 200 miles by postcart, and that plaintiff would be put to great expense.

The hearing was set down for Monday, 8th May, with leave reserved to the defendants to apply for a postponement, and either party to call further witnesses, costs to be costs in the cause.

Ex parte GREENING.

Mr. Alexander moved, as a matter of urgency, on behalf of the Incorporated Law Society, to have the petitioner's application, which was set down for Thursday next, postponed until June 1. Counsel said the application was on behalf of Robert Greening to be reinstated as an attorney, and the Law Society were opposing the application.

The respondent appeared in person, and said that on the 20th March he applied for re-admission as an attorney. He had been suspended in the Cape Colony and Natal for twelve months, at the instigation of the Law Society. The Law Society applied to the Right Hon. the Chief Justice for a postponement on the ground that they did not know that he had been suspended in Natal, which, as a matter of course, followed the suspension in the Cape Colony. If he did not apply in June for re-admission in Natal he would be struck off the rolls there. He was only suspended there because he was suspended here, and the Law Society had only just discovered this. The Chief Justice then told the learned counsel that he thought it would be sufficient if he gave him a postponement until the 11th April.

[Maasdorp, J.: The only question is whether you will be prejudiced.]

Respondent: I shall be finished in Natal, my lord. At present I have no means of earning a living.

Mr. Alexander pointed out that the respondent was suspended with leave to apply again. Counsel said he had an affidavit which referred to malpractices in Natal.

Respondent: I do object to the postponement, because this is an attempt to extend my punishment.

Mr. Alexander read an affidavit by the secretary of the Law Society, which set out that there was reason to believe that certain fees were still due to members of the bar here by the respondent—something between £300 and £400—and there was considerable probability that Mr. Greening had appropriated some of the money to his own use. A letter had been sent to the Attorney-General, and from his reply it appeared that any fees owing were long overdue before the respondent's insolvency, and no claims against the estate were made by members of the bar. The members of the bar felt that before they should give any information there should be an expression of opinion from the Court. A further affidavit was put in from one Nicholls, of Durban, which set out that the respondent had been struck off the roll of notaries in consequence of the disgraceful state in which he kept his protocol.

The respondent said he had no objection to members of the bar giving the names of clients and all information that lay in their power. When the Law Society obtained the previous order against him they were well primed with all the facts they had now. There was no one that could find half as bad about him as he could himself. They came up with the story about counsel's fees, but many a time he had paid them without getting anything from the clients. The secretary of the Law Society's affidavits were vague, incoherent, inconsistent, egotistical, and absurd.

Maasdorp, J.: It seems the matter must stand upon the roll where it has been placed. There is no urgency about this application. If the bar is in a position to give information which would satisfy the Court that the applicant is unfit to be reinstated, then such information would, of course, be of the utmost importance to the Court.

The Respondent: I should like a full inquiry, your lordship.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

DIVORCE CASES.

HAAKENSEN V. HAAKENSEN { 1905.
Apr. 18th.
May 1st.
" 4th.

This was an action brought by Bernard Julius Haakensen, of Cape Town,

dren. This he denied, because the farm was bequeathed to the children by his first wife.

Mr. Molteno said that the defendant lived close to the plaintiff's farm.

Decree of restitution granted, defendant to return to the plaintiff on or before the 15th May, failing which, to show cause on the 2nd June why a decree of divorce should not be granted as prayed, with costs.

Postea (June 2nd). Decree absolute with costs.

TRIAL CAUSES.

PALMER V. CAPE COLD { 1905.
STORAGE AND SUPPLY CO. { Apr. 18th.
Sale and purchase—Suspensory condition.

This was an action brought by Charles Thos. Palmer, of Observatory-road, against the Cape Cold Storage and Supply Co., for the return of a horse or its value (£40), and for damages for detention in the sum of £10.

From the pleadings, it appeared that the plaintiff sold to one Robert Jenkins a certain horse, the terms being that the buyer was to pay £5 down and £1 10s. per week until the debt was discharged. It was a condition of the agreement that the sale was not to take effect, and property in the said animal was not to pass, until the last instalment had been paid. The said Jenkins paid down the sum of £5, and also paid certain instalments, but he afterwards failed to keep to the terms of the agreement between them, and in the end the plaintiff found that the animal had been sold to the defendants for the sum of £23. He demanded its return, but they refused to deliver up the animal until after pleadings had been filed, when the animal was given up. The defendants put the plaintiff to proof of damages, and prayed that the claim should be dismissed, with costs.

Dr. Rainsford was for the plaintiff; the defendants in default.

Charles Thos. Palmer (the plaintiff) said that he first saw the mare in a cart belonging to the defendant company, and ascertained that the company had bought the mare for £23. Witness at once pointed out that the animal was his property, under a hire and purchase agreement. Witness produced the agreement for the inspection of the company's manager, Mr. Elliot, and also the traveller. The former said that the agreement was not worth the paper it was written on. Witness had not at that time commenced proceedings. The horse was returned to him a month afterwards. Witness was a cartage contractor, and owing to the horse being detained, he had had to obtain another horse for his business. The

animal would have been worth from 10s. to £1 a day to him.

Edward Isaac Sidney, the plaintiff's attorney, said that he offered to one of the representatives of the defendants' attorneys an inspection of the hire and purchase agreement between Jenkins and the plaintiff.

[De Villiers, C.J.: I am bound to say that these agreements are not really agreements to be encouraged, because they open the way to fraud. A man is left in possession of a horse, he enters into negotiations for a sale, and then it turns out that there is a private agreement between the parties that the ownership in the horse has not to pass. Have there been any decisions that such an agreement can be maintained?]

Dr. Rainsford said that there were several cases reported which upheld the suspensory condition. There was the case of *Albertyn v. Basson* (15 C.T.R. 118), decided before Mr. Justice Hopley on February 18th last. The same principle had been recognised in previous cases, including that of *Wolfe v. Ritter* (3 High Court, 102).

De Villiers, C.J.: In this case it is unnecessary to discuss the question of law, which might have been an interesting one if the defendants had defended the case. The defendants have admitted their liability to return the horse by actually returning it after the costs had been incurred, and I think, therefore, that they should pay the costs of the action, which is, to my mind, the only question really in dispute. There is a further claim for damages, and, in my opinion, that should not be allowed. The form of contract is one which I think should not be encouraged. It certainly opens the way to fraud. A man is left in possession of an animal as if it were his own property; there is nothing to give notice to the person with whom he deals that the animal does not belong to him. After he has sold to a *bona fide* purchaser, the owner comes forward and says to the purchaser, "It is my horse," and he practically claims the benefits of a pledgee without having the article pledged in his possession. Then, again, in this case it is not perfectly clear to me that any damages have been sustained. In any case, it would appear to me that a person who does buy an animal under circumstances like the present is entitled to require the clearest proof that the animal is not that of the ostensible owner before delivering it back. That was the position the defendants took, and in the present case, on the whole, I think that the plaintiff should not have, in addition to the value of the animal, and in addition to the costs of this action, any damages for detention of this horse. There will, therefore, be judgment for the plaintiff for costs of this action.

CHORITZ V. SHOOLMAN.

This was an action to recover the sum of £300 upon a certain acknowledgment of debt, with interest *a tempore moræ* and costs. Mr. Alexander was for the plaintiff; the defendant, Max Shoolman, did not appear.

Mr. Alexander stated that the defendant had been prosecuted for forgery of an alleged previous agreement under which it was said that plaintiff agreed to accept £50 a year. The defendant was admitted to bail, but on the day of the trial he did not appear, and the bail had been estreated. A warrant had been issued for his arrest, but Shoolman had not been found.

John H. C. van Breda, clerk at the Resident Magistrate's Court, Cape Town, produced the record in the case of Rex v. Shoolman.

Judgment was entered for the plaintiff for the amount claimed, with costs.

ILLIQUID ROLL.

TREDGOLD, MCINTYRE AND (1905.
BISSET V. JEFFREYS. (Apr. 18th.

Dr. Greer moved for judgment under rule 329 (d) for £54 10s. 8d., balance due for professional services and moneys disbursed, with interest *a tempore moræ* and costs.

Order granted.

COLLIE V. WAGNER AND CO.

Mr. Swift moved for judgment under rule 329 (d) for £41, balance of rent due, with interest *a tempore moræ* and costs.

Order granted.

JONES V. GASH.

Mr. Long moved for judgment under rule 329 (d) for £31 1s. 3d.

Order granted.

BENDHEIM V. HIRSCHHORN.

Mr. Swift moved for judgment under rule 329 (d) for £157 16s. 9d., balance of account for goods sold and delivered, with interest and costs.

Order granted.

ABELU V. BURCHARTH.

Mr. Sutton moved for judgment under rule 329 (d) for £97 10s., rent due with interest *a tempore moræ* and costs.

Order granted.

EATON, ROBINS AND CO. V. ABERG.

Mr. Sutton moved for judgment under Rule 329d.

Order granted.

BOWLAND HILL AND CO. V. LOUW.

Mr. Struben moved for judgment under Rule 329d for £147 17s. 2d., balance of account for goods sold and delivered.

Order granted.

NICOLA V. FALSE BAY QUARRIES.

Dr. Greer moved for judgment under Rule 329d for £86 17s. 10d., for work and labour done and material supplied.

Order granted.

GRAMOPHONE AND TYPEWRITER CO. V. ANDERSON.

Mr. Struben moved for judgment under Rule 329d for £175 7s. 5d., less £50 paid on account, with interest *a tempore moræ*, and costs.

Mr. Alexander (for defendant) applied for a stay of execution, and stated that defendant was prepared to at once pay £50 more. He had outstanding debts in his favour amounting to about £1,000. The defendant said that there was only due from him to plaintiff £114 7s. 5d. The balance would be paid within one month.

Judgment was given for £125 7s. 5d., with costs, with stay of execution on condition that the sum of £50 be paid before 4 o'clock, and the balance and costs be paid before May 20.

KRUMM V. BROWN.

Mr. Douglas Buchanan moved for judgment under Rule 329d for £79, balance of rent and goodwill and money lent, with interest *a tempore moræ* and costs.

Order granted.

WOODSTOCK MUNICIPALITY V. DELMORE.

Mr. Sutton moved for judgment under Rule 329d for £143 6s. 8d.

Order granted.

LIBERMAN AND BUIRSKI V. ENDIN.

Dr. Greer moved for judgment under Rule 329d for £150 10s. 4d., for goods sold and delivered, with interest *a tempore moræ* and costs.

Order granted.

DEMPEERS AND VAN RYNEVELD V.
RODDE AND HECTOR.

Dr. Greer moved for judgment under Rule 329d for £139 9s. 4d., balance of account.

Order granted.

FICK V. TANNER.

Mr. Roux moved for judgment under Rule 329d for £700, balance of purchase price of certain land at Piquetburg.

Order granted.

MAXWELL AND EARP V. NEL.

Mr. J. E. R. de Villiers moved for judgment under Rule 329d for £201 12s. 4d., for goods sold and delivered, with interest *a tempore mora* and costs.

Order granted.

ZEMDERBERG AND DUNCAN V. LOFTUS.

Mr. Douglas Buchanan moved for judgment under Rule 329d for £47 14s. 6d., less £30 paid on account for goods sold and delivered, with interest *a tempore mora*, and costs.

Order granted.

PEARSON V. WEENBERG AND DECKER.

Mr. Douglas Buchanan moved for judgment under Rule 329d for transfer and conveyance of certain land at Retreat, sold to plaintiff by the defendants for £36, and in respect of which £39 11s. had been paid by way of purchase price and transfer expenses or, in the alternative, for cancellation of sale and return of the sum of £39 11s.

Order granted; transfer to be given or on before May 15.

GENERAL MOTION.

Ex parte VOSLOO.

Mr. Roux moved for leave for the petitioner to be examined in Pretoria as an attorney and notary.

De Villiers, C.J., said that the Court would grant a similar order to that given in *ex parte* Dirk.

SUPREME COURT

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

TRIAL CAUSES.

S.A. BIBLE UNION V. COSAY. { 1905.
Apr. 18th.

Sale and purchase—Agent.

This was an action for transfer of certain premises. The declaration set out that the plaintiff, Mr. Pienaar, was the secretary of the S.A. Bible Union, Sarah Cossay, was the defendant, both of Cape Town. Prior to and in July, 1904, certain negotiations took place between the parties for the purchase of certain property belonging to the defendant, consisting of two shops and six offices in Church-street, Cape Town. The plaintiff, on the 16th July, 1904, offered to purchase the property for £8,000, subject to certain conditions, and subject to the confirmation by the directors. The defendant accepted the said offer, subject to the conditions referred to, and on this understanding the property was bought by the plaintiff in July. The plaintiff proposed to the defendant certain terms as to the payment of rates and taxes, and as to a certain dividing wall, and that the purchase-price was to be paid on transfer. The defendant expressed dissatisfaction with certain of the conditions, but not as to the purchase price or to the mode of transfer. Plaintiff, on the 14th July, withdrew and waived all the said conditions, except the method of payment and the mode of transfer. Plaintiff was always willing to pay the purchase-price, and all expenses of transfer, but defendant refused to transfer the property to the plaintiff. Plaintiff had sustained damages to the extent of £2,000, and claimed an order for the transfer of the property.

The plea set out that the main condition required by the defendant during the negotiations, and which was the principal reason for the refusal, was that part of the purchase-money should be paid at once, and before transfer. No completed sale ever took place.

Mr. Burton (with him Mr. Van Zyl) was for the plaintiff, and Mr. Gardiner (with him Mr. P. Jones) was for the defendant.

George Stephman, broker, stated that at the end of 1903 he was approached by Mrs. Cossay with regard to the sale of certain property in Church-street. Among other people, he approached the S.A. Bible Union, and after certain offers had been refused, on the 1st July witness wrote to Mr. Pienaar saying

that if £8,000 were offered for the property, Mrs. Cosay's agent would induce her to accept. On the 5th July, Mr. Pienaar said that the letter had been laid before the Financial Committee, who could not see their way to offer more than £8,000. On the 6th July, Mr. Pienaar again wrote, stating that the offer would be subject to certain conditions. On the 8th July, the defendant accepted the offer, subject to the conditions referred to being satisfactory. That letter was handed to the secretary of the Bible Union, and witness was requested to draw up a draft broker's note, and he was given instructions what conditions to insert. It was set out in the note "that the property was sold for £8,000, the purchaser to pay all transfer expenses, and such to be paid to the seller up to the 1st August, all current rates and taxes for the current year to be paid to the seller, the present dividing wall to be built up to the roof; cash against delivery." The note was handed to the defendant's representative, who returned it next day, saying that he had submitted it to Mr. Partridge, who was holding Mrs. Cosay's power of attorney, and who refused to accept the note, saying that he could not accept the conditions. Subsequently, witness, with Mr. Pienaar, went to the office of Mr. Partridge, and had an interview with him.

Mr. Gardiner said if his learned friend was going to prove that a contract was made by Partridge, on Mrs. Cosay's behalf, he would object, as that was not pleaded. Partridge had disappeared, and there was no trace of him.

[Maasdorp, J.: You will have to prove that Partridge was acting for Mrs. Cosay.]

Mr. Burton pointed out that at a subsequent stage Mrs. Cosay wrote saying that the conditions would have to satisfy Mr. Partridge.

[Maasdorp, J.: I might allow an amendment of the plea.]

Mr. Gardiner pointed out there was no plea of a verbal contract with Mr. Partridge.

[Maasdorp, J.: The question is whether this contract made with Partridge should not have pleaded?]

Mr. Burton: We maintain that the contract was made by the letters of the 16th July. The only question is whether those conditions were fulfilled.

[Maasdorp, J.: Then the question is whether at this time the conditions were settled in Partridge's presence.]

They were discussed with Partridge, and notification was sent to the defendant for Partridge's decision. Counsel applied to amend his declaration to read: "The defendant either by herself or through her agent, one Partridge."

Mr. Gardiner objected to the amendment at this stage.

[Maasdorp, J.: I will note your objection.]

Witness (proceeding) said when Partridge came to the item of rates and taxes, he objected, stating that it was usual that the purchaser paid a *pro rata* share. He also objected to the stipulation as to the leases and the building up of the dividing wall. Nothing was said about cash against transfer. That was the usual condition. Partridge did not say that he objected to the price. Witness drew up another draft note. A letter was sent to the defendant from the Bible Union, withdrawing the conditions except the usual one, cash against delivery, and defendant replied that she could do nothing until Mr. Partridge was satisfied.

Cross-examined by Mr. Gardiner: He was aware that an offer of £10,000 had been made by the Bible Union for the property in April. He had heard that Mrs. Cosay was anxious to have some money in hand. Mr. Thomas had written, asking £1,000 deposit, which would mean before transfer. As a broker, he could see as time went on that Mrs. Thomas was getting more anxious to get the money. He was positive that Partridge did not object to cash against transfer. On Mrs. Cosay accepting the offer of £8,000, he thought the contract was made. He drew up another note to see if Thomas would accept it. He really did not know among the three, Mrs. Cosay, Thomas, and Partridge, who had the authority to act.

Bernard Pienaar, secretary of the S.A. Bible Union, stated that in 1903 the Union were anxious to buy certain property in Church-street. Some time about May or June he was approached by the broker, Mr. Stephman. On the 5th and 6th July, witness offered £8,000 subject to certain conditions being agreed upon, and the defendant accepted the £8,000, subject to the conditions being satisfactory. Thomas said that Partridge refused to allow Mrs. Cosay to sign. Witness corroborated the last witness as to what took place before Mr. Partridge. Nothing was said about "cash against transfer." He said others had come up and offered to buy the property, but he had told them that the offers could not be entertained, as the property was sold. While the transactions about £8,000 was going on there was no mention of cash down.

Cross-examined by Mr. Gardiner: Mr. Partridge read the note through, but did not make any remark about the condition as to payment. Witness knew that Mrs. Cosay was in want of money some time before. He never said to his committee, before Mr. Thomas, that if they waited they would get it at their own price.

By the Court: Witness did not buy the property; when he met Mr. Partridge, he only had to report, but both witness and Mr. Partridge took it that the property was purchased.

Mr. Burton closed his case.

Reginald Metcalfe, solicitor, in the office of Silberbauer, Wahl and Fuller, said Mr. Thomas was in the office for some time, and acted for Mrs. Cosay.

William Thomas said he was employed by Mr. Cosay as bookkeeper. In June of last year he was anxious to get money to meet bonds on Mrs. Cosay's property. On June 14 he told Stephman and Pinnaar that he wanted £1,000. He could not say that he mentioned this later on, but he several times mentioned that he wanted money. Mrs. Cosay objected to the condition of the broker's note. Witness attended a meeting of directors of the Bible Union, and stated he was instructed to object to all the conditions. He was never authorised to accept the conditions.

Cross-examined by Mr. Burton: The broker's note produced was the second note. The first was a rough piece of paper. The two notes submitted to him both contained the objectionable conditions. He received a letter on July 14 withdrawing the objectionable conditions. In July he was negotiating for the sale of the whole property, and had an offer of £20,000. Of the £20,000 he considered that the portion of the property sold to the Bible Union represented £12,000. This was before the acceptance of the Bible Union's offer. After accepting of the offer, witness ceased to negotiate elsewhere. At the present time, Mrs. Cosay had a better offer for the property by £500. This offer was made within the last three months.

Sarah Cosay, defendant, said she never authorised Mr. Thomas or Mr. Partridge to conclude any sale. The main condition was money down. She wanted £2,500.

Cross-examined by Mr. Burton: Witness told Partridge that she must have £1,000 at once, but if he could get £2,000, to do so. Witness asked Partridge to tell the Bible Union this. Witness told Partridge that cash against transfer was no good to her.

Mr. Gardiner closed his case; and counsel were then heard in argument on the facts.

Maasdorp, J.: "In this case the plaintiff sues the defendant for the transfer of a certain building, belonging to the defendant, which they alleged was purchased by them from the defendant for the sum of £8,000. The defendant denies that any contract was ever concluded between them, and the Court has now to decide whether such a contract of sale was made between the parties. It appears that as early as June, 1904, there were negotiations going on between the plaintiff, and the defendant, through the medium of a broker, Stephman, and at that time it was brought to the knowledge of the plaintiff that it was a matter of some importance to the defendant that she should, if the sale went through, obtain a certain amount of the

purchase price on deposit forthwith, and that she could not wait the passing of transfer. It was admitted by the plaintiffs that at that time they were aware she was pressed for money, and anxious to obtain it, and with her negotiations it was a matter of importance that she should receive some cash payment at once. However, no contract was then concluded between the parties. The negotiations went on until the 5th of July, when a letter was written by the plaintiff's secretary to the broker Stephman offering to purchase the property for £8,000. After this letter was despatched the secretary sent another letter before the terms contained in the letter of the 5th could be accepted, and that letter is the important document upon which this case mainly turns. The terms of the letter are the following. It is a letter sent by Mr. Pinnaar, and addressed to Mr. Stephman—"Adverting to my letter of yesterday I have to state that my offer of £8,000 is subject to certain conditions to be agreed upon, and same to be confirmed by the Board of Directors of the Bible Union." An answer was sent to this letter by the defendant herself, in which she accepted the offer, subject to the conditions referred to being satisfactory. Now, it is quite clear that up to the 6th July no agreement of sale had been concluded between the parties, but it is also pretty clear that in Mr. Stephman's opinion such an agreement had been concluded, and I may almost say that in the declaration that opinion of his appears to have been adopted, because in the third paragraph we have the following words: "On or about the same day in July last, aforesaid, the defendant accepted the said offer, subject to the conditions referred to being satisfactory, and upon this the property was sold by the defendant to the plaintiff." Here again the plaintiff seems to anticipate matters, because there could be no sale until the agreement was concluded, and here the position taken up is that when the letter of acceptance was written on the 6th July the agreement was concluded. So far from that being the case it was necessary for the plaintiffs to submit their conditions which were to be taken into consideration by the defendant, and afterwards to reject or express satisfaction with them and conclude the sale. The conditions which the plaintiffs proposed were embodied in the broker's note, which Mr. Stephman handed to Mr. Thomas, and by him the broker's note was submitted to Mr. Partridge. Now, with reference to the position of Mr. Partridge in this case, I have come to this conclusion, that he was empowered by the defendant to carry on negotiations, and so far he had a limited power of attorney. He had no full powers to conclude an agreement with the plaintiffs for the sale of this

property, but under the authority given him he had to refer back to her for final decision. The conditions contained in the broker's note were submitted to Mr. Partridge, and, Mr. Partridge having read those relating to the payment of the rents of the property, and the payment of the rates and taxes, objected to them, and some other conditions. At the foot of the broker's note appeared: "Cash against transfer." It is said he also read these words, but did not express any objection to that condition, but it was also clear that he did not in so many words accept that condition. When Mr. Pienaar left the office matters were in the position that the conditions submitted were unsatisfactory and Mr. Pienaar was told that they were unsatisfactory and would not be accepted. Mr. Partridge never told Mr. Pienaar what conditions he actually did accept. After considering the matter the plaintiff decided to withdraw a number of the conditions which were contained in this broker's note and wrote a letter to inform the defendant of this, and I will just point out here that this letter was not written to any agent but direct to Sarah Coeay and also point out that when a letter passed between defendant and plaintiff it was signed by S. Coeay, acting for herself. In this letter, written by Mr. Brand, acting on behalf of the Bible Union, they withdrew all their conditions, but the letter concludes "The only condition is cost against transfer." This is not an unconditional offer which is merely subject to the ordinary consequences of law. It is said the ordinary consequences of law is that cost would be paid against transfer, but it is here more a condition that there should be cash against transfer. After this letter is written another broker's note is drawn up, and I presume, amongst other things, this broker's note contained the condition "cash against transfer." On this second note being submitted to Thomas and Coeay the offer was again rejected. Now it is contended on behalf of the plaintiff that the position was this: that the sale for £8,000 was concluded and that no conditions existed to which Mrs. Coeay could object. To that I may say that I consider this condition, "cash against transfer," an important one, and she does object to it, and did directly after the offer was submitted; but, even if it did not contain an exception when the letter of the 6th July was written, the position was this—that the parties contemplated that the bare sale for £8,000 was not sufficient, but they should meet and consider as to the terms of the payment after the purchase price, which was an important matter, and until they so met and considered their arrangements as to the sale and the purchase price, no agreement was concluded. It was suggested that the defendant contemplated

the agreement as a concluded contract, and that she only withdrew from it when certain better offers were made to her, and that she did not take up a *bona fide* position in the matter, but merely attempted to escape from what was a binding contract. Now, there was no positive evidence that that was so, and it appears to me from the correspondence itself that the defendant did not withdraw from the negotiations. The position she took up in the last letter written for her by Mr. Thomas, was that the conditions put forward to that date were not satisfactory, but she did not withdraw from the negotiations, or terminate them, or wholly reject the provisional arrangements that she had up to that date entered into. Upon the whole of the correspondence, and the evidence submitted I have come to the conclusion that the contract to sell alleged in the declaration was never finally concluded between the parties, and that the plaintiffs are, therefore, not entitled to claim transfer of the property, and judgment will be given for the defendant with costs.

[Plaintiff's Attorney: P. M. Brinok;
Defendant's Attorneys: Silberbauer,
Wahl and Fuller.]

MACLEOD V. JOUBERT.

Pleading—Amendment of plea— Costs.

This was an argument on exceptions, the plaintiff taking exception to the defendant's plea on the ground that it was vague, and embarrassing in law, in that no tender was made in the prayer of the plea, although made in the body, and that certain noting charges had also been included in the tender, but not in the plea, and, further, there was irrelevant and argumentative matter in the plea. Mr. Gardiner was for the plaintiff, and Dr. Greer was for the defendant.

Counsel having been heard in argument,

Maasdorp, J.: An exception is taken by the plaintiff in this case, to the plea of the defendant. It is alleged that the plea was vague, embarrassing, and inconsistent; in that it appears in one part of the plea that a certain sum is alleged to be tendered in respect of the said debt, whereas in another portion of the plea it almost appears as if that debt, in respect of which the condition is made, is absolutely denied. Then in the plea the defendant prays that the whole of the plaintiff's claim may be dismissed, whereas, as a matter of fact, he had already admitted liability for a portion of it, and tendered that portion. Now, this plea seems to me, on the face of it, technically defective and not very artistically drawn, but for

my own part I must admit I don't see there would have been actually an embarrassment to the plaintiff in this matter. The plaintiff would have set about proving his debt in the ordinary way, and then the Court would have considered what the balance was that was due, and whether the amount tendered was sufficient. However, when the attention of the defendant was called to the fact that the plea was excepted to as embarrassing, he suggested he should be allowed to correct this defect, and amend the plea so as to be a good and effective answer to the plaintiff's claim. The plaintiff offered to allow the amendment upon the payment of all costs in the matter. Now, it seems to me, considering the whole case, that the exception is really not a vital matter, and it is a very trivial matter. Indeed, there could have been no special costs. I see no grounds for believing that there are any special costs attached to introducing this exception in the answer to the defendant's plea, and under all the circumstances of this case, I think the amendment ought to have been allowed without the raising of any difficulty at all on the part of the plaintiff. The Court will now order that the amendments, as suggested, be allowed in the plea, and that each party pay his own costs.

REHABILITATIONS.

{ 1905.
{ Apr. 18th.

Mr. J. E. R. de Villiers moved for the rehabilitation of Anna van Heerden, who is the surviving spouse in respect of the joint estate of her late husband and herself. Three-fifths of the creditors consented after the first and final liquidation and distribution of the accounts. Granted.

Mr. J. E. R. de Villiers moved for the rehabilitation of Frans Schoeman, whose estate was voluntarily surrendered on the 11th July, 1900. The deficiency was £322, and there was nothing unfavourable in the trustee's report. The insolvency was due to the unsettled condition of the district during the war.

Granted.

GENERAL MOTIONS.

SCHREIBER V. SCHREIBER.

Mr. Russell moved to make absolute a rule *nisi* calling on the defendant to restore conjugal rights to the plaintiff or to show cause why a decree of divorce, with forfeiture of the benefits of the marriage, should not be granted. The rule had been personally served in St. Louis, U.S.A., from where the defendant sent a postcard to his wife, telling her that he had already obtained a

divorce there, and that he was free and in a free country. He had no objection to forfeiting the benefits of the marriage, and he added: "If the house still exists, give it to your dear mother."

Decree of divorce granted, with costs; a division of the property ordered, with leave to counsel to suggest someone to divide the property.

Ex parte THE MUNICIPALITY OF PEARSTON.

Mr. J. E. R. de Villiers moved to make absolute a rule *nisi* granted under the Derelict Lands Act.

Rule made absolute.

Ex parte DURNFORD.

Mr. P. Jones moved to make absolute a rule calling on all persons to show cause why certain vacant strips of land on certain property in which title has been given to the Admiralty should not be made absolute.

Rule made absolute.

Ex parte FORBES.

Mr. Sutton moved to make absolute a rule *nisi* granted under the Derelict Lands Act.

Rule made absolute.

Ex parte FLAUM.

Dr. Greer moved for a postponement of the return day, as the defendants who were last heard of in Russia, had not yet been traced so far as counsel knew.

Return day extended until 1st June.

Ex parte ESTATE BANKS.

Mr. P. Jones moved to make absolute a rule calling on all persons to show cause why the Registrar of Deeds should not be authorised to cancel a certain mortgage bond.

Rule made absolute.

Ex parte ESTATE DEVENISH.

Mr. D. Buchanan moved to make absolute a rule for the cancellation of a bond which had not been traced for over twenty years.

Rule made absolute.

Ex parte ESTATE STRYDOM.

Mr. P. Jones moved to make absolute a rule *nisi* calling on the Registrar of Deeds, at King William's Town, and all persons concerned, to show cause why

transfer should not be given of certain land in the estate of the late Johannes Strydom.

Rule made absolute.

Ex parte ESTATE BROOK.

Mr. Close moved for leave to realise certain property in an estate in which the petitioner was curator, the owner having been declared a lunatic, and was at present confined in the Pretoria Asylum. It was necessary to realise the property to maintain him and pay certain debts.

Granted.

CLOETE V. DIEPRAEM.

Mr. Upington moved to make absolute a rule calling on the respondent to show cause why certain debts should not be attached in satisfaction of the amount of an award by a judgment of the Court.

Rule made absolute.

Ex parte ESTATE MCCABE.

Mr. Close moved to make absolute a rule to have certain proof of debt by the insolvent's son expunged.

Rule made absolute.

Ex parte ESTATE BADENHORST.

Mr. P. Jones moved for leave to pass transfer of certain property to one of the co-executors. The advertising and the sale were shown to have been satisfactory.

Granted.

Ex parte ESTATE MOSTERT.

Mr. J. E. R. de Villiers moved to make absolute a rule calling on all persons to show cause why a certain bond should not be cancelled.

Granted.

JACOBS V. MILLER AND CHIAT.

Mr. Alexander moved to have this case reopened on the ground that the applicants were unaware of the proceedings. Mr. Roux produced affidavits to show that they must have been aware, inasmuch as they had already instructed attorneys in the matter.

Application refused with costs.

Ex parte KELLY.

Mr. Roux moved to make absolute the cancellation of a bond and for the return of the £50 deposited in court.

Order as prayed.

Ex parte ESTATE VAN DER WAIT.

Mr. Sutton moved for an order authorising the Master to pay out certain moneys to the tutors of the minors.

The Master reported favourably.

Order in terms of the Master's report.

Ex parte RAWLINS.

Mr. Sutton moved for an order authorising the transfer of a certain farm to the minors, as the surviving spouse was about to remarry and it was to the interest of the children that this course should be adopted.

The Master recommended that the petition be granted.

Order granted in terms of the Master's report.

MCNEILAGE V. LONDON AND LANCASHIRE FIRE ASSURANCE COMPANY.

Mr. Swift moved for leave to sign judgment against the plaintiff, who had been duly barred from proceeding.

Granted.

Ex parte DOLD.

Mr. Watermeyer moved for authority to raise a loan in the interests of the minors under a certain ante-nuptial contract.

Maasdorp, J., said he would require further information as to the amount required for the education of the children.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.)]

DIVORCE.

CHRIST V. CHRIST. { 1905.
{ Apr. 19th.

This was an action brought by Margaretta Elizabeth Christ, of Cape Town, against her husband, John Christ, merchant, Cape Town, for a divorce, on the ground of his alleged adultery, or, in the alternative, for a judicial separation, on the ground of his alleged cruelty.

The plaintiff in her declaration said that she was married to the defendant in community of property at Cape Town in 1877, and that for several years past they had lived unhappily, owing to the ungovernable temper of the defendant. In the latter part of 1904 he struck her on several occasions, and caused her bodily harm. The plaintiff also alleged that in November and December last, at Cape Town, and in January at Muizenberg, the defendant committed adultery with one Minnie Zimmerman. He had struck the plaintiff with his clenched fist, and threatened to do for her, and in consequence she had been compelled to leave the house. Her daughter had also been compelled to leave the house, owing to the conduct of the defendant. Since January the defendant had contributed nothing towards their support. Plaintiff prayed for a decree of divorce against the defendant, or, alternatively, for a judicial separation *a mensa et thoro*, division of the joint estate, payment of a sum of money by way of alimony, alternative relief, and costs of suit.

The defendant, in his plea, denied the allegations of cruelty, and said that the differences were solely due to the plaintiff being unhappily addicted to intemperance. He denied that he had neglected to maintain or support the plaintiff or his daughter, and said that both left of their own accord. He said that his house was always open to them, and that if they returned to him, he was prepared to receive them and support them as hitherto. He also denied the allegations of adultery, and prayed that the claim be dismissed, with costs.

The replication was general.

Dr. Greer was for the plaintiff; Mr. Burton (with him Mr. Douglas Buchanan) was for the defendant.

Dr. J. B. Lester said that he had been attending the plaintiff during the past week. He saw no signs of intemperance or any indications that she was addicted to drink. He formerly attended Mrs. Christ, when her condition might have been the result of excessive indulgence in drink. That was about four or five years ago. She was in a very nervous condition, and was very irritable.

Margaretha Elizabeth Ohrist (the plaintiff) said she was married to the defendant in October, 1877. After the marriage they lived happily for a few years. Then the defendant started carrying on with the coloured girls; witness remonstrated, and defendant retorted that she was jealous. Defendant was very cruel towards her, and sometimes struck her. Last November Minnie Zimmerman came to stay at their house, a letter of invitation having been sent to her by witness's daughter at her husband's request. Witness saw the defendant take the girl into his room and look the door. Wit-

ness had seen her sitting on his lap, and had also seen them kissing each other. This was protested against by witness. She told defendant that it was indecent to behave in such a manner. Defendant told her that if she did not shut up, he would give her a good sjamboking. One day the defendant danced against her, and when she told him to mind where he was going, he struck her on the nose. Witness's daughter complained that Miss Zimmerman was not fit company for her. Her father told her that he was going to have Miss Zimmerman at the house, and that she must clear out if she did not like it. Her daughter left the house, and had since been in service at Worcester. The defendant told witness that he would not support her. He had threatened to shoot her, and had kept a six-chambered revolver in his room. She left the house the following morning, about the 14th January, because she considered that her life was in danger. Witness had since had a quantity of her clothing returned to her, but the defendant still retained her jewels. It was untrue to say that her husband treated Miss Zimmerman as a child. She was over twenty years of age. Witness had told the defendant that Miss Zimmerman was more his wife than she (witness) was. Witness commenced an action against her husband four years ago, but, at the request of the defendant, she withdrew the proceedings, and her husband paid all the costs. She denied the charges of intemperance, and said that she was suffering from nervousness in consequence of the defendant's cruel treatment of her.

Cross-examined by Mr. Burton: Witness had formerly taken beer, like any German would, but she denied that she had taken drink to excess. She denied that she had got drunk and used abusive language to all and sundry, and thrown things about. Her husband twice went with her to Europe, but she denied that it was so that she should undergo treatment on account of her intemperate habits. Miss Zimmerman and witness's daughter had attended the Convent School together, but witness had not encouraged the former to visit the house. Her husband always objected to their keeping company with Germans. They had scarcely any Germans visiting with them; her husband always wanted English friends. Miss Zimmerman was an orphan. It was not true that she had regularly called witness and her husband "Mammy" and "Daddy." Miss Zimmerman had not been in the habit of taking wine, but had taken whisky, because wine was not strong enough for her. One day, while they were at Muizenberg, Miss Zimmerman got drunk, and was lying on the sands in an indecent state. Witness did not see that

incident, but she was told about it by her daughter. Witness had practically been a prisoner for three years. Shortly after she left the house in January, the defendant refused to let her have her clothes and jewellery.

Bertha Caroline Christ (20), daughter of the parties, said that she had seen Miss Zimmerman, who was about her own age, on her father's knee, and she had seen him kissing her. Miss Zimmerman had also gone to her father's room, but she had told witness that she had only gone there to have a drink. Miss Zimmerman and witness shared one room, and witness had had occasion to complain about her father coming into the room in the morning before they were dressed. They had a bathing-house at Muizenberg, containing two compartments. A stock of liquors was kept in both compartments. Her father entered the box just after Miss Zimmerman and witness had been bathing. Miss Zimmerman had called out to her father, and said that she was cold, and he then came in and got her a drink of whisky. Witness objected, and her father told her that she must shut up, or he would do something to her. Witness also stated that her father had treated her mother cruelly, and had used violence towards her. Her mother was not, to her knowledge, of intemperate habits.

Cross-examined by Mr. Burton: Miss Zimmerman had often visited her parents, and had occupied the same room as witness, and, in fact, had been treated as a member of the family. It was untrue that her mother had been addicted to liquor at any time. There had long been unhappiness between her parents. Witness had always taken the side of her mother, while her elder sister had always taken her father's side.

Charles Hanna, of the Central House Private Hotel, said that the plaintiff had been staying at the house a little over two months. He had never seen her under the influence of drink.

De Villiers, C.J., said that it did not seem to him that the evidence was strong enough to support the charge of adultery.

Dr. Greer said that in that case he would rely on the alternative prayer of a judicial separation *a mensa et thoro*.

Evidence was called for the defence.

Dr. S. P. Impey said that he attended the plaintiff in 1901, and found that she was suffering from the effects of intemperance. She undoubtedly had a craving for drink, and was suffering from dipsomania. He considered that the defendant was indulgent towards her. He thought the drink habit might have been caused, but not aggravated by cruel treatment. Witness thought that, in addition to liquor, the plaintiff must have been addicted to a drug, probably morphia. He had noticed that she prevaricated a good deal. The first symptom of morphia was untruthfulness. Plaintiff made many charges against her

husband, but, knowing the circumstances, witness did not believe the allegations. Witness had occasionally prescribed morphia for plaintiff for dyspepsia, but Mrs. Christ had had the medicine repeated without authority.

Cross-examined: Witness spoke very strongly to plaintiff about the morphia. She said she must have something, and witness prescribed a medicine for her to do away with the craving. When witness saw her last in 1901, she was not under the influence of morphia.

John Christ (the defendant), said that his wife left him in January last. There was trouble owing to witness's daughter complaining of her mother's ill-treatment, while his wife complained of the daughter. Witness saw it was better for one to leave. His daughter left some days later; witness returned from business, and found his wife had gone. He denied that he had ill-treated his wife, or that he had been intimate with Miss Zimmerman. He had kissed her—"like he would a child." Witness had never taken the girl into a room, and closed the door. He had taken her into a room two or three times to give her a drop of wine or whisky, but had not closed the door.

[De Villiers, C.J.: How old is Miss Zimmerman?]

Twenty.

And you are?

Fifty-three.

And you thought it a right thing to do to take a young girl into your room and give her whisky?

I didn't think much of it. Perhaps I did wrong in that way.

Referring to the bathing-house incident, the witness said his daughter called to him from the bathing-house to go in and dry Miss Zimmerman's hair.

[De Villiers, C.J.: Spare your daughter.]

I must tell the truth.

[De Villiers, C. J.: Your daughter called you in, you say. Very incredible.]

Witness said he opened the door, and Minnie called out, "No; don't come in."

[De Villiers, C.J.: It is nonsense. What could a daughter's object be in telling her father to do such a thing?]

Witness denied the allegations of cruelty, and said his wife was very jealous, especially when under the influence of drugs and liquor. She used to abuse the children. If the houses were all occupied, the rents would amount to £95 a month, but he was drawing only £65 rent a month from the properties, and he had to pay 5 per cent. interest on loans. The interest came to £760, and he had to pay £220 for rates and insurance. The property could not, at present, be realised to advantage. He had done practically no work for nine or ten months as a painter and decorator. The utmost witness could pay to his wife was £10 a month. He wished

to keep the boys, who, he believed sided with him in the matter. He was willing to take his wife and daughter back.

By Dr. Greer: His daughter objected to Miss Zimmerman coming there, and witness told her if she objected he would stop young men coming to the house. She then said she would go, and witness told her she could do as she pleased. That was not, however, the reason why she left.

Minnie Zimmerman was called, and denied the charges of misconduct.

Llewellyn Henry Roberts, son-in-law of the parties, said that he had known the parties for six years, and he thought the unhappy relations were entirely due to Mrs. Christ's craving. She was very abusive at times. Witness had often been surprised at the defendant controlling his temper when his wife provoked him.

Mr. Burton closed his case, and counsel were heard in argument on the facts.

De Villiers, C.J., remarked that he was not inclined to order any division of the property. For the sake of the lady herself, it would be far better for her to get a fixed allowance, which should not be too great. He did not think such cruelty had been proved as would justify the Court in giving a decree if there had been any real opposition, but the defendant himself recognised that it would be impossible for himself and his wife to come together again. At the same time, he considered that the defendant's conduct had been very improper, very indecent, and very immodest with the young girl Zimmerman, whom he ought to have protected, and he was inclined to order defendant to pay all costs.

After hearing Mr. Burton,

The Court granted a decree of separation, with costs, the plaintiff to have the custody of the daughter Bertha. It was also ordered that, pending a further order of Court, on the application of either party, the defendant should pay to the plaintiff the monthly sum of £14, for the support and maintenance of herself and daughter during the minority of the daughter, and, after that, a monthly sum of £10, defendant to keep accounts of his income and expenditure until a final division of the property should take place, and to hand over to the plaintiff forthwith all her jewellery and personal belongings.

ILLIQUID CASE.

SMUTS V. BRITTON.

Mr. Rowson moved for judgment, under rule 329d, for £37 10s., for rent. Order granted as prayed.

[Before the Hon. Mr. Justice MAASDORP.]

GENERAL MOTIONS.

Ex parte JOSEPH. { 1905.
Apr. 19th.

Dr. Greer (on behalf of the respondent, the husband of the petitioner) moved for the rule nisi temporarily interdicting certain moneys lying to the respondent's credit in the Post Office Savings Bank to be discharged. The petitioner, in her original application, said that she intended to institute an action forthwith for judicial separation, but had failed to institute proceedings.

Rule discharged.

Ex parte ESTATE BLACK.

Mr. Watermeyer, on behalf of the executors testamentary under the will, Sarah Black and William Runciman, moved for an order authorising the repayment of a certain loan of £700, and to advance further sums out of the capital.

Maasdorp, J., said that the application could not be made without John M. Black, one of the heirs, being a party. He must receive notice of the application.

BOTHA V. BOTHA.

This was an application for attachment of the respondent for contempt of Court, in not obeying an order to pay alimony to the plaintiff.

Mr. J. E. R. de Villiers was for the applicant. Respondent did not appear.

The matter was ordered to stand over on account of an affidavit having been filed for respondent to the effect that there had been a reconciliation.

SEALE V. DOOVEY.

Mr. Upington moved for the referee's report to be made rule of Court.

Mr. Roux (for the respondent) urged that, as the matter originally came before Mr. Justice Hopley, it would be in the interests of all concerned that the present matter should come before Mr. Justice Hopley.

Mr. Upington submitted that the matter was one that might properly be dealt with by the Court at present, and he called attention to the terms of the reference. The dispute, it seemed, related to the erection by the plaintiff of certain shops and tenements in the district of the Woodstock Municipality, at the contract price of £1,650. Certain difficulties occurred during the progress of the building operations between the

builder and the Municipality. The report of the referee showed that he found that there was a balance due to the plaintiff of £191 18s. 5d., the defendant having tendered £68 odd.

Mr. Roux read an affidavit by the defendant's attorney, who submitted that the referee had placed a construction upon the contract that was contrary to law. That was in reference to the foundations and excavations. He submitted that the award should be reduced accordingly, or returned to the referee. The amount allowed by the referee for the excavations and foundations was £224.

Maasdorp, J., said that he thought Mr. Justice Hopley would shortly be back from the Circuit Courts, and in the meantime he considered that it would be better to allow the matter to stand over, to be mentioned to Mr. Justice Hopley upon his return.

SCHREIFER V. SCHREIFER.

Mr. Russell applied for the appointment of Mr. W. A. Currey, of the General Estate and Orphan Chamber, to act in the division of the joint estate.

Order granted.

Ex parte GRESLEY.

Dr. Greer moved, on behalf of petitioner, as executor in the estate of George Bolton, for an order directing the Master to accept a certain distribution account and file the same. It was stated that there had been a second marriage by Bolton. The first wife had not been heard of for a period of twenty-five years, and her death had been presumed.

Order granted as prayed.

Ex parte ESTATE ALBERTSE.

Mr. Russell moved for leave to transfer certain property to an executor.

Maasdorp, J., said that notice must be given to the usufructuary, Magdalena Elizabeth Botha, and the matter would therefore stand over.

Ex parte MABERY.

Mr. J. E. R. de Villiers moved for leave to sell certain property in the estate of petitioner and her late husband, and to apply the proceeds to the purchase of another property.

Order granted authorising the sale, the proceeds to be devoted to the purchase of a property, to be registered in the names of the children.

Ex parte D.R. CHURCH, JAMESTOWN.

Mr. Roux moved, on behalf of the petitioner, the minister of the Dutch Reformed Church, Jamestown, in the district of Aliwal North, for an order calling upon the High Sheriff to pay £1 2s. 6d. for each of certain erven set out in the schedule, or altogether a sum of £25 17s. 6d. The erven, according to the affidavit, bore by the original conditions of sale an annual tax of 5s. in favour of the D.R. Church at Jamestown, and four and a half years' taxes were claimed. It appeared that the land had been attached by the Divisional Council by reason of the non-payment of rates, that the High Sheriff had held a sale, and that a certain sum of £160 remained unclaimed in his hands.

Maasdorp, J., said notice of the application should be served upon the Sheriff, so that he might be a consenting party. The matter would stand over pending a report from the Sheriff, and then the question might arise as to whether a rule nisi should be issued. Perhaps under all the circumstances it would be best to give a rule nisi now to avoid further costs. The order of the Court, therefore, would be that a rule nisi be issued calling upon all parties interested in the properties mentioned to show cause why the sums claimed by the applicant should not be paid out of the proceeds in the hands of the Sheriff, notice to be served on the Sheriff, and rule to be published once in a newspaper circulating in Jamestown and to be returnable on the 13th May.

Postea (May 15th). The rule was made absolute.

Ex parte STROBEL.

Mr. Douglas Buchanan moved, on behalf of petitioner, acting as father and natural guardian of his minor son, for leave to raise a further sum of £250 to complete the erection of a dwelling-house. Leave had already been given to bond the property to the extent of £250, so that the property, if the present application were granted, would be mortgaged in the sum of £500. The Divisional Council's valuation was £600.

Maasdorp, J., said that if the order were granted in the present form of the application, the minor might be saddled with a good deal of interest. He would take time to consider the form in which he would grant the order.

Postea (March 20th). Leave granted as prayed.

GARLICK V. THOMPSON.

Mr. Upington moved for an award of arbitrator to be made a rule of Court. The dispute related to a lift in premises belonging to the applicant. The arbitrator found for Mr. Thompson for £157.

but ordered him to refund £500 to the applicant, and directed the respondent to pay the costs of the arbitration.

Order made rule of Court, with costs.

RAYNER, CAWOOD AND CO. V. NORVAL.

Mr. P. S. T. Jones moved for the attachment of certain property situate in Colesberg *ad fundandam jurisdictionem*, and for leave to sue the respondent by edictal citation for £48 15s. 7d. Defendant was residing in the Orange River Colony.

Order granted for the attachment of the property as prayed, and leave granted to sue by edictal citation, citation to be served personally, and to be returnable on the 1st June.

Ex parte NESER.

Mr. M. Bisset moved for the appointment of Mr. Thomas Percy Dawson as sole trustee in the insolvent estate of Simon Solomon. Petitioner said that he was a creditor against Solomon's estate upon a promissory note for £1,000.

Order granted, appointing Mr. Dawson as provisional trustee, with full powers of a trustee to administer the estate.

Ex parte MARAIS AND WIFE.

Mr. P. S. T. Jones moved for leave to sell certain property. The matter, he said, had previously been before the Court, and had been ordered to stand over pending further information. The petitioners were married by ante-nuptial contract, under which certain settlements were made, certain of the property was mortgaged, and there were sundry other liabilities. One Van Ardtt also had a life interest in the property. The whole estate was in a most complicated and involved state. Counsel stated that the further information required by the Court had now been furnished.

Maasdorp, J., said that, before making an order, he would like to read the papers in the matter.

Postea (May 5th). Lease granted to sell the property at not less than £2 per morgen.

ILLIQUID ROLL.

JACOBSON V. GRESSE.

Mr. Van Zyl moved for judgment, under Rule 32nd, for £163 18s. 6d., balance of account for goods sold and delivered, with interest *a tempore morae* and costs.

Order granted.

SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

TRIAL CAUSE.

PARRY V. LANG AND { 1905.
ANOTHER. { Apr. 19th.

Sale and purchase—Brokerage—
Rectification of contract—
Misjoinder of parties.

This was an action to recover £85 for brokerage in respect of a transaction in connection with the sale of the Transvaal Hotel, Sir Lowry-road.

The declaration set out that the plaintiff was a broker, of Cape Town, the first defendant until recently a licensed victualler, and the second defendant, who had been originally joined as co-defendant, was also a licensed victualler of Cape Town. The first-named defendant employed the plaintiff to find a purchaser, and in January, 1905, the first-named defendant sold the goodwill and fixtures of the Transvaal Hotel through the instrumentality of the plaintiff to the second defendant for £3,000. One of the conditions was that the first-named defendant should pay the plaintiff £85 for brokerage. Inadvertently, the words the "purchaser to pay the brokerage" instead of "vendor to pay brokerage" appeared in the note, and plaintiff claimed a rectification of the note so that the vendor should pay the brokerage. In February, 1905, the plaintiff obtained a rule *nisi*, acting as an interim interdict against both defendants, and he claimed against Lang £85 brokerage, with interest and costs of suit.

The plea set out that the plaintiff introduced two likely purchasers in Ginsberg and Kanterowitz. The defendant denied that he ever instructed plaintiff to find a purchaser, or that the sale to Moore, the second defendant, was effected through him. The first defendant signed the note, but informed the plaintiff that he did not effect the sale. The defendant denied that through inadvertence the words were put in the note.

Mr. Alexander for the plaintiff, and Mr. Searle, K.C. (with him Mr. Gardiner) was for the defendants.

Edwin Parry, broker, said he had known Lang for upwards of two years. When he knew him first defendant was concerned in the sale of an hotel at Robertson for a friend of Lang's.

The defendant asked him in March, 1903, to call at the hotel to see if a sale could be put through, and witness said the price of £6,000 for the Transvaal Hotel was too much. Lang subsequently said Josephs had put through the sale. Moore was the last purchaser he introduced. That was in December

last. In the case of Kanterowitz, broker's notes were actually made out. According to these Lang had to pay the brokerage. The sale was announced to Lang's principal creditors, and a meeting was held at Messrs. Logan's office, at which Lang was present. It was then found that Lang's statements regarding loans were incorrect. Kanterowitz was prepared and anxious to carry the sale through if Lang's representations had been correct. Witness afterwards told Lang he had another purchaser, and about December 23 he introduced Mr. Moore to Lang and to Mr. Anchutz, the manager of Sedgwick's. It was arranged that Mr. Moore should interview the creditors, and that gentleman showed witness a written option he had obtained from Lang. There was a difficulty in the matter of finance, but witness got two of the firms to transfer their loans. A meeting was arranged with Mr. Bultitude, and at that meeting witness, in the presence of Mr. Moore, discussed the matter of brokerage. Lang asked him to reduce the amount, and witness agreed to take £85. Lang said he would pay this, and Mr. Bultitude, who was present during part of the discussion, suggested that witness should make the note out. Lang, however, said he would not sign it then, but would go to witness's office. Afterwards, Lang said he would not let Mr. Moore have the billiard table or the cash registers. Witness remonstrated with him, and eventually they went to witness's office, where the note was written. They took the note to Moore, and the latter and Lang signed it.

Mr. Alexander, in putting the note in, said it was unstamped. Application had been made to the Treasury to assess the fine, but the Treasury preferred to leave it to the Court.

Continuing, the witness said that next day he altered the note, substituting "vendor." Moore pointed out the mistake to witness. He took the amended note to Lang next day, but the latter said he did not want to alter the note, but wanted witness to cancel the sale, as he had been offered £500 more. He said he would give witness £100 instead of £85 in the event of his selling to some other purchaser. Witness asked him to put this in writing, and he did so. Moore, however, refused to cancel the sale. Subsequently, Lang's attorney wrote, repudiating the amended note.

Cross-examined by Mr. Searle: He would produce his licence for January, 1905. The note was signed at the Cafe Royal, and the only people present and interested in the matter were Lang and Moore. The broker's note was written at witness's dictation. Moore claimed the discounts, and witness filled them in. Witness did not instruct Mr. Bernard to draw up the note over the deal with Kanterowitz. He knew in the agree-

ment that the discounts were to be given to Lang, but Lang was to pay brokerage. Lang never said to him in Ohlsson's office that he refused to pay brokerage, as there was no broker in the matter. He did say that he would refuse to pay brokerage, as witness had done him a shabby trick over another action. The premises were never advertised by witness on behalf of Lang, although Lang did authorise him to do so.

Re-examined by Mr. Alexander: On the 12th witness pointed out the mistake, but he did not write until the 16th.

Arthur Moore, proprietor of the Cafe Royal, said that he purchased the Transvaal Hotel. The first he heard of the hotel was that Parry had it in hand. Some time afterwards Parry brought Lang into the Cafe Royal, and witness, in reply to a question from Parry, said he was still prepared to buy the hotel at a price. Anchutz said there was no broker in the business, but Parry did not hear that remark. There was never any arrangement that he should pay Parry any brokerage. Witness heard a dispute between the plaintiff, Lang, and Bultitude as to the brokerage in Ohlsson's office. Parry wanted the full amount (£175), and at the finish they arrived at a compromise, Lang agreeing to pay £85. Lang also told Logan's manager that he would pay the brokerage.

Cross-examined by Mr. Searle: Lang extended the option which witness held for a few days. In consequence of an interview with Mr. Sedgwick, witness got the option on the hotel. Mr. Sedgwick said there was to be no broker in the affair. Witness objected to the discounts not being in, and the plaintiff must have put them in while he was in the Cafe Royal, but witness did not actually see him write. When witness heard that he was a co-defendant in the case, he got an assurance from Parry that he would claim no brokerage from him. There was a dispute pending between witness and Lang over certain fixtures.

Re-examined by Mr. Alexander: He knew when the conversation took place about a broker that Parry was concerned with the affair.

By Buchanan, J.: The discounts on beer last year amounted to £67 2s.

Archibald Bultitude, manager for Ohlssons, stated that his firm were landlords of the Transvaal Hotel. Witness gave Lang notice to leave, as he was behind with his rent and beer account. Parry was the man who introduced Kanterowitz. On the final day Lang, Moore, Parry, Anchutz, or Sedgwick, and witness were present, and on that day he believed the note was signed. There was a good deal of friction between Lang and Parry, and witness induced Parry to take £85 in full settlement. Lang distinctly agreed to do that, and the matter was again confirmed in Logan's office. It

was agreed that Moore was to have the discounts on the beer.

Cross-examined by Mr. Searle: He was quite clear as to what took place. He never swore that the note was signed in his presence. Witness considered that Moore was entitled to the beer discounts. Lang objected to paying any commission.

George Frederick Brown, manager for J. D. Logan and Co., said that in December witness was pressing Lang, and witness told him he must sell the place. Several persons were introduced to Parry as buyers. Parry was the broker all through. At one meeting he heard Lang objecting to pay Parry brokerage, and heard the others urging him to pay, but he did not hear Lang consent to pay £85.

Wm. George Duncan Nicholls, managing clerk for the plaintiff, stated that shortly after he joined Parry eight months ago, there were negotiations about the Transvaal Hotel with Kanterowitz. On the 10th January Parry and Lang came into the office, and plaintiff immediately said that the business with Lang was finished, and instructed witness to write out the note. There was a discussion about cork-pullers, and a cash register, and the plaintiff said he would not be a party to Moore paying for those articles. The plaintiff said that Lang had cut him down in his brokerage to £85, and Lang said: "You are all right, Parry; you have made enough." Lang never said that he was not going to pay the brokerage.

Cross-examined by Mr. Searle: They had plenty of printed forms of brokers' notes in the office, but they did not put the agreement in the brokers' printed form. Witness knew nothing about the plaintiff's licence. Witness understood that the contract was completed, but still he drew up a second draft. He believed the document was drawn up on the 10th January.

Re-examined by Mr. Alexander: There was still a dispute about the billiard table and Mr. Moore was not present.

Mr. Bultitude (re-called) fixed the interview in this office, as far as he believed, at the 10th January.

Solomon Kanterowitz, builder and dealer, said he was introduced as a purchaser of the hotel, and subsequently Lang told him that Parry's man was the buyer. Lang told Parry that he would not get more than £100, and witness, at Parry's request, made a note of this.

Cross-examined by Mr. Searle: It must have been a day or two after the 15th December, when he saw the plaintiff and defendant.

Abraham Bernstein stated that he went with the last witness to the Transvaal Hotel, where Lang said the place was as good as sold. Lang said it was all right, it was Parry's man, and he (Parry) would get £100.

Bennie Yates, licensed victualler,

of Swellendam, stated that in January he had occasion to go to the Transvaal Hotel with Isaacs, where they saw the defendant. Witness said he could put £1,200 into the hotel, and Lang produced a note, which he handed to Isaacs, and asked him if he saw anything wrong with the note. Isaacs did not see it, and Lang pointed out "purchaser to pay brokerage," instead of "seller to pay brokerage."

Cross-examined by Mr. Searle: Isaacs and the plaintiff were supposed to be in partnership at the time. He could not say that anything was struck out of the note.

Albert Isaacs, broker, stated he went down with Yates with an idea of selling the hotel, and Lang told him that Moore had bought it. He saw the broker's note. For the moment witness did not see the mistake. Beyond a joint transaction with Parry over the Belvedere Hotel, there was no partnership between them. Lang pointed out the mistake, "purchaser to pay brokerage."

Cross-examined by Mr. Searle: Parry suggested that Yates might be a purchaser of another hotel. The note that he saw was typewritten.

George Blyth stated that he heard Lang say to Parry that he had made a mistake in the note. Parry offered to alter it, but Lang would not let him. Lang said he had another man who would go £500 more, and Parry said if he could arrange with Moore that he (Parry) would not stand in his way. He heard Lang say that he would give Parry £100 if the sale with Yates went through.

Cross-examined by Mr. Searle: He believed that sale had already gone through when the question of reselling to Yates cropped up.

Mr. Alexander closed his case.

Frederick John Christian Lang (defendant) stated that Moore came to him about the hotel about a year ago. Witness never gave the plaintiff any instructions about advertising the hotel. He did not hear Anohutz say that there was no broker in the matter. Witness saw Parry with Moore at Ohlsson's office, where the only thing discussed was the brokerage. As Mr. Sedgwick sent down the buyer, witness refused to pay brokerage altogether. He never agreed to pay any brokerage. At Logan's office, Parry again asked for his brokerage. The plaintiff said he would draw up a note and protect witness with regard to the billiard table, cash register, etc. Witness signed after they came to an agreement about the discounts on the beer. When Isaacs, Parry, and Yates were present, the place had not been sold, and witness said if Parry could get the sale through for £4,000, the plaintiff would get £100. Witness took up the position that Moore was sent to him by Sedgwick's. It was incorrect to say that all that took place

on the day in question when the property had been sold. If he had had the discounts over the sale with Kanterowitz, he would have paid the brokerage.

Cross-examined by Mr. Alexander: The plaintiff was to get nothing for all his trouble. The plaintiff had nothing to do with the transaction with Moore. Bultitude was not speaking the truth when he said witness offered £85 in settlement of the brokerage. The sale, as far as he knew, was completed between the 11th and the 15th January. Witness did not ask Parry to endeavour to break off the sale with Moore. He promised Parry £100 if the sale with Yates went through. Yates was introduced by Isaacs. Witness could not explain why he would give Parry £100 over the sale with Yates. Moore was not introduced as a buyer.

Charles Low stated that in January last he was in Ohlsson's office, when he heard the defendant tell the plaintiff that he would see him "blowed" if he paid him any brokerage, and he did not think he was entitled to it.

Cross-examined by Mr. Alexander: He was not certain as to the date. It might have been when the lawyer's letter was sent.

John Henry Anchut, manager for Sedgwick and Co., stated that when he was in the Cafe Royal, Moore asked him if anything was done, and witness told him to come to the office. Witness asked Moore if he was on his own, without any broker, and Moore replied in the affirmative.

Cross-examined by Mr. Alexander: Witness did not have a private interest in the hotel with the defendant. Parry never asked Moore in witness's presence if he was still prepared to buy the Transvaal Hotel.

Mr. Searle closed his case.

Counsel having been heard in argument on the facts,

Buchanan, J.: In this case there was a contract between two parties—Lang and Moore—and I cannot understand why exception was not taken to the declaration, on the ground that the plaintiff had absolutely no part in the contract, and had no legal status to come before the Court to ask for a rectification of the document. As far as this document stands, it is a contract between Lang and Moore. It was competent for either of these parties to sue the other for a rectification, but I don't see how it is possible for the plaintiff to do so. Carefully reading Mr. Bultitude's evidence, I hesitate to believe that Lang agreed to pay the plaintiff the amount of £85. Moore and Lang took no objection to the written document, and the only thing for the Court is to give absolution from the instance, with costs.

[Plaintiff's Attorneys: P. Andrews; Defendants' Attorneys: C. Bernard.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

ADMISSIONS.

{ 1905.
{ Apr. 20th.

Mr. P. S. T. Jones moved for the admission of A. P. de Villiers as an attorney and notary.

Application granted, oaths to be taken before the Resident Magistrate of Richmond.

Mr. Roux moved for the admission of Charles W. A. Coulter as an attorney and notary.

Application granted and oaths administered.

Mr. J. E. R. de Villiers moved for the admission of Albert R. Fleischack as an attorney.

Mr. Searle, K.C., appeared for the Incorporated Law Society.

Mr. De Villiers said that the applicant, who was a Transvaal attorney, was prepared to come down and appear personally. He asked that the Court should grant the application, and allow applicant to take the oath on his arrival.

Ordered to stand over, pending the applicant appearing personally before the Court.

PROVISIONAL ROLL.

TURNBULL V. STEWART.

Sir H. Juta, K.C., said that this matter was standing over pending production by the respondent of certain contracts.

The respondent said that he had applied to Messrs. Walker and Jacobsen for the contracts, but they refused to let him have the documents, because he had not paid the costs of the first application.

Maasdorp, J.: The document is no pledge for costs. I should like to have some explanation from the attorneys. A note must be sent to the attorneys asking them to attend and give an explanation.

At a later stage a representative of Messrs. Walker and Jacobsen produced the documents in question.

Defendant having been cross-examined by Sir H. Juta,

Maasdorp, J., said that, as it appeared that in this case the defendant had no means, there would be no order.

NANNUCCI, LTD. V. GASLOLI.

Mr. Swift moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

VAN DER SPUY V. LE GRANGE.

Mr. De Waal moved for provisional sentence on a mortgage bond for £200, with interest from 1st July, 1904, and for the property specially hypothecated to be declared executable. The bond became due by reason of non-payment of interest.

Order granted.

HARTRODT V. MCKAY { 1905.
AND CO. { Apr. 20th.

Provisional sentence — Bills of exchange — Liquid and illiquid claims.

The Court refused provisional sentence upon certain bills of exchange, where it did not clearly appear how far these bills referred to items for which credit had been given.

Mr. Burton moved for provisional sentence for £1,495 19s. 6d., upon certain bills of exchange drawn and taken bills of exchange drawn up and accepted by the defendants, which had been dishonoured. There was also an illiquid claim for £497 17s. 5d., goods sold and delivered, and disbursements made for and on behalf of the defendants. Plaintiff allowed under these heads a credit of £961 16s. 3d.

Mr. Gardiner was for the defendants.

Mr. Burton, replying to the Court, said that he did not at the present stage move for judgment on the illiquid claim.

Mr. Gardiner read an affidavit by Mr. John P. A. Bischoff, a partner in the defendant firm, who stated that they had demanded from the plaintiff a full and complete account of all transactions, but the same had never been rendered. The deponent said further there was a considerable sum due to the defendants on account of percentage of freight to which they were entitled. They said that they had never received an account showing the amount due to them by way of rebate, and that the rebate must be considerable, as their transactions must have amounted to about £12,000. They estimated that at least £250 was due to them under this head. There were also a goodly number of credit notes due to them. Defendants maintained that, if full particulars were rendered to them, the position of affairs would be very different from that alleged by the plaintiff. Under all the circumstances, the defendants prayed that the plaintiff be ordered to go into the principal case.

Mr. Burton read an affidavit by Mr. Gotther Mann, of the South African As-

sociation, who stated that the association had been acting on behalf of the plaintiff. He annexed a balance-sheet handed to him by the accountant employed by the defendants. In that balance-sheet there figured a debit due to the plaintiff of £968 4s. 3d. A further affidavit by Mr. George Forrest, who held the plaintiff's power of attorney, annexed the specified account referred to in the defendant's affidavit. As to the other allegations, an answer could only be given by plaintiff from London or Hamburg.

Mr. Gardiner said that, although there were two claims, one liquid and the other illiquid, the two were very much involved one with another.

Maasdorp, J., intimated that he would first hear Mr. Burton.

Mr. Burton submitted that the fact that certain parts of the plaintiff's claim, bills of exchange had not been drawn, could not debar the plaintiff from his right to obtain provisional sentence upon the liquid documents which he now produced. If necessary, let the whole of the credit go off against the liquid claim. The defendants had given no answer to the plaintiff's claim upon the bills of exchange. The figure brought up by the defendants' accountant approximately corresponded with the amount claimed by the plaintiff.

Mr. Gardiner was not called upon.

Maasdorp, J.: The plaintiff in this case sues the defendants upon certain bills of exchange, and also for an illiquid claim. It appears from the documents put in that there is a large amount of indebtedness between the parties, consisting, to a large extent, of bills of exchange, and also a number of items for goods sold and delivered. For a portion of these debts credit has been given. Upon the face of the accounts these items are inextricably involved. There is a credit allowed, and upon the face of the documents it is impossible to say in respect to which items these credits have been allowed. It is stated in the affidavits that portions of the items for which credit has been given have been allocated, but it is admitted that others have not, and it is now suggested that the appropriation may be made in law in respect of the bills of exchange. What the legal effect might be if no appropriation took place would be a question of law but, as a matter of fact, such appropriation may have taken place between the parties when they entered into these transactions. It also appears that certain rebates ought to be allowed, and that such rebates might be a set-off. On the whole, I have come to the conclusion that the items of account are so involved that it is impossible to distinguish between the bills of exchange and the rest of the account. Provisional sentence will be refused, costs to be costs in the cause.

PURCELL, YALLOP AND EVERETT V.
MCNAUGHTON AND SON.

Mr. Swift moved for provisional sentence on a promissory note for £328 1s. 1d., with interest. Counsel also applied for judgment under Rule 329d for £173 19s. 8d., for goods sold and delivered, and for £33 1s. 5d., interest, and costs of suit.

Order granted.

SACHS V. DE JAGER.

Mr. J. E. R. de Villiers moved for provisional sentence on a notarial bond for £100, and upon a promissory note for £100, less £85 paid on account, with interest.

Order granted.

DE VILLIERS V. KEET.

Mr. P. T. S. Jones moved for provisional sentence on a promissory note for £164, together with interest at 9 per cent., and costs of suit.

Order granted.

TREDGOLD AND CO. V. VAN DYK.

Mr. Sutton moved for provisional sentence on a mortgage bond for £350, with interest, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable, with costs.

Order granted.

KOCH V. MORRIS.

Mr. Russell moved for provisional sentence upon a mortgage bond for £1,000, less £15 paid on account, with interest, the bond having become due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Defendant's wife appeared, and said that her husband was ill, and was without means to pay anything more at present. She asked for a postponement.

Order granted, His Lordship advising Mrs. Morris to communicate with the creditor.

WOODHEAD, PLANT AND CO. V. PFUHL.

Mr. Gardiner moved for provisional sentence for £464 1s. 9d., which the defendant owed on a deed of suretyship, and for judgment under Rule 329d for £1 9s. 6d., for goods sold and delivered, with costs.

Order granted.

HARDIE V. BARNARD.

Mr. Sutton moved for provisional sentence on a mortgage bond for £500, with interest, the bond having become due by reason of notice having been given. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

JOSEPH V. FISHER.

Mr. De Waal moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

ESTATE HIDDINGH V. HOFFMAN.

Mr. Swift moved for provisional sentence upon a mortgage bond for £690 9s. 2d., with interest.

Order granted.

ILLIQUID ROLL.

COLONIAL GOVERNMENT V. { 1905.
BURGER. { Apr. 20th.

Mr. Howel Jones moved for judgment under Rule 329d for £5 quitrent and stamp duties.

Order granted.

KALK BAY MUNICIPALITY V. PRIDEAUX.

Mr. P. S. T. Jones moved for judgment under Rule 329d for £161 11s. 3d., owners' rates for 1904-1905, less £47 6s. paid on account, and for £27 14s., balance due for road construction at Lakeside.

Order granted.

ESTATE BAUMANN V. LOUW.

Mr. Pymont moved for judgment under Rule 329d on a balance of account for £19 1s. 11d., less £14 10s., with interest and costs.

Order granted.

STEER V. TRUSTEES MALAY MOSQUE.

Mr. P. S. T. Jones moved for judgment under Rule 329d for £261 11s. 2d., balance of certain money lent by the plaintiff to the defendants.

One of the defendants appeared in Court, and said he had been summoned for the debt to Mr. Steer, who drew the rent of £6 a month. Mr. Steer discovered that he could not pass the bond, and asked witness to call a meeting and explain to the congregation that the bond could not be passed. Afterwards

Mr. Steer discovered he had made a mistake in the title. The congregation agreed, in satisfaction of Mr. Steer's debt, that he should draw the rent, provided he paid the taxes. Mr. Steer agreed to this arrangement. Mr. Steer subsequently said they would have to pay interest at the rate of 6 per cent., and later at the rate of 8 per cent.

Mr. P. S. T. Jones said an appearance had been entered on behalf of the defendants, and it had been withdrawn.

[Maasdorp, J.: You owe this money?]

Defendant: Yes.

[Maasdorp, J.: And you represent the congregation?]

Yes.

[Maasdorp, J.: Why don't you pay?]

We will pay.

Maasdorp, J., said judgment must be given as prayed. The defendant could arrange to give Mr. Steer security.

PURCELL AND OTHERS V. MCNAUGHTON

Mr. Swift moved for judgment under Rule 329d for £60, goods sold, delivered, and £3 12s., with interest and costs.

Order granted.

KAPLAN AND OTHERS V. PORTER.

Mr. Watermeyer moved for judgment for £150 10s. 9d.

Order granted.

JANUSKA V. O'BRIEN.

Mr. Gardiner moved for judgment against the defendant for £120 18s. 6d., being moneys deposited with the defendant in order to institute certain proceedings, and for costs of suit as between attorney and client.

Order granted.

SPIILHAUS AND CO. V. SAMSODIEN.

Mr. Watermeyer moved for judgment under Rule 329d for £62 2s. 6d., with interest and costs.

Order granted.

WAR DEPARTMENT V. EDWARDS.

Mr. Upington moved for judgment under Rule 319, in default of plea, on an action in which plaintiff sued for £55 4s. 9d., with interest and costs. The money was lent to the defendant, who was a sergeant in the Royal Irish Lancers.

Order granted.

REHABILITATION.

Mr. Du Toit moved for an order for the rehabilitation of Max Satski. The insolvency occurred four years ago, and applicant was charged with fraudulent insolvency, but was acquitted.

Order granted.

GENERAL MOTIONS.

KRIGE V. MALHERBE. { 1905.
Apr. 20th.

Mr. J. E. R. de Villiers was for the plaintiff, and Mr. Van Zyl appeared as *curator ad litem*. Mr. De Villiers moved for an order declaring the defendant of unsound mind, and for the appointment of a curator to dispose of his property, in order to maintain his wife, himself and children.

The affidavit of Dr. Dodds set out that the defendant, who was confined in the Asylum, exhibited symptoms of mental unsoundness, and incapable of managing his own affairs.

Mr. Van Zyl said he had seen the defendant, and he could offer no opposition to the application.

Order granted, declaring the defendant of unsound mind. Mr. Herman J. Dempers, attorney, of Cape Town, appointed as *curator bonis*, with power to sell the property and pay debts, and advance moneys for the maintenance of the defendant, his wife, and children, costs to come out of the estate.

LINSCOTT V. LINSCOTT.

Mr. Gardiner was for the plaintiff and Mr. Sutton appeared as *curator ad litem*.

The summons called on the defendant to show cause why she should not be declared of unsound mind, and for the appointment of a curator to administer the estate.

Wm. John Dodds, medical superintendent at Valkenberg Asylum, said that the defendant was admitted on March 25 this year. The defendant was undoubtedly insane, and quite incapable of looking after herself and her property.

Examined by Mr. Sutton: There was a very fair prospect of a recovery.

Arthur Linscott, husband of the respondent, said he was married in France in 1898. The respondent was always somewhat hysterical, and since the birth of her child she got worse, and had to be detained as a lunatic. His wife had an income of about £110 a year. Witness was desirous of being appointed as curator of her person and property.

Order granted, declaring the respondent incapable of managing her own af-

fain, and appointing the husband, Arthur Linscott, as curator of her person and property, with power to receive the revenue from her property for the maintenance of the respondent.

Ex parte ESTATE KERDEL.

Mr. De Waal moved to make absolute a rule nisi under the Derelict Lands Act.

His Lordship pointed out that publication had been ordered in a Dutch newspaper. It had been published in a Dutch paper in the English language, but it was palpable that publication in the Dutch language was meant. He held that the publication was insufficient.

The return day was extended until Thursday next for proper publication.

KRIGE V. GREEF.

Mr. De Waal moved to make absolute a rule nisi, calling on respondent to return a certain mare and foal.

Rule made absolute.

BROWNE V. HAYWARD.

Mr. Van Zyl moved for the applicant's (Browne's) release from civil imprisonment.

Mr. Close appeared for the respondent, and consented to suspension of the decree, pending payment of £100 out of the proceeds of certain property.

An order was made in terms of a consent paper.

Ex parte SEDGWICK AND CO.

Mr. Struben moved for an order authorising the issue of a certified copy of a certain bond to enable petitioners to institute a certain suit.

Rule nisi granted, rule to be published once in the "Cape Times," and to be returnable on the 4th May.

HARRIS BROS V. FRANKEL.

Mr. Close moved for an order of ejectment against the respondent in respect of certain premises at Seaforth, Simon's Town. Mr. Alexander was for the respondent.

Mr. Close read affidavits filed on behalf of the applicants, in which it was alleged that the respondent admitted having received notice to quit, and having agreed to leave on the 31st March.

Mr. Alexander read a replying affidavit by the respondent, Solomon Frankel, who stated that he took over the business of Messrs. J. Lipett and Co., upon payment of certain consideration, and that Messrs. Harris Bros. had granted Messrs. Lipett a two years' lease. The

lease was dated the 1st May, 1904, and was subsequently confirmed by the firm by letter. Deponent said that he interviewed a member of the applicant firm, and was granted by him a verbal lease of the shop for the remainder of Messrs. Lipett's unexpired term. Upon this undertaking he had paid £28 for the goodwill of the business, and took possession in September last. Deponent had regularly paid his rent since he entered into possession. Counsel also read a supporting affidavit.

Mr. Close read an answering affidavit by Mr. Greengood, a member of the firm of Messrs. Lipett and Co., who declared that the respondent on interviewing Messrs. Harris was accepted as tenant of the shop, but only on a monthly tenancy, and he (the respondent) took the shop on this condition. Counsel also read a supporting affidavit by Mr. Wolf Harris. Mr. Close having been heard in argument on the facts,

Maasdorp, J.: There is a conflict of evidence in this matter upon which the Court might have assistance if the witnesses appeared, and their testimony could be tested at the trial. Under the circumstances, the Court will now refuse the application, costs to be costs in the cause, and motion to stand as summons in the case.

Ex parte OLIVIER.

Mr. Sutton moved, on behalf of the executor testamentary in the estate of J. J. Olivier, for leave to pass certain mortgage bond to discharge liability.

Order granted.

MABERLY V. WOODSTOCK MUNICIPAL COUNCIL.

Mr. Searle, K.C., said that he appeared for the Municipal Council of Woodstock, but he understood that there was no appearance for the applicant, John Mabery. Some time ago Mabery obtained a rule nisi against the Woodstock Council, restraining them from proceeding with the purchase of a certain farm in connection with the water scheme of Oliphant's Hoek. That rule was made absolute on the 17th November, 1902.

The respondent Council now applied for the interdict to be discharged, the consents which it was pointed out when the rule was made absolute were necessary to enable the Council to proceed having now been obtained. Counsel read affidavits by Mr. Smith, Town Clerk, to the effect that the Council had obtained the necessary consents of the Minister and the Governor. Mr. Searle submitted that the Council were entitled to have the rule discharged.

Maasdorp, J.: It seems that the grounds upon which the interdict was granted have now been removed, and the applicant, who obtained the inter-

dict, does not appear to offer any opposition to the order being discharged. Under the circumstances, the Court will order that the interdict be discharged.

Mr. Searle, replying to his lordship said that the Council did not ask for costs.

Ex parte ALLY.

Mr. Pymont moved to make absolute a rule *nisi* calling on the Registrar of Deeds to issue a certified copy of a mortgage bond which had been destroyed in a fire in June, 1902.

Rule made absolute.

Ex parte ALLY.

Mr. Pymont moved for an order authorising the Registrar of Deeds to accept a certain power of attorney signed before a notary public in Bombay, but which had not been properly attested as required on notarial deeds outside the Colony. Counsel said that the notary was on the Civil Service List in India.

Maasdorp, J., ordered that the matter be referred again to the Registrar with the fresh information to see if the Registrar had any objection to the Court granting the order.

AFRICAN MUTUAL TRUST AND ASSURANCE CO. V ABRAHAMSON.

Mr. Gutache moved for leave to sue the respondent by edictal citation for the recovery of certain moneys due on a bond.

Application granted, with leave to attach the property, the citation to be returnable on the 1st August, personal service if possible, failing which one publication in the "Gazette" and one in a paper circulating in the Malmesbury district.

STEWART'S ESTATE V. THE MASTER. 1905.
Apr. 20th.
May 19th.

Succession duty—Secs. 1 and 15 of Act 5 of 1864—Act 4 of 1895.

S., domiciled in Scotland, died intestate in India, leaving certain moveable property in this Colony, which, in virtue of a certain antenuptial contract entered into here, devolved upon certain heirs, ab intesto, who were also domiciled in Scotland. Letters of administration had been taken out here, and the Master claimed that

the moveable property was liable to succession duty under Sec. 1 of Act 5 of 1864.

Held, that as these heirs succeeded to a settled estate in this country under a settlement executed here, the estate was liable to succession duty.

Held further, that by Sec. 15 of Act 5 of 1864, such succession duty was to be assessed at the rate of five per cent.

This was a petition to have it declared that the moveable estates of the late Charles Stewart and his wife within this colony was not liable to succession duty.

The petition set forth that by an antenuptial contract entered into between the late Charles Stewart and his wife, Lena Stewart, in 1832, it was provided that there should be a settlement on trustees of a certain sum for the benefit of the issue of the marriage. There was only one child of the marriage—a son—who died in India, and was a domiciled Scotaman. The trust funds were taken over by applicant on his appointment as executor *dativo*. The next-of-kin, who were heirs in the estate, ten in number, were domiciled in Scotland, and petitioner held that distribution must take place in Great Britain and succession duty paid there. The Master, however, decided to assess a succession duty of 5 per cent., and applicant now prayed for a declaration that succession duty was not payable in this colony.

Sir H. Juta, K.C., appeared for the applicant; Mr. Searle, K.C., for the Master.

Sir H. Juta: This is a question of succession duty. The deceased was in India, the heirs *ab intestato* in Scotland, and the property in this country. The property will be administered according to the law of Scotland. Act 5 of 1864 does not say whether the succession duty applies to the *situs* of the property, or to the place of death of the *de cuius*, or to the residence of the heir. The person liable for succession duty must be sueable for it, and I therefore argue that the heir cannot be liable unless he is in this colony. The duty must be paid by someone amenable to the jurisdiction of this Court, Sections 7 to 14 of the Act show this. As to Act 4 of 1895, before that Act was passed, succession duty had to be paid on moveables wheresoever they might be. But the *situs* of moveable property has nothing to do with succession duty. There is no machinery by which it can be levied.

[Maasdorp, J.: Does not property under trusteeship stand upon a different footing from other property? If pro-

perty in a certain country is accepted by a legatee, he accepts it subject to the laws of that country.]

But see Section 21 of Act 25 of 1894, whence we may say that it is not the property which pays succession duty, but the successors.

[Maasdorp, J.: The Court has ruled that the domicile of the testator settles the whole question.]

Then if a man comes here and acquires property here, but is not domiciled, no duty will be due?

[Maasdorp, J.: If the property were vested in a trustee here, would not that make the property to be legally here?]

But the ante-nuptial contract provides that the property should go to the one child on his majority or marriage. The property therefore vested in the son, only the enjoyment of it was deferred. There was no trust, and nothing for a trustee to do. The property was not tied up, and all the executor had to do was to realise it and send the proceeds to Scotland.

Mr. Searle (for the Master): An executor dative was appointed here at the request of the trustees. Section 1 of Act 5 of 1864 is practically the same as Section 2 of the English Succession Act of 1853. If this were *res nova*, the Court might be open to listen to arguments based on the ambiguity of the Act; but we have a number of English decisions on the matter. The only sections of our Act to which I need refer are 1 and 15. If the property to be administered is settled here it must pay duty and stands on quite a different footing from things which a man carries about with him. See Hanson on Probate and Succession, p.p. 22 to 25 and 219 to 225 and *Attorney-General v. Campbell and Lyle v. Lyle* therein referred to, which show that the question of the forum of administration governs the law as to duty (Hanson, p. 23).

[Maasdorp, J.: As soon as John succeeds there will no longer be any property under the trust.]

That is so.

[Maasdorp, J.: Then how do the heirs *ab intestato* come under the trust?]

They could not get the property without the trust. We do not charge duty on property not brought into the country.

[Maasdorp, J.: Oh yes, duty can be charged in England on moveables no matter where they may be if an Englishman be domiciled there. If a testator has disposed of property *inter vivos* in trust, the law of the country in which that has been done will govern the question of duty.]

Sir H. Juta (in reply): The English Act differs widely from our Act. As to the liability of moveable property to duty, see Hansen (p. 22). My whole contention is that the Acts look to the person and not to the property.

Maasdorp, J., said section 1 of Act 5

of 1864, upon the interpretation of which the decision of this matter depends is almost identical with the corresponding section in the English Succession Duty Act. The chief difference exists in the express exemption from duty of immovable property out of the Colony, but in view of the principles upon which the question is dealt with, this exemption may almost be regarded as surplusage. The English decisions upon the question raised in this case go off entirely upon general rules and first principles of law which are common not only to our law and English law, but also to the law of almost all civilised nations, and they may, therefore, be taken as safe guides, if not conclusive authorities in the determination of the issue. The intestate whose succession is in question, though he died in India, was at the time of his death domiciled in Scotland, and the personal property in question, to which his heirs succeed is situate in this colony. Now, in the decided cases in England it has been clearly and finally laid down that if a person dies domiciled in England, testate or intestate, and whether or not it be necessary to have recourse to a foreign tribunal for the administration of portion of the property situate in a foreign country, and wherever the heirs may happen to be, the personal property of such person, wherever situate, is subject to English legacy duty and succession duty. Whereas, on the other hand, if under similar circumstances a person dies domiciled out of England his personal property situate in England is not liable to English legacy duty or succession duty. These decisions are based upon the rule that the personal property of a person must be taken to be where he is domiciled, upon the maxim *mobilia sequuntur personam*. It is quite within the power of any country to tax the property of foreigners within its jurisdiction, but such intention is not presumed unless it is clearly expressed. After the law had been settled as abovementioned by the English decisions, the case of the *Attorney-General v. Campbell* came before the Master of the Rolls in England, and he held accordingly that a certain fund in England passing under the provisions of the will of a testator domiciled abroad was not liable to succession duty. Upon appeal to the House of Lords it was held that this case was to be distinguished from those upon which the decision of the Master of the Rolls proceeded, in that the fund which formed the subject of the succession was a settled fund under an English settlement made by the testator, and no longer followed his domicile, but became subject to succession duty. It is contended on behalf of the Master in this case that the succession of the heirs in Scotland is in respect of a settled fund under a Colonial settlement, and that

they succeed under the trusts of a marriage settlement executed in this country in respect of property situate here. The deceased John N. Stuart, who died before he attained his majority, would have become entitled to the possession of the fund upon his attaining majority, and it is agreed on both sides that the fund vested in him upon the death of his parent, and that his heirs in Scotland are entitled to succeed to it. In my opinion these heirs succeed to a settled estate in this country under a settlement executed here, and that fund is liable to succession duty. Act 4 of 1895 does not seem to me to affect this case. It having been decided that succession duty is payable, the question arises at what rate is it to be charged. It is provided by section 15 of the Act that "where the interest of any successor in any property shall, before he shall have become entitled thereto in possession, have proved by reason of death to any other successor or successors, then one duty only shall be paid in respect of such interest, and shall be due by the successor who shall first become entitled thereto (possession), but such duty shall be at the highest rate which, if every such succession had been subject to duty, would have been payable by any of them." It appears that if John Nairn had succeeded the duty would have been at the rate of 1 per cent., upon the succession of his heirs the rate is 5 per cent. The Court therefore declares that succession duty is payable in this case at the rate of 5 per cent., costs to be paid out of the estate.

[Petitioner's Attorneys: Friedlander and Du Toit; Respondent's Attorneys: Reid and Nephew.]

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

DIVORCE.

REED V. REED.

} 1905.
} Apr. 25th.

This was an action brought by August Salemon Reed, of Philip's Town, a mason, against his wife, Francina Reed, of Hanover, for restitution of conjugal rights, failing which, divorce,

by reason of the unlawful and malicious desertion of plaintiff by defendant.

The declaration set out that the parties were married in community of property at the Dutch Reformed Mission Church, Hanover, in January, 1892. There was no issue of the marriage. Within three months of the marriage defendant unlawfully and maliciously deserted the plaintiff and had been absent from him since, although requested to return to him. Plaintiff prayed for a decree of restitution, failing which divorce, and forfeiture of defendant's half share of the property.

Mr. Van Zyl was for the plaintiff; the defendant was in default.

Mr. Van Zyl said that defendant had been barred from pleading and in consequence of the plaintiff being old and infirm leave was obtained for the Court to have his evidence taken on commission before the Civil Commissioner of Philip's Town. Counsel having read the evidence taken on commission,

A decree of restitution was granted, with costs, defendant to return to or receive the plaintiff on or before the 1st June, failing which rule to issue calling on the defendant to shew cause on the 15th June why an order for divorce should not be granted and why defendant should not be declared to have forfeited any rights accruing from the marriage.

Postea (June 15th). Rule absolute.

TRIAL CAUSE.

LE ROUX V. MARAIS AND OTHERS.

Prescription.

This was an action brought by Thomas Jacobus le Roux, junior, of Caledon, against Johannes Petrus Marais, of Caledon, and the Colonial Government and the Municipality of Caledon for the declaration of rights in respect of a certain strip of land, an interdict against the first defendant and also damages against him for trespass.

The plaintiff's declaration was as follows:

1. The plaintiff and the first defendant reside at Caledon and are the registered owners of certain erven, in Millstreet, in the Municipality of Caledon, the plaintiff of erf La H, No. 15, and the said defendant of erf La H, No. 16 in the said street.

2 Between the boundaries, according to diagram of the said erven there lies a strip of land which has never been granted from the Crown, and which would appear to have been originally set apart as a road or passage, but during a period of much more than 50 years the said strip of land has been enclosed

and continuously possessed and used adversely as and of right as against the other defendants by the plaintiff, and the first defendant and their predecessors in title.

3. There existed for more than 40 years and until recently upon the said strip of land a certain quince hedge which the plaintiff, the first defendant and their predecessors in title at all times recognised as the boundary between their respective properties, and the plaintiff and his predecessors in title for the period of 40 years and upwards have continuously possessed and used adversely and as of right *pro domo* the portion of the afore-said strip of land bounded by the said quince hedge, and the ownership of the said portion of the said strip has been by prescription acquired as against the Colonial Government and the Municipality of Caledon and generally as against all persons whatsoever.

4. In or about the month of April 1904, the first defendant wrongfully and unlawfully in part cut down the said quince hedge, whereupon the plaintiff by his Attorneys protested against the said acts of the first defendant and threatened to bring an action for a declaration of rights and for damages.

5. Thereafter in the month of June, 1904, the first defendant by his Attorneys in consideration of a settlement of the dispute, and an abandonment by the plaintiff of his intention to bring the said action, proposed that the first defendant should recognise the said hedge as the boundary of his said erf and of that of the plaintiff, and that if the plaintiff was satisfied that he was the owner or entitled to the land on his side of the said hedge, the said hedge should for the future be viewed as the common boundary between them, and the plaintiff by his Attorneys thereafter agreed to accept the said proposal and abandoned his intention to bring the said action and settled the dispute in accordance with the said proposal.

6. Thereafter in violation of the plaintiff's rights acquired, as set forth in paragraph 3, and also in breach of the agreement so arrived at as aforesaid, the first defendant in the months of October and November, 1904, trespassed upon the plaintiff's land acquired by him by prescription as aforesaid and recognised by the said agreement as his property, and more especially in the month of November, 1904, the first defendant wrongfully and unlawfully so trespassed and placed iron standards and a wire fence on the said land on the plaintiff's side of the said quince hedge, enclosing the said hedge and a portion of the plaintiff's said land. The first defendant has caused damages to the plaintiff in the sum of £50.

7. The Colonial Government and the Municipality of Caledon are joined in this suit in order that the plaintiff's

rights in respect of the said land may be declared in respect of the said land, but no costs are asked against either of these defendants who do not dispute the plaintiff's title to the said land bounded by the said quince hedge.

Wherefore the plaintiff prays for: (a) An order declaring that he is by prescription and by the agreement referred to in paragraph 5, entitled to the said land bounded by the said quince hedge, and lying between the said hedge and the erf La H. No. 15, in Mill-street, in the Municipality of Caledon; (b) An order compelling the first defendant forthwith to remove the said iron standards and wire fence and restraining him by perpetual interdict from trespassing upon the said land; (c) Judgment against the first defendant for £50 sterling by way of damages; (d) Other relief; (e) Costs of suit.

Mr. Searle, K.C. (with him Mr. Sutton) for plaintiff. Defendants in default.

Mr. Searle said that upon these proceedings being taken the plaintiff's attorney wrote to the Colonial Government and the Caledon Municipality and now had letters from those authorities to say that they did not intend to defend the action. The first defendant had now been barred from pleading and did not enter appearance.

Buchanan, J., said that a letter had been received from the first defendant stating that the plaintiff had no right to the land in question and that he sold it to him (the writer) in 1885 upon the purchase of land on the other side. Marais added that he had been advised by his friends not to appear as the Court could not take away any ground which was marked off by a surveyor as belonging to him. He thought it would be best for the plaintiff to look into that point.

Mr. Searle said they would do so. Evidence was called.

Johan Frederick Willem Kaupferberger, Government Land Surveyor, said he had surveyed lots 15 and 16 of the Mill-street erven and he explained the points of the plan put in.

Johannes Jacobus le Roux (the plaintiff) and others gave evidence.

At a later stage Mr. Searle produced a copy of the transfer in question.

Judgment was given for the plaintiff against all the defendants in terms of prayers (a) and (b) of the declaration, and against the first defendant (Marais) for £5 damages and costs, to include plaintiff's expenses as a necessary witness.

[Plaintiff's Attorneys: Van Zyl and Buissinè.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

DIVORCE.

RAUBENHEIMER V. RAUBEN-HEIMER. } 1905.
 } Apr. 25th.

This was an action brought by the husband for restitution of conjugal rights, failing which divorce, by reason of alleged desertion by his wife. Mr. P. S. T. Jones was the plaintiff.

The defendant appeared, and said that she had left her husband because he had not supported her, and she did not intend to return to him because he could not support her.

Decree of restitution granted, defendant to return to the plaintiff on or before the 15th May, failing which rule to issue calling upon her to show cause on the 15th June why a decree of divorce should not be granted, and plaintiff be declared to have custody of the minor child, a girl.

Postea (

TRIAL CAUSE.

MCLEOD V. JOUBERT.

This was an action brought by William James McLeod, conveyancer, of Cape Town, formerly carrying on business as an auctioneer and general dealer at Aberdeen, against Johannes A. Joubert, farmer, Aberdeen, to recover a sum of £15 15s. 11d., alleged to be due by way of debt, with interest *a tempore mora* and costs.

The plaintiff, in his declaration, alleged that a sum of £15 15s. 11d. was due to him.

The defendant, in his plea, said that he had already paid a sum of £10 in part payment of the account to Mr. Smythe, who took over the plaintiff's business. He admitted that a balance of £5 15s. 11d. was due, and made a tender accordingly.

The plaintiff, in his replication, said that the defendant gave him a certain promissory note for £26 12s. 9d., and that, taking the sum of £10 into account, there was still an amount due of not less than the amount claimed. The said sum of £10 was paid as against the promissory note.

Mr. Gardiner was for the plaintiff; Dr. Greer was for the defendant.

Maasdorp, J., ruled that the onus lay upon the defendant to prove that the payment of £10 was in respect of the open account.

Evidence having been led for the plaintiff,

Mr. Gardiner argued that the amount of £10 was paid towards partial discharge of the promissory note, and that the plaintiff had taken a proper remedy in bringing his action in this Court.

Dr. Greer contended that the balance of the evidence was in favour of the statement of the defendant, that he had paid the sum of £10 in reduction of the open account. The plaintiff, he submitted, had multiplied and piled up costs against the defendant and the Court, even if it found for the plaintiff, should not award costs to him.

Mr. Gardiner having been heard in reply,

Maasdorp, J.: The plaintiff in this case claims from the defendant the sum of £15 15s. 11d., being the balance of an account, the items of which are annexed in full in the plaintiff's declaration. The account consists of items of an open account and other items having reference to the indebtedness of the debtor to the plaintiff upon a promissory note, to which he had become surety. The indebtedness of the defendant upon this account runs over the years 1902 and 1903. It would appear that at the same time that this account was running the defendant also owed the plaintiff a sum of £26 12s. 9d. upon a promissory note made by him on the 15th June, 1903, which fell due on the 15th July, 1903. It seems that during August, 1903, this promissory note was partly renewed by another, for the sum of £17 19s. 3d., a payment on account having in some form been made by the defendant to the plaintiff. The circumstances under which that payment was made have really given rise to this action, and I may say the suit is largely the result of a misunderstanding between the parties. The defendant alleges that he paid a sum of £10, on the 7th August, 1903, to the agent of the plaintiff, at Aberdeen, and he says that he paid this amount and expected it to be set off against his open account, upon which he is now sued by the plaintiff. However, in August, he had an interview with the plaintiff, in which the plaintiff brought to his knowledge that a promissory note for £26 12s. 9d. was due. The plaintiff also then admitted to the defendant that he had received the sum of £10, which he suggested should be set off against that promissory note, the renewal of which it had been already agreed should be made by the defendant in favour of the plaintiff. It appears that credit was given by the plaintiff for the £10 paid by the defendant. When this suit arose, it appeared to the defendant that nowhere was an acknowledgement made of the receipt of the £10, and he consequently endeavoured to set up the payment of the £10 against the open account, and here, as I say, a misunderstanding arose between the parties. When the defendant proposed to set off

that £10 against the open account he was not at the time informed by the plaintiff that he had already given him credit for the £10, and that he set it off against the promissory note, for which he had granted a renewal. If the matter had been cleared up between the parties at that time, I am sure that the case would not have proceeded any further, because the defendant would fully have understood that he had received credit for the £10. At one time the plaintiff was unwilling to admit that the payment made to Smythe, which had been made by the defendant, was a payment to himself through his agent, for which the defendant ought to receive credit, but that state of affairs was wholly altered when the plaintiff filed his replication. In the pleadings, it will be seen that what the defendant had contended for was admitted by the plaintiff. I have come to the conclusion that the money was paid for the promissory note, and that, when the defendant signed a renewal of the promissory note, he was a consenting party to the £10 being treated as in part payment of the original note. Upon the defendant receiving the replication, all the difficulties which had up to that time existed were removed, and it was consequently brought to the notice of the defendant that he had received full credit for the £10 paid by him. Under the circumstances, the £10 cannot now be set off against the account, which is annexed to the declaration, but the plaintiff is entitled to judgment upon that account. The question arises whether under the circumstances, considering the amount of the claim, the plaintiff should have his costs in this case. Now, as has been pointed out by counsel, upon the authorities cited, the Act of Parliament, in which the power of the Court in this respect is granted, does not allow the Court discretion to hold in a case like the present that a plaintiff is only entitled to Magistrate's Court costs. A further difficulty arises in my mind whether the plaintiff should not be disentitled to his costs on other grounds, because of his having at one time denied the receipt of the money. But, as I say, with respect to the costs, the Court cannot now go back upon the state of the case before the replication was served, and when the replication was served, that difficulty was removed, and, although there may have been some doubt still in the mind of the defendant, whether he had received the full credit he was entitled to, still, for that doubt he is himself only to blame. He is, no doubt, not a good business man, he was not aware that he had signed a renewal of the former promissory note, which has been clearly proved, and under the circumstances I think the difficulties under which the defendant laboured were the result of a bad memory and business incapacity, but for this the plaintiff

should not suffer. Judgment will be given for the plaintiff for the amount claimed, with costs.

[Plaintiff's Attorney: R. G. McLeod; Defendant's Attorneys: Dempers and Van Ryneveld.]

GENERAL MOTIONS.

BRUMMER V. ESTATE STEYN. { 1905.
Apr. 25th.

Mr. P. S. T. Jones moved for the rule nisi calling upon the respondent, as executrix testamentary in her late husband's estate, to show cause why she should not sign certain papers for the sub-division of a certain farm to be made absolute.

Rule made absolute, with costs.

Ex parte ESTATE EDKINS.

Mr. Gardiner moved for leave to pay over proceeds of policy of assurance to Mrs. Edkins, and to discharge petitioner from the office of trustee. The Master's report was favourable.

Order granted in terms of Master's report.

Ex parte DATH.

Mr. Gardiner moved for leave to sell certain property. Petitioner married the widow of the late Mr. Elliott, and they had executed a mutual will, in which they appointed the children of the first marriage and any children to be born of the second marriage to be their heirs. The second marriage was without issue. Petitioner's wife had since died, petitioner was in bad health, there were certain charges to be met—£1,000 odd annually—and he desired to sell such properties as produced a low rent, and put out the proceeds on mortgage. The outgoings were a little in excess of the income from the property. Petitioner applied for an order for the appointment of Mr. G. W. Steytler to sell such properties as he thought fit. Counsel said that the Master in his report pointed out that this was not a favourable time for the sale of landed property, but he (Mr. Gardiner) contended that the interests of all concerned would be protected if a reserve price were fixed.

Maasdorp, J., said he thought it was desirable that the Court should have a report from Mr. Steytler upon the matter before any order was made. The matter would therefore stand over for further information from Mr. Steytler as to the whole matter, but especially as to which properties should be disposed of or mortgaged to meet the requirements of the case.

ERASMUS V. VAN DER MERWE.

Mr. De Waal moved for a rule nisi calling upon the respondent to show cause why a certain inheritance of £100 due to him should not be declared executable to a judgment obtained by the petitioner to be made absolute.

Rule made absolute.

MAKGOSOA V. FLAG MINI.

Mr. Alexander moved for an order of personal attachment against the respondent for contempt of Court, in failing to restore to the applicant her female child, Lily Malefani, in accordance with an order of the Court. Counsel read an affidavit by the petitioner, who stated that the respondent had failed to restore the child, and had declared his intention of not returning the child. He added that the respondent had never appeared in court. The applicant was the mother of the child, and it appeared that the respondent had obtained possession of it by a subterfuge, and was retaining it because the applicant had refused to marry him. The respondent resided at Aliwal North.

An order was granted directing the respondent to deliver the child to the Deputy-Sheriff at Aliwal North, and directing the Deputy-Sheriff to take the child from the respondent and place it in the possession of the applicant; respondent ordered to pay the costs of this application.

Maasdorp, J., said he thought that the defendant, seeing that the demand for restoration of the child had been made upon him by the applicant's agent, had not really understood that he was disobeying an order of Court in refusing to give up possession.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

TRIAL CAUSES.

KRUGER V. KRUGER. } 1905.
Apr. 26th.

Will — Codicil — Construction —
Bequest by implication.

A testator, by codicil to his will, bequeathed a farm to his

grandson A., "upon this understanding that he shall not be able to sell the farm, but that after his death and that of his wife it shall devolve upon his eldest son." A. married his first wife after the testator's death, and after her death he was twice married. Upon the death of A., the plaintiff, being his eldest son by his first wife, took possession of the farm.

Held, in an action by A.'s widow, being his third wife, claiming a life interest in the farm, that the wife referred to in the codicil was the mother of the eldest son of A., and that the defendant, as such eldest son, was entitled to the farm after the death of his father and mother.

This was an action brought by Hester Carolina Kruger, widow of the late Abraham Lodevicus Kruger, of Steynsburg, against Jacob Petrus Kruger, for an order of eviction from the farm Morsfontein, in the district of Cradock, and also for damages.

From the pleadings it appeared that the circumstances were as follows: By the codicil to a certain will a bequest was made to a grandson called Abraham, whose widow plaintiff was. That bequest was embodied in a codicil in the following terms: To our grandson, Abraham Lodevicus Kruger, the perpetual quit-rent farm named Morsfontein, situate in the Field-cornetcy of Brak River, aforesaid, for which he shall indemnify and pay to our estate the sum of four thousand Rix dollars, also upon this understanding, that he shall not be able to sell the said farm, but that, after his death and that of his wife (it), shall devolve upon his eldest son; but, in case he should die unmarried, the said farm shall then fall back to our joint estate, which shall also take place after the death of his wife, as well as his own, in case he should die without leaving children. And that the ground and the dam, of which a separate diagram exists, and which are at present used with the farm Morsfontein, shall be regarded exactly as if the same were included in one and the same diagram and title deed, to be assumed and possessed by our two last-named legatees for always after the death of both of us; and, in case of their predecease, as hereinafter mentioned, by their lawful descendants by representation, as free and lawful property, without the contradiction of anyone." The testator died in January, 1843, at which time the grandson Abraham was a boy about 13 years of

age. Subsequently Abraham married, and by his first marriage there was born the defendant. Then Abraham married a second time, and afterwards he married a third time, and it was his widow by the third marriage who had instituted the present suit. Abraham died in October, 1904, and the plaintiff claimed that under this codicil she was entitled to remain in possession of the farm Morsfontein during her life.

The declaration further stated that the defendant, Jacob, the eldest son, had taken possession of the farm, and the plaintiff claimed that she was entitled to have possession during her life. There was also a claim for damages. The plaintiff herself was unable to come to Cape Town, and she had abandoned the claim for damages, and the question simply arose as to the construction of this codicil. The defendant, in his plea, said that the marriage was without community of goods. He dis-sented from the construction placed upon the will by the plaintiff, and denied the correctness of that construction. He admitted having taken possession of the farm, and that he now occupied it, but said that he was lawfully entitled to do so, and he refused to give up possession. He also said that the plaintiff voluntarily quitted the farm after the death of his (defendant's) father.

Sir H. Juta, K.C. (with him Mr. Sutton) for plaintiff. Mr. Searle, K.C. (with him J. E. R. De Villiers) for defendant.

Jacob Petrus Kruger (the defendant), said that he was the eldest son of the late Abraham Lodevicus Kruger, of Steynsburg, by the first marriage. He was now occupying the farm in question, having lived there from his eleventh or twelfth year, that was since about 1861. During his father's lifetime witness bought his father's life interest, paying about £600 for it. Upon his father's death in October, the plaintiff left the farm nine days afterwards, and went to live with her son by a previous marriage, who was at Bethulie. Witness first heard in January that she was making a claim to the farm, receiving a notice on the 27th January. The farm contained a little over 7,000 morgen. His step-mother (the plaintiff) was not quite 50 years old; witness was 55 years old. Witness had built a house on the farm.

Sir H. Juta argued that there was a bequest by implication to the plaintiff, and that it was intended that Abraham's widow, whichever she was, should enjoy the usufruct of the farm.

Mr. Searle contended that the testators only contemplated the first wife of Abraham, and that it was never intended, seeing that an eldest son had been born, that the widow by any subsequent marriages should have any enjoyment of the property. In this case they had a lady who was claiming against the eldest son of Abraham, who was several years her senior. The intention of the testators was to benefit the eldest son, and not

to benefit any lady who was not the mother of the eldest son.

Sir H. Juta having been heard in reply,

De Villiers, C.J.: The farm in question was bequeathed by the testators to their grandson, Abraham Kruger, upon this understanding, that "he shall not be able to sell the farm, but that after his death and that of his wife, it shall devolve upon his eldest son." If the codicil had stopped here, I would have had no doubt whatever that it was the testator's intention to postpone the enjoyment by the eldest son until the death of his mother as well as his father. In point of fact, Abraham had three wives. The defendant in the present case was the eldest son by the first wife. The third wife was alive at the time of Abraham's death, and she now claims that she is the wife referred to and that she is entitled to remain in possession during her lifetime, excluding the defendant, who is the eldest son of the first wife. In my opinion the words "after his death and that of his wife," must be held to refer to the first wife, the mother of the eldest son. If it were otherwise, it would have been in the power of Abraham practically to oust the eldest son. In his old age he might marry a young wife, and this young wife would step in, retain the property during her lifetime, and practically oust the step-son, who would be very much older than she is herself. In the present case the step-son is only five years older, but he might have been 20 years older or more, and in that way the desire of the testators would be completely frustrated. That could never have been the intention of the testators. Therefore, in my opinion, even if a bequest could be allowed by implication, there is no such necessary implication in the present case as to justify the Court in holding that the third wife is entitled to a life interest. But, then, there is a further clause in the will, and the Court has to decide whether that further clause should in any way affect the interpretation the Court would place upon the first part of the codicil. That further clause says, "But in case he shall die unmarried, the said farm shall then fall back to our joint estate, which shall also take place after the death of his wife, as well as his own, in case he should die without leaving children." No doubt, this clause throws some doubt upon the construction the Court has placed upon the first part, but, in my opinion, the doubt is not of such a nature as to exclude the interpretation I have just referred to. It may well be that the testator desired that the eldest son should take the bequest, and thus exclude the third wife, but in that case there were no children at all. There is nothing to show that the widow of Abraham, even if not his first wife, should have a life interest. In the events which have hap-

pened the defendant was entitled, after the death of his father and mother, to the benefit of the bequest. For these reasons I think that the judgment of the Court should be for the defendant. In regard to the costs, I think defendant should have his costs, and as to his expenses as witness, under the circumstances, seeing that the claim for damages was not withdrawn until to-day, I think the defendant is entitled to his witness's expenses.

Maasdorp, J., concurred.

[Plaintiff's Attorneys: Fairbridge, Arderne and Lawton; Defendant's Attorneys: Walker and Jacobsohn.]

MALCOMESS AND CO. V. { 1905.
CARY. { Apr. 26th.

Misjoinder of plaintiffs—Exception—Compensation.

M. and the trustee of N.'s insolvent estate joined in an action to recover the amount of certain promissory notes made by the defendant in favour of N., and by N. endorsed before his insolvency, in favour of M., as security for certain advances made to N.

Held, that in the absence of any prejudice to the defendant from such joinder, he was not entitled to except thereto.

This was an argument upon an exception taken by the defendant to the plaintiffs' declaration. The plaintiffs, Malcomess and Co., of East London, and Peter August Reimers, in his capacity as sole trustee in the insolvent estate of the firm of H. B. Cary, of Tarkastad, brought an action against Thomas Bovey Cary, to recover a sum of £414 2s., upon certain promissory notes, with interest *a tempore morae*, and costs.

The declaration set out that the first plaintiff carried on business at East London and elsewhere under the style of Malcomess and Company, and the second plaintiff joined in the action in order to complete the record and assist the plaintiff, as far as need be, but he did not advance any claim on behalf of creditors in such insolvent estate, other than that of the said Malcomess and Co. to the proceeds of the promissory notes, in respect of which the defendant was sued in this matter. The two promissory notes in question were made by the defendant in February, 1903, for amounts of £265 and £149 2s. respectively, in favour of the firm of H. B. Cary, or their order, at

the Standard Bank, Tarkastad. The said notes were due and payable on the 9th May, 1903, but before their maturity, they were endorsed by the firm of Cary to the Standard Bank, who took the said notes with others to hold for and on account of Malcomess and Co., the said firm of Cary having ceded, assigned, and pledged the said notes to Malcomess and Co. by way of security in respect of the liability of the latter under a guarantee to the extent of £8,000, given by Malcomess and Co. to the said bank for the amount of any overdraft of the firm of Cary. The amount of the overdraft of the firm of Cary at the said bank was £2,447, and Malcomess and Co. had been called upon to meet the said notes, which had been dishonoured.

Sir H. Juta, K.C., was for the excipient and defendant in the action; Mr. McGregor was for the respondents and plaintiffs in the action.

Sir H. Juta said that the exception was to two plaintiffs suing the defendant. It was a most extraordinary proceeding for a trustee to sue together with a creditor. If the debt was due to the insolvent estate, then the trustee must sue. It was of vital importance to the defendant, because he said that there were mutual credits at the date of the insolvency, which he would be able to set off against any indebtedness on his part to the insolvent estate, and if in some manner or other this creditor Malcomess could sue, then he must sue on his own behalf. As a matter of fact, Malcomess had sued for provisional sentence on these promissory notes. Defendant opposed on certain grounds, and the Court refused provisional sentence, and ordered Malcomess to go into the principal case. Malcomess, after a time, instead of going into the principal case, paid up all the costs of provisional sentence, and then this action was instituted, in which Malcomess joined the trustee of the insolvent estate. One or other might have a right to sue, but the two could not.

[De Villiers, C.J.: Has Malcomess paid up his guarantee to the bank?]

Sir H. Juta said that he had. He would, however, draw their lordships' attention to one or two points. When his client gave the promissory notes, he was indebted to the firm of Cary, but subsequently the firm became indebted to him, and they had a regular sit-down and a settlement of accounts, in which credit was given to the firm of Cary for these very promissory notes. Malcomess was, no doubt, in a quandary, and he wanted to get the trustee to help him out of his difficulties. This money either belonged to the insolvent estate or it did not. It was a very nice way of getting out of the difficulty when you were in doubt to whom the debt was due, but he submitted that it

was a counsel of perfection that that Court would not allow.

Mr. McGregor said that the object was to have it made quite clear that there might be no question of a party whose rights were affected not being before the Court. He contended that the plaintiff was quite justified in having the trustee in the insolvent estate joined with him as plaintiff.

De Villiers, C.J.: The declaration discloses the fact that Malcomess and Co. (the plaintiffs) are the legal holders of certain notes made by the defendant. That fact, no doubt, would entitle the plaintiffs to sue the defendant, but then the declaration further discloses this fact: that, although the plaintiffs are the holders of these notes, yet they took them merely as security, and the question may therefore well arise whether, seeing these notes are held merely as security, the trustee is not the person who should sue, or at all events, has such an interest in the notes as to entitle him to become a party to the suit. In order, therefore, to remove any difficulty, the trustee is joined as co-plaintiff. It certainly cannot prejudice the defendant that the trustee is so joined because every defence which would be open as against each plaintiff suing separately would be available as against the plaintiffs suing jointly. It is said that, if the trustee sued alone, the defendant could plead compensation, but if, by law, there has been compensation, the defendant could plead it, notwithstanding that Malcomess and Co. are co-plaintiffs. It is just possible that at the trial further facts may come to light, shewing that there has been a misjoinder of the plaintiffs, and, therefore, in disallowing the exception, the Court will order the costs to be costs in the cause.

Maasdorp, J., concurred.

HOULDER BROS. V. COLONIAL } 1905.
GOVERNMENT. } Apr. 26th.

Plea—Document relied upon in defence—Exception.

A declaration set forth the terms of a contract upon which the plaintiffs relied, and the plea, without admitting or denying that the terms of the contract had been correctly stated, alleged that the terms of the contract were contained in a certain letter addressed at a certain date to the defendant's agent, but the terms of the letter was not set out, nor was its general purport stated. An exception by the plaintiff

to the plea as being embarrassing was sustained.

This was an argument on exceptions to a certain amended plea (see 15, C.T.R. 41), on the ground that the amendment raised a new defence, and that if the Court were to decide upon that exception in the plaintiffs' favour, there would be no need to have the Commission, for which the application had been made, to go to take evidence in England.

Sir H. Juta, K.C. (with him Mr. Struben), was for the excipient (plaintiffs in the action). Mr. Howel Jones was for the Colonial Government (defendants in the action.)

Sir H. Juta said that the evidence required on Commission would not be necessary if the Court took a certain view as to the construction of the contract. It was necessary that the contract should be before the Court, and the Government in its plea had referred to the contract. The Government said that the terms of the agreement were contained in a certain letter, addressed by the plaintiffs to the Agent-General on August 7, 1901, and that the letter would be produced at the trial. The point was, that the plaintiff said that the letter ought to be in, or that, if it were not, the material terms should have been set out to show the agreement, because if that were done the question of the construction of that agreement might at once be raised before the Court. The action was instituted by the plaintiffs against the Government upon a contract for the supply to the Colonial Government of certain coal, to be sent out to the Cape Colony, and the Government was to take delivery of that coal in instalments. The plaintiffs alleged that, by the agreement, the Government undertook to pay demurrage at the rate of fourpence per net registered ton per diem, in respect of sailing ships, and sixpence per diem in respect of steamers. The plaintiffs alleged that the Government did not take delivery of the coal as it was bound to do under its contract, and that, as a result, these vessels were detained. They claimed demurrage in terms of this contract. The original plea simply gave a denial as to the Government being indebted to the plaintiffs in any demurrage. The declaration had set up that the Government had paid demurrage in respect of a number of these, but refused to pay on the remainder. The plea was a denial that the Government was bound to pay any demurrage, or damages for detention. Then the Government moved the Court to amend the plea, and leave was given. By the amended plea the case which the Government now set up was that the rates of demurrage stipulated for in the charter parties of these ships was a different

rate of demurrage to that laid down in that agreement between the Government and the plaintiffs, and that the Government, if it were liable for anything, was liable to the owners of the ships, and not to the plaintiffs. Now, in order to ascertain whether the Government was liable to the owners of the ships or to the plaintiffs, it would be necessary to see the terms of the agreement entered into between plaintiffs and the Government. The plaintiffs asked that that agreement of August 7 should be annexed to the plea, and he (counsel) could not see how the Government could be prejudiced by this. The point was whether the Government, if it were liable for demurrage, was liable to the plaintiffs in terms of the contract made with them, or whether it was only liable to the owners of the ships. The letter containing the contract was not before the Court, and consequently this was the first proceeding the plaintiff took. He excepted to the plea on the ground that it was vague, embarrassing, and inconsistent in law, and that the plaintiffs were prejudiced and delayed in their suit. He contended that where the defendant relied upon a document for his defence, he should put that document before the Court, and he would ask his learned friend whether he would not annex the letter, which procedure would save a great deal of time and expense.

Mr. Jones urged that the Court had the contract before it in the plaintiff's declaration, which set out at length all the terms of the contract. Government admitted all the terms of the agreement, with one exception, regarding the quality of the coal, and that not being specifically denied in the plea, it was admitted by implication. All that was necessary had been done, and there was no reason for doing anything further.

[Do Villiers, C.J.: For the convenience of the plaintiffs, and perhaps for your own convenience, if they say the insertion of the letter would save time and expense, would you not be prepared to insert the letter?]

Mr. Jones said he was not prepared to take the responsibility of attaching the letter. There was nothing, he urged, to prevent the plaintiffs putting the letter before the Court.

De Villiers, C.J.: The declaration sets out the terms of the contract between the plaintiffs and the defendant, that is, the terms as understood by the plaintiffs. Then the plea says: "As to paragraph 2, the defendant denies that it was agreed by the parties that the Welsh coal contracted for must be Merthyr coal. He says, further, that the terms of the agreement referred to in the said paragraph are contained in a certain letter addressed by the plaintiff on the 7th August, 1901, to the Agent-General of the Cape of Good Hope, and, for the greater certainty

as to the terms of the agreement, he craves leave to refer to the said letter when produced at the trial in this court." It is impossible to say that this letter is not relied upon as the defence to the action, because if that letter were produced, and the terms of it were different from the terms stated in the declaration, the defendant would be entitled to have the benefit of the terms of that letter. It is therefore, right, if the plaintiffs insist upon it, that the defendant should set out generally the effect of the letter, or set out the letter in terms. Looking further into the plea, I find in the sixth paragraph the following is stated: "It was the duty of the plaintiffs, in terms of and according to the true and proper interpretation of the agreement referred to in paragraph 2, to despatch the coal to Cape Town." It is clear, then, that the defendant here relies upon the interpretation of a certain agreement, and that agreement can only be the document which is referred to. Now, how is the Court to decide upon the true and proper interpretation of that document without having that document before it? It seems to me clear that the defence is really based upon that document, and that there is a suggestion that the document, if produced, would show a different agreement from that which is disclosed in the declaration. It is, therefore, fair towards the plaintiff, in order to enable him either to except or to reply to the plea, that the true nature of the agreement contained in the letter should be set out, and, as at present advised, it would seem to me that the pleadings are embarrassing to the plaintiff, inasmuch as this letter is not set out, nor is its purport stated. The exception, will, therefore, be allowed, and the defendant be allowed to amend his plea by inserting a copy of the letter in his plea. As to the costs of this exception, I must say that, with the information at present before the Court, it is impossible to say whether the embarrassment was such as to justify allowing the costs of this argument. The exception will be allowed, the defendant will be allowed to amend his plea by inserting a copy of the letter of the 7th August, 1901, and the question of costs will be reserved.

Maasdorp, J., concurred.

[Plaintiffs' Attorneys: Fairbridge, Arderne, and Lawton.]

[Defendants' Attorneys: Reid and Nephew.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

REVIEW.

BEX V. MEYER. { 1905.
 { Apr. 27th.

Buchanan, J., said that this case had had come before him as judge of the week, the defendant having been charged before a special Justice of the Peace at Herbertsdale, under the Master and Servants' Ordinance, "in that he wrongfully and unlawfully took his son away from Mr. P. du Preez, without giving him proper notice." The charge was laid under sub-section 2, section 7, of the Act 18, 1873. This section only applied to servants absenting themselves without lawful cause, and it did not allow a Magistrate to punish the father of a servant, who, being his son, had been allowed to return home from an indefinite hiring, for refusing to allow him to go out again. The conviction must be quashed.

ADMISSIONS.

Mr. Close moved for the admission of Harry P. Ward, as an attorney and notary.

Application granted, oaths to be taken before the R.M. of Komgha.

Mr. Gardiner moved for the admission of V. G. F. Solomon as an attorney and notary.

Application granted, and oaths administered.

Mr. Close moved for the admission of Arnold E. G. W. Grimmer as an attorney.

Application granted and oaths administered.

PROVISIONAL ROLL.

BANK OF AFRICA V. { 1905.
 KOENIG AND CO. { Apr. 27th.

Provisional sentence — Bill of exchange—Liquid document —Set off.

Sir H. Juta, K.C., moved for provisional sentence on eleven bills of exchange amounting to £12,921 9s., drawn by Knowles and Co., to the order of plaintiffs, upon and accepted by the defendants.

Mr. Searle, K.C. (for the defendants), said that the defence was that the bills had been discharged by an arrangement come to between the Bank and Koenig.

These bills cannot now be sued upon. They have never been presented, and

the summons is not correct in stating that they were all due on January 14th. That was not so. The question is one purely of fact. The application for a loan of £22,000 is very important. The bank cannot now sue on these bills. By letter dated March 3rd, the manager undertook to hold over its claims against Koenig in consideration of a commission paid by him. The commission amounted to over £200. The only question in dispute is as to whether the bills were presented to us or not. We say that they were not presented till after the issue of summons. The bills are all more than a year old, and practically are only presented now. We have paid interest to the amount of £4,000 instead of the legal interest amounting to about £1,500. If the bank can come down upon us at any moment, to what do our facilities amount? Where is our consideration for our money? The bank says it set off our £4,000 as against our bond. Possibly it may be able to sue on the bond, but I contend it cannot sue on the bills. The idea that money paid in should go against the overdraft is quite inconsistent with their own letters. The only facilities the bank gave us was a *pactum de non petendo*.

Sir H. Juta (for plaintiff): I do not understand the defence. Either these bills have been met or not—or they may have been novated. Last June the defendants set up the case that they had been met: they had not, and we still hold the bills and that is a very important point in a question of provisional sentence. The facilities given by the bank were, that they would retire the bills in the hands of the National Bank (£2,000) and others: in all about £6,000, and the bank also agreed not to press for payment. Our letter of March 3rd has no reference to a loan, we merely asked for 1 per cent. on defendant's liabilities for retiring these bills. His £4,000 went to pay this overdraft. I do not see that there was any novation. The consideration received by the defendant was the retiring of bills in the hands of other banks.

Mr. Searle was not heard in reply.

Buchanan, J.: The plaintiff in this case sues upon a certain number of bills made by the defendants, and *prima facie* they are liquid documents. But the papers which have been put in show that this is not a case which can be settled upon provisional proceeding. If the bank have any case, they must go into the principal case, either upon this summons or upon the general liability of the defendant to them. Provisional sentence will be refused, with costs. It appears to me that this is not a matter which ought to have been brought in provisional form.

[Plaintiff's Attorneys: Tredgold, McIntyre and Bisset; Defendant's Attorneys: D. Tonnant, Jun.]

RIPLEY V. LATEGAN.

Mr. Long moved for provisional sentence on a promissory note for £42, with interest and costs of suit.
Order granted.

AFRICAN HOMES TRUST V. BOYCE.

Mr. J. E. R. de Villiers moved for provisional sentence on a mortgage bond for £1,400, with interest, less £12 paid on account, the bond having become due by reason of the non-payment of interest and capital. Counsel also applied for the property specially hypothecated to be declared executable.
Order granted.

LOMNITZ V. O'DRISCOLL.

Mr. Gardiner moved for provisional sentence on a mortgage bond for £1,500, with interest and costs, the bond having become due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.
Order granted.

ESTATE FILLIS V. VAN DER WEST-HUYZEN.

Mr. De Waal moved for provisional sentence on a promissory note for £93, less £7 16s. 5d. paid off, and also for £100 on a notarial bond, and for the property to be declared executable.
Order granted.

KAPLAN V. SMIT.

Mr. Gardiner moved for provisional sentence on a judgment of the Magistrate's Court at Calitzdorp for £15, with interest and costs, and for certain share in a farm to be declared executable.
Order granted.

CONRADIE V. SMIT.

Mr. Watermeyer moved for provisional sentence on a Magistrate's Court judgment for £9 1s. 11d., and also for £165, balance of purchase price of certain property, and for the property to be declared executable.
Order granted.

SAVAGE AND SONS V. TANNOCK.

Mr. Watermeyer moved for final adjudication of defendant's estate.
Granted.

MALMESBURY BOARD OF EXECUTORS V. WITTE.

Mr. Struben moved for provisional sentence on mortgage bonds for the sums of £40 8s. 8d., £20, £40, and £25, with interest and costs, and for certain property to be declared executable.
Granted.

MALMESBURY BOARD OF EXECUTORS V. LAUBSCHER.

Mr. Russell moved for provisional sentence on a mortgage bond for £75, with interest at the rate of 6 or 7 per cent. Counsel said the bond stipulated 6 per cent., but defendant entered into a special agreement, whereby he undertook to pay 7 per cent. The Sheriff, however, had not in his return given proof of service of the agreement.

The matter was ordered to stand over for a week for an amended return by the Sheriff.

MALMESBURY BOARD OF EXECUTORS V. LAUBSCHER.

Mr. D. Buchanan moved for provisional sentence for £125 and £75 on two mortgage bonds.

The circumstances in this case were similar to those of the last case, and the matter was ordered to stand over.

GAVIN V. BOTHA, EXECUTRIX TESTAMENTARY ESTATE BOTHA.

Dr. Greer moved for provisional sentence on two mortgage bonds for £1,000 and £500 respectively, with interest and costs, and for property specially hypothecated to be declared executable.

Buchanan, J., granted provisional sentence, subject to production of a certificate from the master that the defendant had been appointed executrix.

VISSER AND ANOTHER V. NAGAN.

Mr. Gardiner applied for an order for the final sequestration of defendant's estate.
Granted.

ILLIQUID ROLL.

GRASSICK V. B.S.A. ASPHALTE CO. 1905.
Apr. 27th.

Mr. P. S. T. Jones moved for judgment under Rule 319 in default of plea. The claim was for certain sums for tar paving which plaintiff had laid down for the Town Council, as sub-contractors, defendants being contractors.
Granted.

MOIR V. MOIR.

Mr. Struben moved for judgment under Rule 319. The declaration was filed and appearance was entered. Service of a demand for plea was made on the attorneys, as also was notice of bar.

Buchanan, J., pointed out that service was made on the attorneys after the latter had informed plaintiff that they no longer acted.

The matter was ordered to stand over for proper service.

GAUSS V. ESTATE EYBERS.

Mr. Van Zyl moved under Rule 329d for judgment for £20 for professional services.

Judgment was given, subject to the certificate of the Master being filed that the defendant was executor.

GAUSS V. EYBERS.

Mr. Van Zyl moved, under Rule 329d, for judgment for £149 for professional services.

Granted.

PURCELL, YALLOP AND EVERETT V. VISSER.

Dr. Greer moved for judgment, under Rule 329d, for £16 10s. 11d., for goods sold and delivered.

Granted.

CLARK V. LEA.

Mr. D. Buchanan moved for judgment, under Rule 329d, for £103, money lent and advanced.

Granted.

DEWAN V. HART.

Mr. Van Zyl applied for judgment, under Rule 329d, for £310 18s. 6d., balance of purchase price of certain ground.

Granted.

MARQUARD AND CO. V. JACOBS.

Mr. De Waal moved, under Rule 329d, for judgment for £59 2s. 3d. for goods sold and delivered.

Granted.

REHABILITATIONS.

Mr. J. E. de Villiers moved for the rehabilitation of Martin Elfert, whose estate was voluntarily surrendered in 1900.

Granted.

Mr. Gutsche moved for the rehabilitation of Angelo Brusoni, whose estate was surrendered in 1903.

Granted.

GENERAL MOTIONS.

Ex parte STERLEY. } 1905.
} Apr. 27th.

Mr. Watermeyer moved to make absolute a rule *nisi* granted under the Derelict Lands Act.

Granted.

Ex parte THE ESTATE OF KERDEL.

On the motion of Mr. De Waal, a similar order was made.

BOTHA V. BOTHA.

Mr. J. E. R. de Villiers moved, on notice, calling on the respondent, the husband, to show cause why an order should not be granted for his attachment for contempt of Court, in not paying alimony which he was ordered to pay by the Circuit Court at Worcester.

Sir H. Juta, K.C., appeared for the respondent.

Mr. De Villiers said the matter arose out of a case heard at the Worcester Circuit Court in October last, when an order for judicial separation was made. Defendant stated that his wife and himself had resumed marital relations since the order was made. The wife admitted this, but said she had only been persuaded to accompany her husband to Cape Town on three occasions, on his promise that he would secure a house there. She was only willing to return to him on the condition that they left Worcester. He had not kept that promise.

Buchanan, J., said he was sorry for the wife, who had been too easily persuaded, but she had put herself out of Court by her act in returning after the order for judicial separation was granted.

Mr. De Villiers argued that there was no reconciliation; that there was only an attempt at reconciliation, which had fallen through, because the defendant failed to keep his promise.

Buchanan, J., said that the decree had fallen to the ground, owing to the action of the wife, and no order would be made.

The application was accordingly refused, with costs.

VAN REENEN V. ESTATE of 1905.
VINK. (Apr. 27th.

Will—*Fidei commissum*—Grandchildren — Renunciation of fiduciary interest.

V. instituted his seven children and their children, by representation, as his heirs, but burdened the inheritance with a life interest in favour of his wife. V. having died, his widow now wished to renounce her life interest in favour of the fidei commissarii.

Held, that as it had been ascertained that no further grandchildren of V. could be born, the portions of the heirs should at once be paid out, notwithstanding the fact that V.'s widow had power to impose further *fidei commissa*. It was, however, ordered that the shares of the minor heirs were to be paid to the executor for their behoof.

This was an application for an order on a certain executor to pay to the three applicants their inheritance, under the will of the late Peter Joseph Vink, of Koeberg. The will bequeathed Mrs. Vink the usufruct, with a *fidei commissum* in favour of her children. The will made provision for the passing of the share of any children dying to their lawful descendants and gave Mrs. Vink power to encumber the share of any child with a *fidei commissum*. Mrs. Vink now wished to renounce her usufruct, in order that the applicants might forthwith be paid their inheritance, and the question for the Court to decide was whether this could be done under the terms of the will.

Sir H. Juta, K.C., was for the applicants, and Mr. Van Zyl for the executor.

After argument,

Buchanan, J.: In this case the late Mr. Vink instituted as his heirs his seven children, but he burdened the shares of the children with a *fidei commissum*. It was admitted on both sides that the effect of the will was to give a vested interest to the grandchildren, subject only to the life interest of the mother, and that construction is in accordance with the construction so frequently placed on such wills by this Court. The mother now is willing to renounce her life interest in the three-sevenths which is vested in the applicants, and to allow the

amount to be paid out to them at once. The mother, it is true, under the will, had power to burden the shares of the applicants with a further *fidei commissum*, but she does not wish to exercise this power, and there is no compulsion on her to do so. The shares of the minors will remain with the executor, and will not be affected by the order that the Court will make in any way. It is clear that there can be no more grandchildren entitled to a share, and consequently the amount of the grandchildren's share can now be ascertained. That amount being vested in them, and being only subject to the life interest of the mother, and as she now waives her life interest, there is no objection to the Court ordering that the three-sevenths vested in the applicants be paid over to them. As to the costs, I think it is only fair that the costs should come out of the three-sevenths.

[Applicant's Attorney: J. D'Oliveira; Respondent's Attorney: Not on record.]

HEYNES, MATHEW AND CO. V. COOPER.

Sale and purchase—Goodwill—Sub-tenancy.

This was an application upon notice of motion by Heynes, Mathew and Co., wholesale chemists, Cape Town, calling upon the respondent, John William Cooper, to show cause why he should not be ordered to give up possession to the applicants' representative of certain premises in Main-street, Malmesbury, occupied by the Malmesbury Dispensary.

The affidavit of A. H. Mathew, of the applicant firm, stated that they purchased the business in question in September, 1899, and continued the respondent in his position as manager. Subsequently, on the 27th February, 1903, the parties entered into an agreement, whereby Cooper purchased the business. The respondent, however, had fallen into arrear with the instalments of the purchase price, due to the applicants, and the applicants had now given him notice that, under clause 7 of the agreement, they now resumed possession of the business. The respondent had broken nearly every clause of the agreement. The affidavit of Mr. Cope, a representative of the applicant firm, stated that he had demanded possession of the premises from the respondent, but that the latter said that he could only give up the fixtures, and stock, and that he had no right to hand over the premises to the applicants without an order of Court.

The answering affidavit of the respondent stated that he was willing to give up the stock and fixtures, but he could not sub-let the premises, without the permission of the owners,

Messrs. Rootin, Pemberthy and Co., and he (the respondent) was merely a monthly tenant. He denied that he had broken almost every clause of the agreement. An affidavit by Mr. William Pemberthy stated that his firm only acknowledged the said Cooper as their tenant, and no one else.

A replying affidavit by Mr. A. H. Mathew was also put in.

Counsel having been heard in argument on the facts,

Buchanan, J.: In the agreement under which the respondent Cooper took over the business for Messrs. Heynes, Mathew and Co. there were certain conditions by which, if Cooper did not fulfil them, he agreed that Heynes, Mathew, and Co. should have the power to take possession of the business without further recourse to legal proceedings. Heynes Mathew and Co. wish to take possession of the business; Cooper will not allow them to do so, saying that the premises belong to persons who are not parties to this suit, that he is only a monthly tenant, and that he has no right to sub-let. I cannot in any way in this order bind the proprietors of the property, but as between Cooper and Heynes, Mathew and Co. he has absolutely no right. Cooper agreed to take over the business hitherto occupied and carried on by Heynes, Mathew and Co. as the Malmesbury Dispensary, and this business, occupied and carried on by Heynes, Mathew and Co. is the business which Cooper undertook by his agreement to give up if he broke the conditions of this agreement. He is bound, therefore, by his own contract, to give up possession at once. The owners of the property may have a remedy, both against Cooper and Heynes, Mathew and Co., if there is any remedy, but apparently they are not concerned in this matter between Cooper and Heynes, Mathew and Co. He must forthwith deliver up the business known as the Malmesbury Dispensary and pay the costs of this application. I think, under all the circumstances, he ought to deliver up the business within forty-eight hours.

Ex parte ARTER BROS.

Mr. Roux moved for a rule nisi calling upon the respondent to deliver up the keys, books, etc., of a certain aerated water business at Prieska to be made absolute.

Rule made absolute, with costs.

Ex parte ESTATE DE KLERCK.

Mr. J. E. R. de Villiers moved, on behalf of petitioner, the surviving spouse of the late Joseph de Klerk, of Cradock, for leave to prove by affidavit the con-

tents of a certain will which had been destroyed by Frank Isaacs, the adopted son of the petitioner, against whom criminal proceedings had been instituted. Isaacs had pleaded guilty to the charge brought against him, but the Solicitor-General had declined to prosecute, because he did not think that the act of the youth was such as was contemplated by the section. Certain affidavits were also read in support of the application, including one by the youth Isaacs, who admitted that, in a fit of disappointment, on seeing the contents of the will, he destroyed the document. Petitioner and her late husband were married in community, and he made a joint will. Counsel asked the Court to grant a rule nisi.

Rule granted calling upon all persons interested in the estate of Joseph de Klerk to show cause why the dispositions mentioned in the petition should not be admitted by the Master as the joint will of Joseph de Klerk and his wife, rule to be published in the "Government Gazette" and the "Midland News," to be served on the brother and sister of the late Joseph de Klerk, and to be returnable on the 15th June.

Postea (June 15th). Rule absolute.

Ex parte ESTATE BRUCE.

Mr. Searle, K.C., moved, on behalf of the executors testamentary in the estate Bruce, Mr. E. R. Syfret and Mrs. Cleghorn, for leave to raise a mortgage of £5,000 upon certain property, 94 and 96, Adderley-street, Cape Town. The property was valued at £17,000, and was at present leased to the second-named petitioner's husband. The property was at present unmortgaged. The heirs under the will all consented to the application, which was made on behalf of the second-named petitioner's husband. Counsel also read an affidavit by Mr. J. Bruce Cleghorn, attorney.

Order granted as prayed.

Buchanan, J., remarked that he was sorry that the heirs were not minors.

REINECKE V. OOSTHUIZEN.

Mr. Van Zyl appeared for the applicant; Mr. Searle, K.C., for the respondent.

An order was granted in terms of a consent paper.

Ex parte WARD AND FELIX.

Mr. Sutton moved for leave to the petitioners to sue *in forma pauperis*.

Granted, Mr. Sutton being appointed counsel, Mr. S. S. Huton attorney.

Ex parte GROENEWALD AND WIFE

Dr. Greer moved for an order in terms of a certain notarial deed of separation.

Buchanan, J., said the Court could not grant a judicial separation on motion. An action must be brought.

No order was made.

Ex parte THE EXECUTRIX OF THE ESTATE OF SLIER.

Mr. Gutsche applied for leave to mortgage certain property to enable the widow to support the minor children. The Master's report was favourable.

An order was granted in terms of the Master's report.

Ex parte DU PLESSIS.

Mr. Gardiner moved for judgment for certain moneys from the estate of the late Opperman, to which the children of petitioner were entitled under the will. Petitioner asked for the payment of the shares of the major children, who consented to the order.

The Court ordered that the share of the inheritance given to the major heirs, who had consented to the application, be authorised to be paid over to the petitioner.

Ex parte VENTER.

Mr. Burton moved for an order authorising the Master to pay out certain money. The Master's report was favourable.

Order granted.

Ex parte THE CAPE TIMES, LTD.

Mr. McGregor moved for an order to have a certain election account re-opened. The petition set forth that on the 4th November, 1903, Mr. W. H. C. Klein, acting on behalf of the election agent of Mr. W. P. Schreiner, a candidate for the Parliamentary election at Caledon, gave an order for the insertion of a certain advertisement in the "Owl" newspaper. The account was rendered before the expiration of the 35 days prescribed by the Act, but it appeared to have gone astray, and could not now be paid without order of Court.

It was ordered that leave be given to pay the amount.

Ex parte THE COLONIAL GOVERNMENT.

Mr. Howel Jones moved for authority to the High Sheriff to pay out certain money in satisfaction of claims by the Government against a certain land syndicate.

Buchanan, J., said there had been no judgment.

Mr. Jones suggested that a rule *nisi* should be issued calling on respondents to show cause why the money should not be paid.

An order was granted, giving leave to sue by edictal citation, and to attach the money, the citation being made returnable on the 1st August.

Ex parte MARAIS.

Mr. Van Zyl moved for leave to mortgage certain property donated to the minor children of the petitioner for the sum of £150, for the purpose of paying for improvements made to the property. The Master recommended that authority be given subject to a sum of £20 being paid annually out of the rents towards restoring the capital.

Order granted in terms of the Master's report.

Ex parte LEIBBRANDT.

Mr. Rowson moved for an order to have Mary Ann Attwell, an inmate of the Valkenberg Asylum, declared of unsound mind, and to appoint a *curator ad litem*.

His Lordship asked counsel where the respondent's husband, Holme, was?

Mr. Rowson said that the marriage proved to be bigamous. They knew nothing as to Holme's whereabouts.

Rule granted, calling upon the respondent to show cause why an order should not be granted as prayed, Mr. Advocate J. E. R. de Villiers to be appointed as *curator ad litem*, and rule to be returnable on the 7th May.

Postea (May 11th).

Mr. Rowson asked leave to mention the case of Mary Ann Attwell, with a view to the appointment of a curator.

Dr. Black, medical officer at Valkenberg Asylum, said that Mary Ann Attwell was suffering from suicidal mania, and was not likely to recover. She was quite unable to manage her own affairs.

Mr. J. E. R. de Villiers, *curator ad litem*, said he had seen Miss Attwell, and was satisfied that she required to be kept under restraint.

Mr. Rowson moved that Mr. Liebrandt, an uncle of Miss Attwell, be appointed *curator bonis*.

Mr. J. E. R. de Villiers moved that Mr. Roos, of the Board of Executors, be appointed.

Order granted, declaring Miss Attwell of unsound mind, and appointing Mr. Roos as curator.

Ex parte TROLLIP.

Mr. Upington moved for cession of certain articles of clerkship to Mr. J. B.

Cleghorn, who would act for petitioner during his absence from the Colony on account of ill-health.

Order granted as prayed.

Ex parte STEWART AND { 1905.
WIFE. } Apr. 27th.

Scottish marriage—Married Women's Property Act—Community of property.

Husband and wife domiciled and married in Scotland prior to the passing of the Married Women's Property Act of 1882, are married in community as to movable property but not as to immovable.

Mr. Sutton moved to have a certain transfer deed of ground situate at East London amended by the description of the parties as having been married in community of property. The parties were married in Scotland, where they were domiciled, in 1877, before the passing of the Married Women's Property Act. They had since become domiciled in this colony.

Buchanan, J., said that it seemed to him that the parties were married in community so far as movable property was concerned, but without community so far as immovable property was concerned. On the authorities quoted, he was not prepared to say that this property was held in community. There would be no order.

SUPREME COURT

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLKY.]

TRIAL CAUSES.

DE KOCK V. COLONIAL { 1905.
GOVERNMENT. } Apr. 28th.
May 1st.

Fire—Railway—Negligence.

Lategan v. Colonial Government (14 C.T.R., 935) followed.

This was an action brought by Marthinus de Kock, farmer, Malmesbury,

against the Colonial Government, to recover damages in the sum of £100 for injury done to his property by reason of the negligence of the Railway Department, or its servants.

From the pleadings it appeared that the plaintiff claimed £100 by way of damages caused through his grazing lands having been burned out, the grass having caught fire from coals thrown or deposited from a railway engine proceeding past his farm on its way from Cape Town to Malmesbury. On the 7th January last what was locally known as the 11 down train, was passing through plaintiff's farm to Malmesbury, when live coal was thrown out from the engine, and the plaintiff's summer grazing was destroyed. Defendants repudiated liability, and said specially that the fire and damage complained of were not in any way caused by or attributable to the acts or negligence of the driver of the engine or any other servants of the defendant.

Mr. Upington (with him Mr. Alexander) was for plaintiff; Mr. Howel Jones (with him Mr. Morgan Evans) was for the Government.

The plaintiff, Marthinus de Kock, said that he was a farmer at the farm Amoskuil, division of Malmesbury. The line passed through his ground. Witness had from time to time suffered from fires when railway trains had been passing. On the 7th January the train for Malmesbury passed through his farm about 10.45 a.m. Witness's farm was about three miles from Malmesbury. At the time the train passed he was on his horse, and was getting ready to go to one of his camps. He at once noticed a fire, which grew rapidly; there was a strong north wind blowing in the direction of witness's homestead. Witness immediately went to the railway line to see how the fire had been caused. He found that coal had been thrown down from the engine. One piece was by the wire fence, and about a yard from this was another piece of coal lying inside the fence. The coal was still burning, so that he was unable to handle it. He afterwards picked up the two pieces of coal (produced), and went to his homestead immediately.

By the Court: There was no other way in which the fire could have been caused except by the hot coals from the engine. There was no one by at the time he went to the spot. Witness was about 300 yards from the line, when the fire broke out, and he at once rode to the spot.

Witness (continuing) said that the fire spread in the summer grazing, and went as far as his kraal. He called up his son and some coloured helpers. It was impossible to save the summer grazing. He had great difficulty in keeping the fire from spreading to his homestead. The line was not clean; grass was growing in it. The same afternoon the

train, on its return journey to town, caused another fire on his farm; the veld was burning as the train was passing. That fire was soon extinguished by his servants. He valued the hire for one summer of the grazing destroyed at £100, or even more. That was what he would have been prepared to give for such grazing.

By the Court: He had kept all his stock on his farm. He had not hired any other veld in consequence of the fire, nor had he had to buy fodder. He considered that his cattle were in poorer condition by reason of the grazing having been burnt. He had had to give the cattle more hay than would otherwise have been necessary. He calculated that about £25 worth of hay more had been consumed than would have been necessary if the grazing had not been destroyed.

Witness (in further cross-examination) said that he had received a circular from the Railway Department in reference to the measures to be taken to minimize the risk of fires along the line. He sent a reply; he did not know whether he posted it, but he was not prepared to agree to the proposals of the Department.

Mr. Jones said that the department had not had a reply from the plaintiff.

Witness (continuing) said that his land, extending 100 ft. from the fence, was very valuable. He received a further letter from the Department, stating that they took it that, if they had no reply from the plaintiff, he did not consent to the making of a fire-path 100 ft. outside the railway boundary. On the day of the fire he noticed grass growing on the railway line itself.

Cross-examined by Mr. Jones: He would not swear that he wrote a reply to the communications that he received from the Government. He objected to giving the Government 100 ft. of land on each side of the fence. As to the proposal of the Government to cut a 10 ft. fire-path, he did not think they would have kept such a path clean. He could not afford to give the Government 10 ft. of the ground for nothing. On the day in question he saw grass growing about a foot high on the line between the two fences. The line was not kept clean. The Department's servants were on the line almost every day.

Mr. Jones (to witness): How are you the poorer on account of this fire?

Witness: I can't say I am the poorer, but I have the damage; I have the loss.

Further cross-examined: He had about 600 or 700 morgen of good grazing ground. Much more than 25 morgen was burnt out by the fire. He had suffered damage by the previous fires, but the damage in the present case was so serious that he was obliged to bring an action. He had had to keep two men specially on his farm during certain months to

look after any fires that might break out.

Re-examined: He did not consider that an 100 ft. path would be necessary if the line were kept clean.

Joseph de Kock (son of the plaintiff) spoke to the springing up of the fire immediately after the train had passed, and the extremely rapid extension of the flames. He corroborated his father's evidence on various points, and said that he valued the grazing destroyed by the fire at about £100.

By the Court: About half a camp was burnt out by the fire.

Cross-examined: He had seen burnt paper where the fire occurred.

Marthinus de Kock, jun., another son, also gave evidence.

Mr. Burg, surveyor, proved the plan put in, showing the area damaged by the fire. About 40 morgen of ground was damaged.

Cross-examined: Witness surveyed the land for the purposes of the case on April 13.

Wilhelm Hubach, baker, Malmesbury, said that on Saturday, January 7, while travelling on the main road he saw a fire on the plaintiff's farm shortly after 11 o'clock. He stopped, and went to the spot. He did not know whether the fire had started from the inside or outside the fence. The fire, he was sure, started from the railway side. There was a strong northerly wind blowing towards the homestead. During the following week he passed along the road, and saw a ganger employed by the C.G.R. engaged in burning the grass on the line opposite to the plaintiff's farm.

Cross-examined: The grass was not being burned opposite the exact place where the fire had taken place. He came to the conclusion that the fire had been caused by the railways. He took some interest in the matter, because so many of the farmers in the Malmesbury district had complained about damage done to their farms by fire.

John de Kock, farmer, Malmesbury, said he valued the grazing destroyed by the fire at £100 or more.

By the Court: He would be prepared to pay £100 for forty morgen of grazing land for one season, if he had a good deal of stock, say, about 100 head. Witness was not related to the plaintiff. Plaintiff had one of the best stock farms in the district of Malmesbury.

Cross-examined: The value of the farm was about £5,000.

Mr. Upington said that from the transfer deed it appeared that the farm contained 1,491 morgen, and the purchase price in 1893 was £2,500.

Abraham Carel Steyn, of the farm Diep River, district Malmesbury, said that he had also suffered from fires to his property caused by the railway, and so recently as the 21st March he was engaged for half a day in putting out a fire due to this cause. He considered

that about £140 or £150 of damage was done to the plaintiff's veld.

Mr. Upington closed his case.

Mr. Jones called

Martin Delaney, engine-driver, employed by the C.G.R., who said that he drove the 17 down train from Cape Town to Malmesbury on the 17th January. He knew nothing about a fire having occurred on the plaintiff's farm.

By the Court: He did not remember that the 17th January was a very windy day.

Witness (continuing his evidence) said that he saw fires along the line so often that he did not take any notice. It was not an impossibility that the pieces of coal (produced) would pass through the fire bars and drop underneath the engine on the line. There was a width of 20 feet on the line between the fences. It was possible that the coal produced might have been blown on to the adjoining land if there had been a very high wind.

Cross-examined by Mr. Upington: He had had 16 years' experience as a driver, both on the main line, the Malmesbury branch, and the Sir Lowry Pass branch. He had shovelled coal into the veld formerly, but they did not do that now. He had seen places along the Malmesbury line where fires had occurred, but he was not aware that the fires had been caused by the railway. He had been called upon by the assistant locomotive superintendent to make an explanation in regard to a fire on a farm adjoining the plaintiff's. He was not aware that the man was compensated. He had remarked to the stoker, "Hello, we shall be blamed again." He, however, did not remember any other occasions when they had been blamed before.

Witness did not know that there had been demands made upon the Department by Jordaan, Loftus, and John Steyn, all of whom had been compensated. He did not know that there had been a demand by Mr. Van der Spuy for £75 damage to his veld.

Mr. Upington: Now, to be quite plain, if they had only kept the railway line clear of long grass, there would be none of these fires at all?

Witness: I cannot say.

Witness, replying to another question, said that the line was clean in some parts.

In further cross-examination witness exclaimed: How much ground do you want the railway to keep clear?

Mr. Upington: Ah, Mr. Jones will tell us that.

Witness, re-examined, said that he did not know anything about the other claims made for compensation.

Thomas Hollvan, locomotive inspector, said he had examined the engine in question, and found that it was fitted with all the latest appliances for preventing pieces of live coal getting through. The spark-arrester was of the latest type.

In cross-examination, witness said that so far as the prevention of fires was concerned, the C.G.R. engines were as good as any in the world.

Frederick Gie, fireman on the engine in question, said that they did not throw out coals on the journey. It was usual to empty the grates only at the end of the journey.

Cross-examined by Mr. Upington: His idea was that some of these fires were caused by the farmers, and that they tried to get money out of the Government.

William Edward Wood, ganger, C.G.R., said that on the Monday after the fire he found five burnt matches near the gate-post on plaintiff's farm. He told the plaintiff about what he had found.

Cross-examined: Witness and his under-ganger, Lindequist, would be held responsible for the fire if it were caused by the railway. He denied that he was now merely trying to "save his own skin." Witness produced the matches.

Mr. Upington: You see it is rather a pity, because there are six matches in the paper.

Witness: I can't help that; it may be five or six.

Thos. Hollvan, locomotive superintendent (recalled by Mr. Jones), stated that the engine came out of the shops on the 6th April, 1904. It was the practice with an engine of that class to shovel the ashes out at the end of the journey, and not in the course of it.

Cross-examined by Mr. Upington: He found out his mistake that morning as to the time when the engine went out of the shop. The first bars were not burnt. Since he gave evidence he thought that the engine was out longer than he had stated on Friday.

Christian Rindquist, a ganger, stated that a week before the fire he burnt all the dry grass on the line. The Monday after the fire witness went with the ganger Wood, who found some matches outside the fence.

Cross-examined by Mr. Upington: He always burnt the grass right up to the fence. Sometimes he was left to do the work by himself.

John Griffiths, permanent way inspector, stated that the fire was reported to him on the Wednesday following. The next day he visited the scene of the fire, and came to the conclusion that the fire started at the hanging post of the gate. It could not have started inside the gate. The Thursday previous he inspected the line, and noticed no combustible matter by the permanent way.

Wm. George Hopkins, claims inspector, who visited the scene, said that Joseph de Koch told him that when he first saw the fire it was 160 yards north of the gate-post, and 70 ft. inside.

Cross-examined by Mr. Upington: During this summer he had examined

fire claims for damage by fire in that neighbourhood.

Mr. Jones closed his case.

Mr. De Koch, plaintiff (recalled by His Lordship) said of the 40 morgen mentioned, about half was stubble land, which had been reaped.

Counsel having been heard in argument on the facts,

Hopley, J.: In this case it is not necessary for me to consider my judgment, because the principles that should govern my judgment have been sufficiently laid down in the case of *Lategan v. Colonial Government* (14, C.T.R., 955), and all the Court has to do is to apply them to the circumstances of the present case. Mr. De Koch was on horseback on the morning of January 7th, and saw a fire break out just after the train has passed his farm. After telling his servants to put it out, he went at once down to the scene of the outbreak. No doubt it occurred to him that he was going to suffer considerable loss, and thought he had better go and see what caused it. He came to the conclusion that the fire started just inside the line by the fence, and he discovered just inside the railway fence a small piece of coal, and also one on his own side, still hot. I have to consider two points, and find them proved before I can give judgment for the plaintiff. The first is, was the engine the cause of the fire? and, if so, was it through the negligence of the Colonial Government, or through its servants? I believe there was no fire before the train passed, and also believe that shortly after the train passed there was a fire. There is no evidence that there was anyone on the veld who could have caused it. Then, as a matter of common-sense, I think there is no other explanation that could be adopted than that the fire was caused by the engine. It is possible, as stated by some of the witnesses, that it might happen that, owing to the slides being left open, live sparks might get out, and that would constitute neglect. It was necessary for the Colonial Government to perform with the greatest vigilance all its duties. The view I take is that the fire was caused by the engine, and there must have been neglect, because there is the evidence of Hughes that combustible material was left inside the fence, and the Railway Department must be held strictly responsible in that matter. They should have seen that their hands kept their line as clean as possible. I think, therefore, they could not escape liability. The real question is that of damages. As to the plea of contributory negligence raised by Mr. Jones as against the plaintiff, because he would not allow a firepath, the Court cannot hold that his refusing, without compensation, to have fire-paths cut in his veld on each side of the line constituted contributory negligence. As to the amount

of damages, farmers of experience have stated it was excellent land, and was being preserved for summer fodder. The fodder was of excellent quality. One of the witnesses said that the cattle were poorer and might suffer from sickness. I consider justice between the parties would be done by giving judgment for the plaintiff for £30, with costs, also allowing Mr. De Koch his expenses as a material witness.

[Plaintiff's Attorneys: Berrangé and Son; Defendant's Attorney: Reid and Nephew.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

APPLICATION.

Ex parte MARAIS. } 1905.
May 1st.

Insolvency—Provisional trustee—Practice.

In the case of an application for appointment of a provisional trustee to an insolvent estate, the Court must be informed as to the proportion of creditors who support such application.

Mr. Burton moved, as a matter of urgency, for the appointment of petitioner, who is secretary of the African Mutual Trust Co., at Malmesbury, as provisional trustee in the estate of Edward Geo. Devenish Poggenpoel, which was provisionally sequestrated on April 28.

De Villiers, C.J., said that the prayer of the petitioner would be granted in the present instance, but it should be understood that the practice must be followed of informing the Court what proportion of creditors was represented by the person wishing to be appointed trustee. That had not been done by the present applicant, but it must be noted that in all such applications in the future the information must be stated in the petition.

Postea (May 2nd).

De Villiers, C.J., said that it appeared in this matter, which came before the Court yesterday, for the appointment of the petitioner as provisional trustee in the estate of Edward George Devenish Poggenpoel, that the estate had not been yet sequestrated.

Mr. Burton, who appeared for the petitioner, said he was extremely sorry. Maasdorp, J.: The only thing you can do is to apply to the Master to appoint a curator. The order must be discharged.

ACKERMAN V. SMUTS. { 1905.
 { May 1st.

Review of proceedings in inferior Court—Gross irregularity—Postponement of trial—Withdrawal of action—Claim in reconvention.

The plaintiff sued the defendant in the Supreme Court for £500 for alleged slander, and the defendant pleaded to the declaration and filed a claim in reconvention for £20 for illegal impounding of cattle. The plaintiff thereupon gave notice to the defendant of the withdrawal of the action, and issued a summons against the defendant in a Resident Magistrate's Court for £20 for the slander. The Magistrate decided to postpone the hearing of the case until the claim in reconvention had been decided by the Supreme Court.

Held, on application for review, that inasmuch as the question whether the plaintiff could withdraw proceedings in the Supreme Court after filing of the claim in reconvention, was an important question of practice for the Supreme Court to decide, the postponement of the case did not constitute a gross irregularity.

This was an application by the plaintiff in the suit of Abraham N. Ackerman, calling upon the R.M. of Cape Town and the defendant in the suit, Nicolaas Smuts, to show cause why certain proceedings in the Court of the R.M. should not be reviewed and set aside on the ground that they were grossly irregular and contrary to law.

From the record it appeared that the applicant had instituted an action in the Supreme Court to recover £500 damages for slander, to which the respondent had filed a claim in reconvention for £20 damages for the illegal impounding of certain cattle. The applicant, however, had withdrawn from the action in the Supreme Court, and had commenced an action in the R.M.'s Court for £20 damages for slander. The counter-claim by Smuts in the Supreme Court had not been withdrawn. The Magistrate, when Ackerman's claim came before him, ordered the further hearing to be postponed *sine die*, with costs, until the suit between the parties in the Supreme Court had been heard.

Mr. J. E. H. de Villiers was for the applicant; Mr. Burton was for the respondent.

Mr. De Villiers argued that it was the duty of the Resident Magistrate to proceed with the hearing of the applicant's case in his court, notwithstanding that the counter-claim in the Supreme Court had not been disposed of. The plaintiff said that the defendant was a man of no means.

Mr. Burton addressed their lordships on the question of whether the Resident Magistrate should have directed the applicant to pay the costs of the day, and submitted that the order was quite justifiable.

Mr. De Villiers having been heard in reply.

De Villiers, C.J.: When the case came on for hearing in the Magistrate's Court the Magistrate decided to postpone the further hearing until the Supreme Court had decided the question of the claim in reconvention, which had not been brought in the Magistrate's Court. Now, there is an application to this Court to set aside those proceedings on the ground of gross irregularity, and the only question to be decided is, was there such gross irregularity on the part of the Magistrate as to justify this Court in interfering? To my mind, there was nothing approaching gross irregularity. It seems to me to have been a very prudent course on the part of the Magistrate to postpone the further hearing of the case until the Supreme Court had decided the matter. There was an important question of practice in the Supreme Court involved. As to what the position of the Court would have been in such a case, it is not necessary now to decide, but, at all events, there are authorities to the effect that a plaintiff is not entitled to withdraw his claim in convention if the defendant has filed a claim in reconvention. If there had been a doubt upon the point, the Supreme Court alone could have decided that doubt. Therefore, in this case, it was a prudent course for the Magistrate to postpone the case. But there seems to me to have been another reason why the Magistrate might fairly

postpone the case. There was a claim in reconvention, and we must take it that it was a *bona fide* claim; there was nothing to show that it was not a *bona fide* claim. A considerable time might elapse between the hearing of the claim in reconvention in the Supreme Court and the hearing of the case at the Magistrate's Court, and the Magistrate might have fairly said that inasmuch as the plaintiff was the cause of the difficulty inasmuch as he first proceeded in the Supreme Court and then afterwards, when the plea had been filed, removed the venue to the Magistrate's Court, he (the Magistrate) first of all wished to see what became of the claim in reconvention in the Supreme Court. It was a course which, under all the circumstances, seems to me to have been perfectly justified. On the question of costs, I am bound to say that it would have been better if the Magistrate had reserved the question of costs; but it was no gross irregularity to award costs. The application for review must be dismissed with costs.

Maasdorp, J., concurred.

[Applicant's Attorneys: Michau and De Villiers; Respondent's Attorneys: Dempers and Van Ryneveld.]

DU TOIT V. KRUGER. { 1905.
May 1st.
" 4th.

Private property of enemy—
Booty—Rebel—Divesting of
property—*Vindicatio*—Com-
pensation.

During the recent war, the plaintiff, a British subject residing within this Colony, joined the republican forces which had invaded the district in which his farm was situated, and accompanied them to the Transvaal. During his absence the British troops entered the district and seized his goods on his farm, including a harmonium, which were sold to the defendant at public auction by order of the Military authorities.

Held, in an action for the recovery of the harmonium or its value, that if the seizure of the harmonium was contrary to the usages of modern warfare, the plaintiff should apply to the Imperial Government for compensation, but that, as it had been taken by the

Military authorities during the war, with the object of acquiring the ownership thereof from a person who had joined alien enemies, the plaintiff had been divested of his ownership and was not entitled to vindicate the property.

This was an appeal from a judgment of the Resident Magistrate of Vryburg, in an action brought by the respondent (Kruger) to recover £43, the price of a certain harmonium, or, in the alternative, for its restoration.

From the record, it appeared that the claim of the respondent was reduced in the Court below to £20, in order to bring it within jurisdiction. Between October, 1899, and May, 1900, the respondent, a Vryburg farmer, was serving with the Republican Forces, and in his absence the military authorities seized from his home the instrument in question, during guerilla warfare in the district of Vryburg. The harmonium was afterwards sold by public auction by the military authorities, and bought by the appellant, Du Toit, a Vryburg shop assistant. The respondent returned to the Vryburg district in February, 1905, and had been tried for high treason, and disfranchised. The Magistrate, in his reasons for judgment, said that the question to be decided was whether plaintiff had been legally divested of his property, and whether it had legally vested in defendant. On the authority of the case of *Jansen v. Van der Walt*, he the Resident Magistrate came to the conclusion that the plaintiff had not been legally divested of his property, and that he was therefore, entitled to recover it from the defendant. Judgment was given for the plaintiff.

Mr Searle, K.C., was for the appellant; Mr. Burton was for the respondent.

De Villiers, C.J., said that he could well understand that cattle might be of use to the enemy, but he did not see how an harmonium could be of use to the enemy, unless it were to incite them to courage.

Mr. Searle said that it might be placed at the head of the army, but, even then, he was afraid the music would be rather slow. Counsel said the International authorities were agreed that booty comprised all things a soldier picked up in the course of military operations, whether such articles were of use in hostilities or not.

[Maasdorp, J.: Has it not been decided that if a soldier carries off property for his own benefit, he is guilty of theft?]

I have not seen the case.

[De Villiers, C.J.: That was a case of a rebel taking a watch from a station-master.]

There it was held that that was not done in the course of any military operations at all. It depends a great deal whether there is a disciplined force under officers. Here, everything was done regularly by the military authorities.

[Maasdorp, J.: Supposing the military took the property of a peaceful subject, and then removed it to another place and sold it, do you say that would change the ownership?]

No; the Court would then say there was not sufficient to divest the original owner. But I put this case on the ground of booty, on which the international authorities are clear.

Mr. Burton submitted that the true definition of booty was property taken in the actual progress of hostilities, in the course of action. Unless property were taken on the field of battle, so to speak, seizure of any other kind could only divest the owner when accompanied by the proper legal forms, and ceremonies required by a Court of law.

[De Villiers, C.J.: Can the Court now interfere with the acts of the military during warfare in respect of property seized from the enemy?]

Mr. Burton: I say that under the rules of international law there are certain recognised ways in which seizure and sale can take place, and that only in such ways can there be a chance of a man being divested of his property. There has been no such recognised mode of acting here as to divest the man of his ownership.

Postea (May 4th).

De Villiers, C.J.: This case has been exceedingly well argued by counsel on both sides, and the Court is in a position to give judgment without further consideration. The facts of the case are briefly as follows: During the recent war the plaintiff, who was a British subject residing in the district of Vryburg, joined the Republican forces when they invaded that district and went with them into the Transvaal. During his absence, the British troops entered the district and seized his private property on his farm, including a harmonium. The goods were brought into the town of Vryburg and were sold there at public auction by order of the military authorities, martial law being in force at the time. The defendant bought the harmonium, and is still in possession of it. After peace had been proclaimed, the plaintiff returned, when he was tried for high treason and punished with disfranchisement. The plaintiff, finding that the defendant was in possession of the harmonium, brought an action for its restoration or payment of its value, and the Court below held that the plaintiff had never been divested of his ownership, and was entitled to vindicate his property. The modern authorities, to which this Court has been referred, on the rights of capture during war do not afford much assist-

ance for the decision of the appeal. The rules which are laid down by some writers for exempting the private property of an enemy from capture have not been so universally accepted and acted upon as to justify this Court in treating them as binding principles of law. The general theory of war is that all private property of the enemy may be taken in war, but the modern usage is not to touch private property in land without making compensation, except in certain specified cases. These exceptions, according to Halleck (2 International Law, 3rd Ed., p. 68), may be stated under three general heads: 1st, confiscations or seizures by way of penalty for military offences; 2nd, forced contributions for the support of the invading armies, or as an indemnity for the expenses of maintaining order affording protection to the conquered inhabitants; and 3rd, property taken on the field of battle, or in storming a fortress or town. None of these exceptions applies in the present case, for it has not been suggested that the harmonium and other goods of the plaintiff were seized as a penalty for any military offence committed by him, or were required for the support of the British troops, or were captured on the field of battle or in storming a fortress. I do not, however, find any authority for holding that if modern usage is not followed by an army, this or any other Court would be entitled to disregard principles of law which had been well established before modern usage sought to mitigate some of the hardships of war. For the purpose of ascertaining those principles the Court has to fall back upon rules laid down by the ancient jurists of Rome, perpetuated in the jurisprudence of the Netherlands and accepted in times past as holding good in international law. Among the national modes of acquiring property, the Roman lawyers regarded "occupancy" as the most important. If a thing which had no owner—a *res nullius*—was taken possession of with the object of acquiring the property therein, the person who so took it became the owner. Among goods which were regarded as nobody's property were goods belonging to the enemy during time of war. Such goods were therefore capable of being acquired by capture, and it made no difference whether they were the private property of individuals or the public property of the State. The result was that the title to property lawfully taken in war was considered as divested from the owner and transferred to the captor as soon as he acquired firm possession, provided that he took and kept the booty with the object of appropriating it to his own use. A discussion arose between the writers on International law during and after the time of Grotius as to whether

such booty belonged to the State whose troops captured it, or to the individual captor, but they were all agreed that the original owner was divested of his ownership. Now, it is agreed in the present case that whatever acts were done in the taking and selling of the plaintiff's property were done by directions of the military authorities during the subsistence of the war, and at a time when the plaintiff was one of the King's enemies. He was outside the Colony, and his goods were inside, but the facts remained that his goods were the goods of an enemy, and that they were taken by the British troops in the course of actual warfare. It seems strange to an ordinary civilian that it should have been considered necessary for the due prosecution of the war to seize the man's private effects, including a musical instrument like a harmonium, but is the Court now to constitute itself as a tribunal to decide whether the capture was justifiable or not? The military authorities took the goods as booty and sold it as such, and by their acts they have, in my opinion, transferred the ownership to the person who bought the goods. The case of *Johnson v. Van der Walt* (13 C.T.R. 931), which has been cited in support of the Magistrate's judgment, does not, when closely examined, support the plaintiff's case. Unfortunately the head note to the report contains a statement of the law which is not justified by the facts of the case or the remarks of the learned judges who decided it. The head note is to the effect that the private property of alien enemies or even of rebels is not booty, and, if this statement of the law was correct, the judgment of the Court below would have been fully justified. But, in fact, the horse there in question had not been captured as booty but had been taken to a camp for protection. It was subsequently sold by a military officer, but there is nothing to show that he acted on behalf of the military authorities. In his judgment, Maasdorp, J., remarked that in dealing with the acquisition of property the intention is everything, and he held that, as the lawful authority had not appropriated the horse, the ownership remained with the plaintiff, as original owner, notwithstanding his rebellion. This view is entirely consistent with the principle that in order to vest the ownership of a thing in the occupant, it is necessary that his taking possession of it should have been with the view of acquiring property in it for himself. In the present case there can be no doubt whatever that the military authorities took the harmonium with the object of acquiring the ownership and sold it with the object of vesting the ownership in the purchaser. All this was done during the war and in the course of military operations. The

plaintiff at the time was fighting in the ranks of an alien enemy, and, however desirable it might be that more enlightened rules of warfare should be adopted, it is impossible to avoid the conclusion that, as the law actually stands, the capture and retention of the harmonium by the military forces divested the plaintiff of his ownership. If the rules of modern warfare have not been observed by the British authorities the plaintiff would have a fair claim for compensation against the Imperial Government, but the defendant has acquired a valid title to the harmonium. The appeal must therefore be allowed with costs in this Court, and judgment entered for the defendant with costs in the Court below.

[Appellant's Attorney: G. Trollip;
Respondent's Attorney: Not on record.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

REVIEW CASE.

REX V. T. AND J. LOUW. { 1905.
May 1st.

Indecent assault—Children.

*Children under the age of 7
years cannot be convicted of
indecent assault.*

Hopley, J.: A case has come before me from the Assistant Resident Magistrate of Malmesbury, sitting at Illofeld. He had before him two children, named Toss Louw and Jan Louw, aged six years and five years respectively, charged with indecent assault. These children were found guilty, and sentenced to be apprenticed for long terms, up to the years 1915 and 1916 respectively. Of course, these children are not guilty of the crime, being under the age of seven years, and the Magistrate ought to have known that, and simply discharged them with a caution. Probably he might have ordered their mother to give them a good whipping. The conviction must be quashed in both cases.

GENERAL MOTIONS.

COATES V. SEARLE.

Pleading—Declaration and replication.—Variation.

Sir H. Juta, K.C., was for the applicant, and Dr. Rainsford was for the

respondent. Sir H. Juta moved, upon notice of motion to the plaintiff, to show cause why the set down of the case for the 5th May should not be discharged, and the case removed from the list, with costs. The affidavit of the defendant set out that the replication of the plaintiff was served on his attorneys on the 7th April. It was necessary that the defendant should rejoin, in view of the fact that fresh matter was introduced into the replication. The pleadings, counsel contended, were prematurely closed.

Dr. Rainford put in the affidavit of the plaintiff's attorneys, which set forth that no new matter was introduced into the replication. An offer had been made to remove the set down if the defendant was willing to accept short notice.

Counsel having been heard in argument,

Hopley, J.: In this case the declaration sets forth that on the 20th January the defendant agreed to pay to one C. C. Coates, the plaintiff, the sum of £500 as commission on a certain sale, and they say on that date, 20th January, the said C. C. Coates succeeded in selling the property for £4,500. The defendants plead that it is true that this amount of £500 is due to C. C. Coates, and they say there was a certain agreement as to what amount was paid. £100 was to be paid on the payment of one instalment of £700, and another £100 on the payment of £800, and the balance when the purchaser passed the mortgage bond for £3,000. The plaintiff sets forth in his replication what seems to me to be a fresh contract. The replication says that £100 should be paid on the 20th January, and that thereupon if that were paid the rest would become due in February, and it says that the £100 was thereafter paid on that date. But it seems to me if that were the contract it ought to have been in the declaration, and been embodied in the replication. It contains fresh matter; something that the defendant, on seeing it would have to consider and look back at his evidence, and everything that had passed, to see whether or no he could meet that replication successfully, and whether he ought to reconsider his whole position, and perhaps accede to the plaintiff's claim. It appears to me that there is new matter, and I can only put myself in the position of the defendants in such a case, and say I think to this new matter: they should have claim a right to make a rejoinder. It seems to me that the plaintiff has been premature in setting down this matter without giving the defendants a chance, especially after the defendants said they were wanted to rejoin. That being the state of affairs, as far as I can judge, it seems to me that the plaintiffs are in the wrong, and that they set the matter down prematurely, and that this application should be granted. As they acted precipitately,

the logical consequence is that they must pay the costs involved.

[Applicant's Attorneys: J. Buirski;
Respondent's: Moore and Son.]

[Before the Hon. Sir JOHN BUCHANAN
and the Hon. Mr. Justice MAASDORP.]

MURRAYSBURG MUNICIPALITY V. HOLLANDER. { 1905.
May 1st.

This was an appeal from a decision of the R.M. of Murraysburg in a case in which the applicant sued for a writ of ejectment against the respondent, who was the occupier of a hut in the Municipal location. In the Court below the plaintiffs contended that the conditions of the lease had not been complied with, the respondent not having applied for a renewal at the termination of the period of lease. The respondent stated that he had tried ineffectually to get another house, and had tendered six months' rent. The Magistrate ruled that the application should have been preceded by a summons for rent. He further stated that the respondent had been a tenant for a considerable period, and had conformed to the regulations.

Dr. Greer appeared for the appellant: respondent was not represented.

Dr. Greer (for the applicant). The respondent has not even attempted to comply with the regulations by applying for a new lease on or before December 31st.

[Buchanan, J.: He applied on December 26th.]

The evidence is very contradictory, but the respondent's own statement shows that he did not ask to see the Town Clerk.

[Maasdorp, J.: Did the Magistrate find that no application was made for a new lease?]

He did not find on that point. He seems to have held that the respondent was a tenant. The whole difficulty would seem to have arisen from certain new regulations as to water. These regulations, however, the respondent never even attempted to see. I submit that the respondent was no longer a tenant after December 31st. Even had he applied for a renewal of lease, the Municipality could, in their discretion, have refused to grant it.

Buchanan, J.: There may be something behind these proceedings that the Court is not acquainted with, but as it stands the record shows that the defendant was the lessee of a certain hut in the Murraysburg Location, which he had leased for six months. The six months expired, and he did not obtain a renewal of his lease. Summons was thereupon issued for an order of ejectment. The defendant offered to renew his lease, but the Council refused to

renew except on certain conditions, to which defendant objected. The Magistrate seemed to think that the conditions upon which the Municipality offered to renew the lease were conditions which were *ultra vires*. That question, however, is not before the Court: all we have to decide is whether the defendant was entitled to remain in possession of the hut after his lease expired on the 31st December. It is not pleaded or alleged that there is anything in the Municipal regulations to compel the Municipality to renew the lease. They did not do so, and as defendant has not shown any right to remain the Municipality are entitled to judgment. The appeal must be allowed with costs; and judgment entered in the Court below for the plaintiff for an order of ejectment, with costs.

Maasdorp, J., concurred.

[Appellant's Attorneys: Dempers and Van Ryneveld; Respondent in default.]

ARMENIA V. CLAREMONT { 1905.
MUNICIPALITY. { May 1st.

Public washing—Nuisance.

The Municipal regulations of C. prohibited "all washing of clothes in any public streams within the limits of the Municipality," and further ordained that "all public washing of clothes shall be done in public wash-houses." A had washed certain clothes, the property of other people, on premises whereof she was a tenant, and had thereupon be convicted by the R.M. of Wynberg of having contravened the aforesaid regulation.

Held on appeal, that in this case there had been no "public washing of clothes," and that the appeal must be allowed.

Mr. Burton appeared for the appellant; the Claremont Municipality were not represented.

This was an appeal against a decision of the Resident Magistrate at Wynberg, under the regulations of the Claremont Municipality. The Municipality summoned the defendant for a contravention of section 1, chapter 13, of the Claremont Municipal Regulations in that she did public washing at a place other than the public wash-houses, erected for that purpose. Defendant was convicted, and fined 10s. Exception was taken to the summons on

the grounds that the summons did not correctly set forth what was intended to be dealt with by the regulations, that it did not disclose any offence known to law, that there was no allegation that the defendant washed clothes in a public stream or water, and that the regulation, if it were intended to interfere with the rights of citizens as to the washing of clothes on their own premises, was *ultra vires*. The Magistrate, in his reasons, stated that the defendant was charged with public washing in a place other than at a public wash-house, and this charge, he held, had been clearly proved.

Mr. Burton (for appellant). The appeal is brought on the ground (1) that the summons does not set forth the plaintiff's claim; (2) that the defendant was not charged with any offence known to our law; (3) that the Council's regulation under which she was charged is *ultra vires*. The appellant washed the clothes of other people on her own property. The regulation forbids only public washing. The appellant (I contend) did not, by washing the clothes of other people on her private property contravene the regulations. "Public Washing" means washing in public streams, or on public ground; but here there was nothing of the kind. There was no nuisance, and the appellant was summoned for committing a nuisance, but the act which constituted the alleged nuisance is not contrary to any regulation. In the event of the appeal being upheld, I ask for costs against the Municipality.

Buchanan, J.: The appellant was charged before the Magistrate with having contravened section 1, chap. 13, of the Claremont Municipal Regulations, in that she wrongfully and unlawfully did public washing at a place other than the public wash-houses erected for the purpose at Claremont. The charge falls under the Municipal Regulations, which lays down that from and after the promulgation of these regulations, all washing of clothes in any public streams within the limits of the Municipality is strictly prohibited, and that from that time all public washing of clothes shall be done in public wash-houses. The question here is: Has there been any public washing of clothes? The bye-law is framed to prevent the washing of clothes in public streams, and it is very difficult to say what under these circumstances is meant by "public washing" apart from washing in a public place or in a public river but there is no regulation preventing washing on private premises. It may be competent for the Municipality to make such a regulation—I do not say that they cannot—but there is at present no such regulation. All the regulation says is that there shall be no public washing of clothes. Now, the defendant in this case washed clothes

on her own premises. There was no public washing in the sense that there was washing in a public river or in a public place, and I certainly think the regulation was not intended to apply to the act committed in this instance. The appeal must be allowed, and the conviction quashed, on the ground that the evidence does not disclose the offence alleged in the summons, and as the fine has gone into the Municipal exchequer, the Municipality will be ordered to pay the costs of the appeal.

Maasdorp, J., concurred.

[Appellant's Attorney: J. Buiriski.]

DAVIES V. SCHOLTZ.

This was an appeal from a decision of the Assistant Resident Magistrate of Cape Town.

From the record in the Court below it appeared the appellant sued the respondent for £150, due on an acknowledgment of debt. The defendant excepted to the Court's jurisdiction, on the ground that the document sued upon was not a liquid document, and that the amount exceeded £20. Subject to the exception being dismissed, the defendant pleaded that there had been no presentation. The document stipulated for payment of the £150 on a certain date, and interest payable every three months, and it was further provided therein that in the event of the non-payment of interest, the capital sum should become due. The defendant counter-claimed £7 for goods supplied to plaintiff, and claimed that this should be set off against the interest. The Magistrate, after hearing evidence, found for the defendant, and gave judgment for absolution from the instance, with costs. In his reasons, he stated that the document was in the nature of a promissory note, which should have been presented, and that the counter-claim operated as a set-off. The defendant had tendered the interest, and he (the Magistrate) held that the action was premature.

Dr. Greer was for the appellant; Mr. Gardiner was for the respondent.

Dr. Greer: This was not an ordinary promissory note, but a mere acknowledgment of debt, and provision was made for the payment of the debt by instalments. No presentation could be made before June 1, 1906, unless the instalments were not duly paid. We admit that they were not so paid.

Buchanan, J.: The only question is whether we have here a penal clause or not. The whole question as to penal clauses was fully discussed in *Rymer v. White*.

As to the set-off, there is nothing to show that the plaintiff was aware that there was any set-off claimed. The conditions prescribed in the acknowledge-

ment of debt were not complied with.

Mr. Gardiner (for the respondent) was not called upon.

Buchanan, J.: An action is brought upon a written document, which acknowledges a debt for £150 to be due, which amount is payable on the 1st January, 1906. That date has not yet arrived. This debt bears interest to be paid every three months, and there is a condition in the agreement that if the interest is not regularly paid every three months, then the whole debt may become due and payable. Three months' interest accrued, but at that time the defendant had sold certain goods to the plaintiff, and he counter-claimed against the plaintiff for more than the amount of the interest due to him; and before the summons was issued, he wrote to the plaintiff's attorneys, saying: "I have this claim against you; I give you the details thereof, and I shall be pleased to hear from you whether you accept this as against the interest due. If you think this will prejudice my claim against you, I will send you a cheque for the interest, and sue you for the amount due to me." No reply was sent, and summons was issued. As far as the evidence shows, there is a good set-off, and not only is this the case, but there is also a tender to pay the amount of the interest. I think, in these circumstances, the Magistrate's decision that the action is premature is a sound one; that the amount is not yet due. The question of non-presentation I do not think necessary to discuss in this case; the question will go rather on the point that the interest was tendered when demanded. The appeal will therefore be dismissed, with costs.

Maasdorp, J., concurred.

[Appellant's Attorneys: Dempers and Van Ryneveld; Respondent's Attorneys: Friedlander and Du Toit.]

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

KELLY AND CO. V. HERMAN. { 1905.
May 2nd.

Partnership—Dissolution—Liability of retiring partner.

This was an action to recover the balance of the purchase price of goods sold and delivered.

The declaration set out that between 18th March, 1888, and January, 1900, the firm of B. Schocher and Co., in which the defendant was a partner, bought goods from the plaintiff to the value of £1,575 10s. 3d £1,296 18s. 6d. had been paid on account, and there was still a balance of £305 11s. 9d., which the plaintiff was entitled to claim from the defendant. The plea set out that the partnership between defendant and Schocher was dissolved on the 12th August, 1899, the deed providing that Schocher should be responsible for all debts and liabilities of the said business, and that he was to indemnify the said defendant. The plaintiff was informed of the deed of dissolution.

Mr. Percy Jones was for the plaintiffs; Mr. Close for the defendant.

Mr. Jones said that last September a commission was appointed to take evidence in the Transvaal (14, C.T.R., 638). Evidence was then given by the defendant to show that the plaintiff had released him from the liability, on the partnership account. Certain cheques were produced to support this, and application was made for an adjournment in order that plaintiff who had given his evidence on commission, should be examined in regard to these cheques. The commission was made a general one, and the evidence had been duly taken.

Counsel read the evidence taken on commission. The plaintiff denied the statement of the defendant relative to the passing of the cheques; the cheques were, he said, given in respect of money Herman advanced him on behalf of his brother, B. Herman, pending the arrival of money which plaintiff had wired for to Pietersburg, where he resided. This was upon his (plaintiff's) arrival in Cape Town from Europe. Further evidence taken on behalf of both parties was also read.

The defendant was called and supplemented his previous evidence.

Maasdorp, J.: In this case the plaintiff sues the defendant for the sum of £305 11s. 9d., which it is alleged was due from the firm of Schocher and Co., in which defendant was a partner in the year 1899. The indebtedness of the defendant is based upon the fact that Schocher has now left the country and cannot be sued jointly with him. The defendant admits that the firm of Schocher and Co. was indebted to the plaintiffs in 1899, but he alleges that in August of that year he dissolved partnership with Schocher, and acquainted the plaintiffs with the dissolution of the partnership, and they consented to the dissolution of the partnership, and thereupon the defendant was released from liability. I shall not now remark upon the legal aspect of that plea. I take it for the purpose of the defence to mean that the

plaintiffs thereupon discharged the defendant from liability. The defendant having admitted that the debt was at one time in existence, the burden of proving he was released falls upon him, and it is necessary to inquire what is the evidence setting forth the circumstances of this release. The plaintiffs admit that they knew this dissolution took place in 1899, and they were also aware that the defendant was about to leave the country, but they say they never consented to his being released from his share of the debt of the partnership, but they did not press him at the time because they expected to be satisfied by the firm of Schocher and Co. after the defendant had left the country. Now I must say that the defendant's evidence upon this point is undoubtedly of a very vague and unsatisfactory description. The firm was indebted to the plaintiffs in the sum of upwards of £300, and his object, as he alleged, was to obtain a release from his credit. One would have expected, under the circumstances, that he would acquaint the creditors with all the circumstances under which the dissolution took place, and give them a full statement of the affairs of the partnership, and then enter into a clear arrangement on the basis of the position in which affairs then were. Defendant, however, says that he came down to Pietersburg and there saw the plaintiffs, and asked them "would they release him, as he wanted to go to America, and his partner was going to take over everything," and that plaintiffs said "All right; no difference." That was supposed to embrace all the negotiations that took place to lead up to such an important contract as to release the defendant from a debt of £300. He says he informed the plaintiffs that his partner was going to take over all the liabilities and assets. This statement is unsatisfactory, because Schocher did not take all of the assets, for the reason that part of the assets in cash—£200—was taken away by the defendant, but not taken dishonestly. The plaintiff's themselves were not fully informed of the position of the partners as to what took place, and everything was left in the most vague condition. The defendant necessarily should have told the plaintiffs under what circumstances he was leaving, and he says that he told the plaintiffs that Schocher had taken over all the assets. Then if he did, it was a misapprehension, but I don't say he did so. The result of the evidence is that the whole matter was not discussed in such a manner as we would expect it to be if a release were intended to be obtained and granted. The defendant then left Cape Town and nothing more was heard until 1903, when application was made to the defendant for payment, after Schocher had left. In one part of defendant's letter in reply he says: "I

dissolved partnership with Schocher in December, 1899, he taking over all assets and liabilities and notice was sent to the creditors. If this is the only evidence to be put before the Court by the defendant then there was no release. He seemed to think that upon notice being sent to the creditors of the dissolution of partnership and of the fact that his partner had taken over the liability, he was necessarily released from further liability, but in this he is mistaken. I take the plea to mean, as it was alleged to mean, that the discharge was actually granted but the proof is wanting. We have therefore now such vague and unsatisfactory statements of what took place at the time this release was said to be granted that I must come to the conclusion that the defendant has failed to discharge the burden laid upon him of proving this discharge. It was contended that the long delay threw doubt on the plaintiff's case, but it was quite clear that from two to two and a half years after defendant left, the country was in such a state that that would be an excuse for not taking proceedings, and afterwards, it appeared, the plaintiff himself was not in the country; but almost immediately on his return he took proceedings against the defendant. It has not been proved that the discharge was granted and the liability continues, but it appears a portion of the indebtedness arose after the plaintiff became aware of the dissolution of partnership and to that extent the indebtedness must be reduced by the amount of £26 7s. 8d. There will be judgment for £299 3s. 11d. with costs.

[Plaintiff's Attorneys: Tredgold, McIntyre and Bisset; Defendant's Attorney: D. Tennant, Jun.]

TRIAL CAUSES.

HEIDOCK V. HEIDOCK.

This was an action for a decree of divorce, brought by Elizabeth Heidock against her husband, on the ground of his adultery. Mr. Roux was for the plaintiff, and the defendant was in default.

The plaintiff, Elizabeth Heidock, stated that she was married in community of property to the defendant at Calvinia in February, 1898. She lived with her husband at Calvinia, and was fairly happy until December, 1903, when the defendant lost his temper and threw the things out of the house, and subsequently threw the plaintiff out after the furniture. Witness then went to live with her mother, and the defendant continued to live in witness's house, and in November, 1904, he took another woman into the house. The woman, with whom he was at present living, had been delivered of a child. Plaintiff

claimed a decree of divorce and a division of the joint estate and costs. The defendant was possessed of two carts and two horses.

Further evidence having been given of the adultery,

Maasdorp, J., granted a decree of divorce, with costs, the plaintiff allowed her costs as a witness. His Lordship added, if at any time it was found there was any substantial property in the estate, the plaintiff would have leave to move the Court.

FOURIE V. FOURIE AND ANOTHER.

This was an action for decree of divorce brought by Ignatius Fourie, of Uniondale, against his wife, on the ground of her adultery. The parties were married in community of property in October, 1892, at Knysna. They lived happily together until his wife met the co-defendant Jordaan, in July last. Jordaan came as a traveller from the Orange River Colony, and stayed at witness's house for some time. In the middle of August witness, his wife, and Jordaan went down to Knysna to visit his wife's parents. Witness stayed about eight days, and his wife remained longer with her people, and Jordaan stayed over also. Three weeks later witness went to bring his wife home, and he noticed that she was very indifferent towards him, and said that she would not live with him any longer. On a second occasion his wife refused to return home. All the time Jordaan was living in the district. Subsequently his wife disappeared, and he was unable to find her. A number of letters in Jordaan's handwriting came into his possession. The letters were couched in most loving terms, and addressed to witness's wife, and referred to the time when the co-respondent and the defendant would live happily as man and wife.

Mr. Burton was for the plaintiff, and the defendant was in default.

Evidence was led to show that the defendants lived as man and wife.

Decree of divorce granted, and the defendant declared to have forfeited the benefits of marriage. No order as to costs.

CILLIERS V. HEINTJES.

This was an action to recover £139 8s. for rent for a certain furnished house at Gordon's Bay, which had been let by the plaintiff to the defendant. The defendant took the house on a lease for one year from May, 1904, at a rental of £16 per month, payable quarterly. In June, 1904, the defendant represented that he was unable to pay the £48 due for rent. Thereupon plaintiff waived £9 for the first three months. On the

13th of February, 1906, the plaintiff, believing that the defendant was about to remove certain articles without paying his rent, obtained an interdict restricting him from doing so (15 C.T.R., 150), but before the order was issued the furniture was removed. The defendant, in his plea, set up counter claims for £31 16s. for meals, £27 being the purchase price of certain furniture bought by the defendant and £11 12s. paid on account, and claimed £71 in reconviction for damage by reason of the plaintiff's failure to make certain alterations.

Mr. J. E. R. de Villiers was for the plaintiff and the defendant was in default.

The plaintiff, Johannes Cilliers, said he let the house at £16 per month to the defendant on a year's lease, which, however, was not reduced to writing. At the end of the first quarter witness agreed, on a request from the defendant, to reduce the rent for that quarter by £9, but he did not reduce it for the whole of the year. The defendant had paid £11 12s. on account, and witness was willing to take off the £31 16s. claimed by the defendant for meals supplied to the plaintiff. On February 13 witness obtained an interdict in the Supreme Court in respect of goods in the house. Witness made no agreement as to taking over any of the goods. He believed defendant had gone to Bulawayo.

Judgment was given for plaintiff for £107 12s., being £139 8s., less £31 16s. for board, with costs, including costs of motion. The claim in reconviction was dismissed, and plaintiff's expenses as a witness were allowed.

BURROUGHS AND WATTS V CAMPBELL.

Sale and purchase—(Guarantor—
Suspensory condition—"Instalment system."

This was an action brought by Messrs. J. Burroughs and Watts, who are billiard-table manufacturers and general merchants, against the defendant, who resides at Middelburg, to recover from him £196 11s., being the price of a billiard table and accessories supplied to one Adam, for the payment of which it was alleged the defendant was guarantor. The declaration set forth that in October, 1903, the plaintiff firm were in treaty with one Adam, of Middelburg, to supply him with a billiard table and accessories, and to fix the same at Middelburg. A letter was written by the defendant to the firm stating that as Mr. Adam had informed him he wished to purchase a billiard table on the instalment system, he (defendant) would testify that Adam was an honest, solvent, and desirable purchaser, and he (defendant) was willing to accept responsibility, in conjunc-

tion with Mr. Adam. The table, etc., were supplied, and some time afterwards the estate of Adam was sequestrated, and no part of the purchase money was recovered therefrom. The plaintiffs now claimed payment from the defendant. In his plea the defendant denied that the letter amounted to an undertaking or guarantee, and said that at the time he wrote it he did not intend, and plaintiffs knew he did not intend, to give any such undertaking or guarantee as alleged in the declaration. He merely intended to say that Adam was an honest, solvent, and desirable purchaser. Even if the letter was a guarantee, he pleaded that it was given subject to a condition precedent that the table should be supplied on the instalment system, by which term it was meant that the property remained in the lessor, and that in default of payment of an instalment the lessor should resume possession, the lessee forfeiting all instalments paid. Instead of that, the plaintiffs had sold the table outright, by reason of which the defendant was unable to get the table from the insolvent estate. Exception was taken to the paragraph of the plea which set forth that when he wrote the letter defendant did not intend to give any undertaking or guarantee.

Mr. Burton was for the plaintiffs; Mr. J. E. R. de Villiers for the defendant.

Mr. De Villiers said he did not intend to rely on the defence raised in that paragraph, and would agree to its being struck out.

Aubrey Joseph O'Mant, manager of the plaintiff company in Cape Town, produced correspondence between Adam and the company in relation to the purchasing of the billiard table. There were no verbal communications between them; everything was done by letter. The first letter was written by Adam, in which he expressed his desire to purchase a table, for which he offered to pay on ninety days' terms. The company replied offering to supply a table on these terms, providing Adam furnished them with a reference. Subsequently Adam wrote enclosing a letter from Campbell, and asking for an extension of a month. Enclosed in that letter was the defendant's guarantee upon which the case was based. The company thereupon agreed to extend the period. A promissory note was sent to Adam, with a request to get defendant's signature. Adam had gone insolvent, and there was no dividend from his estate to concurrent creditors. If an article were sold on the instalment system, it passed out of the hands of the vendor, and it was paid for by two or more instalments. In witness's business the instalment system and the hire purchase system were quite distinct. If an article were sold on the hire purchase system, the goods remained the property of the seller until payment was made. Witness put in one of the forms

used in the case of a hire purchase arrangement, which was called an agreement of lease, and which stipulated for the payment of rent. In the case of a hire purchase contract, the firm did not require security, as the property remained vested in them.

Cross-examined by Mr. De Villiers: In his letter of guarantee, the defendant said: "I understand Adam wishes to be supplied with a billiard table on the instalment system." The firm did not claim the billiard table from the insolvent estate, inasmuch as they had sold it outright.

George Forrest, manager for R. Muller, music dealer, Cape Town, gave evidence as to the nature of hire purchase contracts. The hire purchase contract was in the form of a lease, which terminated on payment of the full value. Until full payment was made, the article remained the property of the seller. Security was not demanded. It was a practice of witness's firm to give credit when it was inconvenient for the purchaser to pay at once, and in such cases, security was required with few exceptions. Witness had no knowledge of an "instalment system."

Mr. Burton closed his case.

John Campbell, the defendant, gave evidence. He said he gave Adam the letter referred to in consequence of Adam saying Burroughes and Watts wanted a letter of reference. Adam did not show him any of the correspondence with the plaintiffs. Witness wrote the letter intending to be security if the goods were supplied on the instalment system. He regarded the instalment system as meaning that until all instalments were paid the articles did not become the property of the purchaser.

Morris Rosen, proprietor of Rosen's warehouse, said instead of advertising "hire system," the words "instalment" and "deferred" were used, but they all meant the same thing. In respect of anything sold out-and-out, witness did not consider that it had anything to do with the "instalment system."

Mr. De Villiers closed his case, and counsel were then heard in argument on the facts.

Maasdorp, J.: The plaintiffs in this case sue for the recovery of £196 upon what is said to be a written guarantee for the purchase price of a billiard table supplied by the plaintiffs to one Adam. It appears that the billiard table was sold by the plaintiffs, who carried on business at Port Elizabeth, to Adam, who resided at Middelburg, on condition that the plaintiffs erected this billiard table at Middelburg, and included all these incidental expenses in the purchase price. The plaintiffs carried out their agreement, and supplied the table, and thereupon Adam became indebted in the sum of £196. But it appears now that the estate of Adam has been sequestrated as insolvent, and the plaintiffs consequently

say that they are entitled to sue the defendant as surety for the amount upon the guarantee. In order to ascertain the rights of the parties in this case, it will be necessary very narrowly to construe the terms of this written guarantee. It is as follows: "I have known Mr. H. Adam for some time, and I understand he wishes to be supplied with a billiard table on the instalment system. I consider you are quite safe in doing this, if you can agree as to price, and I am willing to accept responsibility for the price in conjunction with the said Mr. Adam." Now, I think it must be taken to be quite clear that this is not an unconditional guarantee by Campbell for the payment of the purchase price of the billiard table. There are certain conditions attached to this document, and they seem to be to the following effect: Campbell undertakes to accept a joint responsibility with Adam for the price of this table in case it is supplied to Adam by the plaintiffs on the instalment system. I consider that a material condition of the contract entered into by Campbell. He was aware that Adam contemplated buying a billiard table, and if his allegation contained in this letter is taken to be true, then he was aware that Adam contemplated purchasing the billiard table on the instalment system. He consequently tells the plaintiffs that they would be perfectly safe in supplying a billiard table to Adam on the instalment system, and that if they did so he was prepared to become responsible jointly with Adam for the payment of the price. It is necessary consequently for the Court to construe what was meant by the words "instalment system." The question arises whether these words have acquired such a technical meaning in the trade, and with persons carrying on business, as it was here carried on between the plaintiffs and Adam that they must be taken to bear that meaning in a contract of this kind between the parties to such an agreement. Oral evidence was called with the object, on the one side, of proving that the words have acquired a technical meaning which they must necessarily bear in a contract of this kind, and be binding upon the contracting parties, and, on the other side, to disprove the fact that this technical meaning has been established. Now, I think it has not been clearly established by the evidence adduced in this case—however it might be if further evidence could have been adduced—that the words have such a general acceptance that they must be taken now to have a technical meaning, known to all parties who carried on this class of business. It is alleged on the part of the defendant that the words "instalment system" necessarily meant "hire purchase system," and he has called a witness—Mr. Rosen—who says that in his business, when he speaks of the "instalment

system," he intended to convey the meaning "hire purchase system." On the other hand, we have Mr. Forrest, who is also conversant with this class of business, and carries on a large business in the sale of pianos, and who says he himself has never regarded the term "instalment system" as necessarily identical with "hire purchase system." In fact, he himself never applies the words "instalment system," but "hire purchase system." If you take these two witnesses, the result of their evidence is that the words "instalment system" have not acquired in the trade generally the meaning of the words "hire purchase system." Therefore the Court has to construe the words as they appear in the contract, and if we take the ordinary and natural meaning of the words, they would simply seem to signify that the contract should be made upon a system by which payments are necessarily made by instalments. And the question arises whether "instalment system" must be taken to refer to a form of contract in systematic use for payments by instalments. Now, there is no evidence before the Court as to the existence of any special system called the "instalment system," which is applied to contracts of this kind, and, in my mind, it was not merely intended by the use of these words that the contract should be simply by payment of instalments. Under the circumstances, if the Court cannot construe the ordinary words of this contract as establishing a clear condition under this contract, the Court would have to hold that the contract is, in its terms, void, but I do not think we are quite driven to that position, because the question further arises whether these terms were not understood between the parties themselves, when they entered into the contract, to bear a special meaning, and if, as between the parties themselves, it could be proved that it bore a special meaning, then the contract would be upheld. When we look at the evidence for the purpose of ascertaining whether the parties are agreed as to the meaning of these words, we find, on the part of the defendant, a statement that he intended the words to mean the hire purchase system. The plaintiffs, on the other hand, state that they never contemplated that the words should bear that meaning. Well, if words were used upon which the Court cannot fix any technical meaning or ordinary meaning binding on the parties, and it is impossible to ascertain that the parties themselves agreed upon the meaning of the words, then the result will be that no mutual consent upon the contract between the parties has been established. Then there is another feature in the case which ought to be looked at, and that is, that it was clearly intended by Campbell that a contract should be entered

into between plaintiffs and Adam upon the instalment system, and I take it that thereby was meant that a contract was to be entered into which was to set forth the mode in which payments were to be made by instalments from time to time, and that, when a contract in these terms was concluded between Adam and the plaintiffs, that contract was then to be submitted to the defendant, who was to signify his acceptance thereof. And I quite accept the view taken by the defendant that, after expressing his willingness in this document to accept responsibility, he all along expected that some form of contract would be submitted to him upon which he would, conjointly with Adam, signify his responsibility. We find that the mere contract of sale was not considered sufficient so far as Adam was concerned, because a promissory note was sent to him to sign. It was clearly contemplated that there should be some document submitted to Campbell for his signature before the contract was completed. Therefore, this is clear: that no contract was entered into upon any system which could in any form of words be described as the instalment system which was contemplated by Campbell, and his responsibility under this guarantee therefore does not arise. Judgment must be given for the defendant, with costs.

[Plaintiff's Attorney: W. K. Baxter; Defendant's Attorneys: Michau and De Villiers.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

TRIAL CAUSE.

ROSENBERG V. CAPE TOWN { 1905.
HEBREW CONGREGATION. { May 2nd.
" 11th.
June 6th.

Architect's plans — Fees — Estimate of cost.

This was an action brought by Max Rosenberg, architect, Cape Town, against the secretary of the Cape Town Hebrew Congregation to recover a sum of £50 alleged to be due as premium award for certain plans.

The declaration set out that in December, 1902, the congregation, through the defendant, offered to the plaintiff, among other architects, that if he would prepare and furnish the congregation with plans for the erection of a synagogue at the top of the Government Avenue, Cape Town, in accordance with certain particulars set out in annexure

marked "A," and if the plan prepared by him should be adjudged by the adjudicator appointed by such congregation to be the best plan the congregation would pay to him £50 as a prize. The particulars stipulated, *inter alia*, were that the cost of the building should be £20,000. Plaintiff accepted the said offer, and prepared plans complying in every respect with the particulars set out in the annexure. In March, 1903, the adjudicator adjudged his plans to be the best furnished, and awarded him first prize. The defendant, however, wrongfully and unlawfully refused to pay the sum of £50, the amount of the prize, and plaintiff claimed that sum, with interest and costs.

Defendant, in his plea, did not admit that the plans submitted by the plaintiff complied with the particulars in all respects, he admitted having refused to pay the plaintiff the sum of £50 as a prize, and said that the plaintiff had failed to satisfy the adjudicator, or the said congregation, that the said building could be erected for a sum of £20,000 or thereabouts. He prayed that the claim might be dismissed. The defendant, for a claim in reconvention, said that the plaintiff promised a donation of £50 to the said congregation, which he had not yet paid, and that he also owed a sum of £14 17s. 6d., due from him as a member and seatholder of the congregation. The defendant claimed from the plaintiff payment of the sums of £50 and £14 17s. 6d. respectively, with interest and costs.

The plaintiff, in his replication, denied that it was a condition precedent to paying the said prize to produce a *bona fide* tender from a reliable builder to the effect that, should it be decided to erect the said building, he would be prepared to do the work for £20,000, and guarantee to abide by his tender. While denying that the defendant was entitled to insist upon such a condition, he obtained a *bona fide* tender from a builder to erect the building within the price stipulated. For a plea to the claim in reconvention, he said that as to the donation of £50, the congregation had disclosed no ground in law to support such a claim, and that the claim was irrelevant and embarrassing, and he prayed that the paragraph should be struck out. He also said that the synagogue now being erected was not being erected in accordance with the said particulars. He admitted that he owed £14 17s. 6d. to the defendant, and tendered that sum.

Mr. Gardiner (with him Mr. Lewis) for plaintiff. Mr. Searle, K.C. (with him Mr. Upington) for defendant.

Max Rosenberg (the plaintiff) said that with the plans he submitted a report, in which he estimated that the cost of buildings, based on figures actually obtained from the latest builders' tenders, with a deduction for tower, would be

£20,012 10s. He did not take out quantities and specifications for the building; his fee for that work would be £500. He looked at the prices of tenders in his office, Mr. Gilham actually working out the estimate. Witness also saw Mr. F. B. Smith about the estimate. Witness subsequently received a letter from the congregation stating that they did not consider any of the designs to be suitable, and that none of the authors had any claim upon them. They had decided not to build on the designs submitted. They would, however, be prepared to pay out the premiums if the authors could obtain a *bona fide* tender of £20,000, or at any rate within ten per cent., from a reliable builder to the effect that he would be prepared to carry out the work for the sum of £22,000. Further correspondence took place in which the secretary of the congregation intimated that if the author of the design would obtain a *bona fide* tender from a responsible builder of £22,000 they would be prepared to award the premium. He would not have been able to obtain a tender from a builder if the building were not to be erected. He could not have got a guarantee tender on the rough specifications put in.

Mr. Gardiner read a lengthy report by the adjudicator (Mr. Howard, Public Works Department), from which it appeared that he did not consider that either of the two premiated designs could be carried out for £20,000 or any approach thereto. He suggested that the plaintiff should be asked to invite tenders by public competition. He had his doubts as to whether any of the designs which he had premiated, except that of "Peace" (awarded fourth position) could be carried out for the sum of £20,000, or anything near it. Mr. Howard added that the best course would be to invite fresh designs upon a properly-prepared schedule of instructions. Mr. Howard's estimate of the cost of carrying out the designs premiated was as follows: First, £27,000; second, £28,000; third, £26,000; fourth, £21,000.

Witness (continuing) said that he had been delayed in bringing his action through various causes, one being that he had understood that the congregation were considering the matter, and that he had hoped they would come to reason. Witness had a tender prepared by Mr. McGregor, dated the 6th January, 1904, tendering to erect the Synagogue for £19,500. This he placed in the hands of his attorneys. On the 18th February, 1902, he sent a letter tendering a donation of £50 towards the proposed new Synagogue. He was a member of the congregation at the time. He made the offer at the time the first competitions were put out, and in which he did not participate. His donation was to be for a Synagogue at the top of the Avenue. The Synagogue had not been built at Hope Mill,

top of Government Avenue. The building had been put up in the middle of the Avenue. Witness did not approve of the scheme which had been carried out. He did not think that, financially, it was as sound as the first scheme. He considered that the building would have looked much better at Hope Mill, instead of on the present site. Cross-examined by Mr. Searle: His Attorney, he believed, did not send in the tender he obtained to the Cape Town Hebrew Congregation. His attorney told him that they were negotiating with the attorneys for the other side, Messrs Van Zyl and Buissinne.

By the Court: He had thought that, after the very unfair way in which he had been treated, the congregation would never claim the donation from him.

Charles Gilham, quantity surveyor, said that he was in the employ of the plaintiff when the latter sent in designs for the Synagogue. He prepared the rough estimate under the plaintiff's supervision, and got out the prices from tenders they had in the office at the time. He considered that the price set out of a little over £20,000 was a fair price.

Frederick B. Smith, builder, said that he was the contractor for the erection of the University Buildings. In January, 1903, he saw the designs and rough estimate for the Synagogue prepared by the plaintiff. Witness considered that the amount that he made up of under £20,000 was quite satisfactory.

Cross-examined: Witness did not recollect having gone through the plaintiff's approximate estimate of cost. The only way to test the prices was to get a tender, and witness was inclined to think that he gave a tender in writing.

Re-examined: From memory now he could not say what prices he actually took at the time.

Edward Simpkin, architect, who erected among other large buildings that of the Harbour Board, stated that he carried off the prize on the first occasion when he submitted £13,000.

Cross-examined: Witness was one of the architects Mr. Rosenberg objected to, although he got the prize.

Edward Austin Cook, architect, stated that in his opinion, in February or March, 1903, the price would have been generally satisfactory. It was impossible to give anything but a rough estimate on a competition. The fall in prices from February, 1903, to February, 1904, was only in the cheaper material.

Cross-examined: Witness had very little experience of the stone work in this country, and he would not care to give an opinion on it.

Charles Rutherford, builder, who erected the present Civil Service Club and the Royal Hotel, stated that he saw Mr. Rosenberg's estimate, and he con-

sidered the prices somewhat high. If the quantities were right the building could have been erected for £20,000 in February, 1903.

Cross-examined: Labour was just the same now as it was a couple of years ago. Materials, on the whole, were about 15 per cent. cheaper. The lower class of labour might have dropped a little in price.

James McGregor, builder, who tendered in January, 1904, for the building of the Synagogue for £19,500, stated that he went on the competitive plans, and the rough specification by Mr. Rosenberg. In February, 1903, he reckoned the job could have been done for £19,500.

Cross-examined: He was asked to give a tender for January, 1904. The price fell a little from February, 1903.

Mr. Gardiner closed his case.

Adolph Howard, who held an appointment under the Government since 1891, stated he was asked to act as assessor in this matter, and he considered the figures too low. Witness

cubed the building, and arrived at a fair price. He considered that on the designs it would require £27,000 to erect the building. The building might be erected now for £22,000. There had been a very substantial drop since February, 1903, as he knew from the Government tenders that went through his hands. Witness dictated the letter setting out on a *bona fide* tender from a builder that the building would be erected for the price mentioned the prize would be awarded, and although the committee did not intend using any of the designs, if they reconsidered their decision the builder would be bound by his tender. He was not satisfied that any of the competitors were entitled to the prize if they did not have a guarantee that the building could be erected for the price stated. The prize was only to be awarded on a satisfactory tender that the building could be erected for £22,000.

Cross-examined: The premium offered was a very small one. He did not contemplate that a man sending in a design should take proper specifications. Witness thought that Rosenberg should have a tender from a builder. He never thought that Rosenberg was not to mention to the builder that the committee were not going to erect the building. If a builder was paid he would tender for a building, even if there was no chance of getting the job. He never contemplated what Rosenberg might have to pay the builders. Witness would have told the builder that there was no chance of getting the contract, and still there would be a chance that the builder might under such conditions give a guarantee tender. Witness thought that Rosenberg might have a builder with his eyes open that would lose over the contract with a view of getting his name up. He took the general price of 9d. per foot in cubing

the building, and that was a comparatively low price.

Leopold Jacobi, defendant, as secretary of the committee, stated that all the letters he wrote were with the approval of the committee. The second prize was awarded on the production of a tender. The price quoted was £28,000, but the winner of the second prize, Mr. Ransom, produced a tender for £20,000.

[Hopley, J.: There was no guarantee with this tender.]

Witness: No, my lord; we took it in good faith.

Witness (continuing) said that he heard nothing about the matter from Rosenberg from September, 1903, to October, 1904. There were several reasons why the site in the Gardens was preferred.

Cross-examined: It was understood that if the first prize winner did not satisfy them with a tender, the money was to go to the second prize winner; but Mr. Ransom did not get the £50, neither did the third prize winner get any surplus, as it was thought that the plaintiff would still send in a tender. When they were in the thick of the fight with the plaintiff, they still thought that they would get the donation of £50 from Mr. Rosenberg towards the building of the Synagogue. He would not say that it was on the faith of the plaintiff's donation the building of the Synagogue was undertaken.

[Hopley, J.: I suppose you are still keeping a seat for him if he cares to come there?]

Witness: Yes, my lord.

Witness (continuing) said it was not necessary for the Building Fund Committee to send collectors for the money. Rosenberg was not the only person who had failed to pay up. At a meeting at which some sixty persons were present, ten objected to the change of the site and thirty-four voted for it.

Thomas Howard, of Messrs. Howard and Scott, stated that in March, 1903, labour and material were at the highest they ever were in Cape Town. In January, 1904, there was a substantial fall, in the price of material in particular. Witness had gone into Mr. Rosenberg's prices very carefully, and he was positive that the prices did not touch anything like what prevailed at the time. The matter could never really have been seriously taken into consideration. At that time witness was getting £19 for steel girders, whereas Mr. Rosenberg put them down at £13. Witness went into the whole thing, and doing it on five per cent. profit, as witness's firm had done for a place of worship in Kimberley, the lowest would be £27,000.

Cross-examined by Mr. Gardiner: You were the contractor for the City Hall; what was the contract originally?—£26,000.

What is it now?—It may run into £160,000.

It may run into £200,000?—Oh, no. Our tender for the City Hall was based on the prices six years ago.

Proceeding, under cross-examination, witness asserted that Mr. Rosenberg's specification was merely an apology. A certain quality of iron girders could have been put in for £14, but he would be sorry to put them in a place of that description. In the early stage, March, 1903, he would have calculated £31,000 for the job. The skilled man to-day knew that there were plenty of men waiting on his job, and his work was consequently 20 per cent. better.

Re-examined: The war had a great deal to do with the building of the City Hall. The contract had to be entirely altered.

Edmund James Sherwood, architect and quantity surveyor, stated that he had gone through Mr. Rosenberg's estimate, and taking the quantities given him, he totalled up £31,587. The largest increase over the plaintiff's prices was in the stone-work.

Cross-examined: The cubing up was a very good old system, if you knew how to do it. The prices he quoted he made up yesterday, but he was well acquainted with the quotations prevailing at the time. It was absurd to think of £22,000.

John Drake, builder and contractor, reckoned £31,500 for the building, without the tower, in March, 1903. The building could not now be built for £22,000. There was a fall of about 12 per cent. in prices from March, 1903, to February, 1904. Witness was building Carlton Buildings in March, 1903, for which he got 8s. 3d. for the stone walls.

Cross-examined: He put the iron at £18 10s., fixed.

By Hopley, J.: Painting and plastering were omitted from the estimates. The contingency of £1,000 could not have included those items, as contingency was only put down after every conceivable item had been covered.

Postea (May 11th). Counsel were heard in argument on the facts.

Cur. Adt. Vult.

Postea (June 6th).

Hopley, J., in giving judgment, held that the plaintiff had done all things necessary to entitle him to the award of £50 for his design, and judgment would be for that amount for the plaintiff in convention, and for £64 7s. 6d. for the plaintiffs in reconvention, the defendants in convention to pay the costs of the action.

[Plaintiffs' Attorneys: W. E. Moore and Son; Defendants' Attorneys: Van Zyl and Buissinné.]

OLOETE V. DIPRAEM. { 1905.
May 2nd.
" 4th.

Mr. Upington moved as a matter of urgency for the arrest of the respon-

dent, against whom numerous applications had been made and judgment obtained for £647 7s. 1d. See 15 C.T.R. 69, 92, 114 and 178. The plaintiff was a solicitor, practising at Lady Grey, Aliwal North, and when return of *nulla bona* was made, the plaintiff proceeded to execute against two plots of land on the Wynberg Flats. The respondent had also debts outstanding to the amount of £331, and the movable property realized £75. The defendant had handed the promissory notes on the above debts to his wife, who sent them to Lady Grey, and the bank manager refused to give them up, as they were the property of Mrs. Dipraem. There was information now (said counsel) that the defendant, who had absconded to the Orange River Colony, intended to return to Lady Grey on May 15, and so come within the jurisdiction of the Court. Counsel now applied for an order on the Sheriff to arrest him when he crossed the border. Counsel urged that the Court had power to deal with a man of this sort, who deliberately evaded justice.

[Hopley, J.: People have done that before by simply clearing over the border and looking at their creditors, and sometimes shaking hands with them.]

Mr. Upington said he felt there was a difficulty in regard to the application, but, at the same time, he would submit that the Court had power to prevent its orders from becoming mere nullity. Here was a distinct allegation upon oath that the defendant was coming over the border. He might come over once a week.

[Hopley, J.: No doubt it is very annoying to Mr. Cloete.]

Mr. Upington: The question, my lord, I submit, is whether under the general jurisdiction the Court has not the power to deal with such a state of affairs.

[Hopley, J.: If you can bring me any authority, I shall be only too willing to help you.]

Mr. Upington: I submit it is really contempt of the order of Court.

[Hopley, J.: Surely you can stop his coming across the border by a writ of civil imprisonment.]

Mr. Upington: But, my lord, we can't serve the notice upon him. He is not now within the jurisdiction. Counsel said that the respondent changed his residence from day to day.

The matter was ordered to stand over until to-morrow to give counsel time to find if possible any authority for the order.

Postea (May 4th).

Mr. Upington cited *Hill and Paddon v. Borchardt* (2, H.C., 253), *Van der Linden* (3-4-1), *Voet* (2-4-22).

Order granted attaching the defendant, pending an action for civil imprisonment to be instituted forthwith by the plaintiff,

and a rule *nisi* granted interdicting the manager of the bank at Lady Grey from parting with the notes or the proceeds thereof, pending an application upon notice to the defendant, and Mrs. Dipraem to show cause why the said notes or the proceeds should not be taken in execution of the judgment of this Court, with leave to telegraph.

SUPREME COURT

[Before the Hon. Mr. Justice MAARDONP and a Special Jury.]

VAN ZYL V. WARNER. { 1905.
 { May 3rd.

Fire—Negligence—Damages.

This was an action to recover £1,000 damages for certain trees destroyed by fire last March. The plaintiff, Mr. C. H. van Zyl, of Sea Point, was the owner of a large property of about fifty acres in extent on the Kloof-road and Victoria-road, at Botany Bay. Towards the Kloof-road, on sloping ground, a plantation was planted about ten years ago, at a good deal of expense. The property was surveyed and laid out in lots, but the only portion of it that was sold was that to the defendant, Robert Charles Warner. On Saturday, May 4, while a stiff south-easter was blowing, there was a bush fire coming up from the Camp's Bay side, high on the mountain. About five o'clock in the afternoon the defendant, who was on the spot, being apprehensive of his own premises, set fire to the plaintiff's grass in the plantation, in spite of warnings not to do so. Within fifteen minutes about a thousand trees were destroyed, as well as the hedges. The defendant denied that he was warned not to do so, but admitted that he did set fire to the grass, and tendered £250 damages. The damage was much greater.

Mr. Searle, K.C. (with him Mr. Gardiner), was for the plaintiff; Mr. Upington (with him Mr. P. S. T. Jones) was for the defendant.

W. Versfeld, Government surveyor, who prepared the plans, stated that the distance from the point the bush fire actually reached to the defendant's house was about 800 feet. The area of the fire was about two morgen.

Casper H. van Zyl (the plaintiff) stated that he bought the property in 1882. It was a very remote place and difficult to grow trees in, as the soil was sandy. Cottages were built on the

ground in 1894. Previous to that time he had planted trees. During the last ten years he had gone to a deal of trouble to get the trees to grow. The first, second, and third years half the trees died, and he replanted them. About a couple of years ago part of the property was sold to Warner for £2,500. Before witness went to England he would not have sold the lots under £250 each, and now he would not take less than £500 each. He wanted to maintain the status of the district, and so restrictions were put in the conditions of sale. Witness was on the plantation after the fire, and found the trees destroyed in seven lots. The trees would never grow again; he would have to replant them. In all, there were about a thousand trees burnt. The trees could not be planted again under £100. It would take ten years at least to bring the trees to the same growth. It would take over £60 a year to pay for the labour, and £100 for water for ten years. None of the burnt trees were under seven years of age. He had sustained more than £1,000 damages by this fire.

Cross-examined by Mr. Upington: It was a great hobby of his to plant trees. Immediately after the fire he claimed £1,000 damages, and accused the defendant of maliciously burning the plantation, but witness would not now say it was malicious. The defendant said he had set fire to it, and that he did not think the fire would spread. The fire got into another part of the plantation. Warner did not discuss the question of compensation at all. He did not know that Mr. Pillans was an authority on forest trees. The trees witness planted were valuable trees.

Mr. Upington, in further cross-examination, put it to witness that Mr. Warner had a very nice house on the ground.

Witness: Yes, the nicest house at Sea Point.

Mr. Upington: But there is no stable; he cannot have a stable on the ground?

Witness: He has got a stable on my ground, for which he pays nothing. He does not pay a sixpence for it.

Cross-examination continued: The purchase price of Mr. Warner's lot with the house was £2,500. The house cost witness £1,750 to build in 1899.

Mr. Upington: The price of property has gone up very considerably then?

Witness: Yes, property did go up, but it has gone down again.

I mean the price of property was high then, when the defendant bought in 1903, as compared with 1899?—Yes.

Further cross-examined: Witness held a mortgage on the defendant's property to the amount of £2,000. He considered that the property was worth at least £3,000.

Mr. Upington: Is it your case that you have been damaged to the extent of £1,144 and more by the destruction of 750 to 1,000 gum trees?

Witness: Yes, and there is the depreciation of the land. The land has diminished in value at least £150 a lot.

You don't want to have both the value of the trees and the depreciation of the land?—I take it as a whole.

Witness, replying further to Mr. Upington, said that he based his damages on the depreciation of the property, and what it would cost to put the property again into a similar state.

Mr. Upington: I put it to you that for £210 a nurseryman is prepared to replant that ground and maintain it for three years?

Witness: If he plants, as a tree should be planted, I should take him at once. Many people do not know how to plant. They simply dump it into the ground, and say: "The Lord must do the rest."

Richard Bremner, superintendent of Mr. Van Zyl's property at Botany Bay, said he supervised the plantation on the mountain side, and the one burnt out. On the 4th March he saw what seemed to be a small fire at the back of the houses at Clifton. Afterwards he saw smoke rising in the air. He went up to Mr. Saunders's estate. Witness's cottage was about 75 yards from the defendant's place. Mr. Warner told him that he would set fire to the field down below. Witness told him he must do nothing of the kind, and that he had enough to look after with the fire on the mountain. Witness walked away with the defendant's coachman, and on chancing to look round he saw the field on fire, and Mr. Warner standing by. Witness at once sent down the defendant's man, and told him to ask Mr. Warner to put out the fire at once. The other fire was about 1,000 yards from Mr. Van Zyl's property at that time.

Cross-examined: Mr. Shaw was present when witness spoke to the defendant. Witness denied that he was in a "blue funk." There was a tremendous cloud of smoke rising towards the Lion's Head. The fire travelled from Clifton towards Sea Point; a south-easter was blowing. Witness was sure that he told Mr. Warner that he must not set fire to the grass. Witness had never seen a flowering gum in the Peninsula, except on Mr. Van Zyl's property.

Henry Wepener, farrier, Sea Point, said he heard Mr. Warner say to Mr. Bremner that he would set fire down below at the spot close to his house. Mr. Bremner said that he (defendant) must do no such thing. They then turned to go up the mountain, and Mr. Warner said, "All right, Bremner, I will look after the lower part." When they returned the lower part had been burnt out.

Fred Fox said that he rented a billiard saloon in Cape Town, and lived at Sea Point. He corroborated substantially the evidence given by Bremner as to the conversation that the latter had with the defendant. Witness said that the remark made by defendant struck him as very

peculiar, because he could not see any need to set fire to the part down below.

Pete, a Kafir, said he went down to the lower place, where the fire was burning, and asked defendant who had caused the fire. Mr. Warner said "Go to —."

Hugh Ross Sharpe said that he lived at a cottage near the plantation. He saw Mr. Warner just outside his own fence with his hose watering his ground to prevent the fire, which he had just lighted in the plantation, spreading to his property. Witness asked him what he meant by lighting the plantation, and Mr. Warner said that he wanted to save his property. Witness then said, "What about my house?" and the defendant rejoined, "I can't help that; when my place is all right, I will come and help you." The defendant was not trying to put out the fire. The fire scorched the gable of witness's house. He saw no reason whatever why the defendant should have set light to the plantation. He should say that the plaintiff's property had suffered to the extent of quite £100 a plot.

Cross-examined: Witness was a tailor. Witness saw the beginning of the fire, but he never saw the defendant trying to extinguish the flames with a bush. He did not see a Kafir go up to the defendant. Witness had had no quarrel with the defendant. Mr. Warner was watering about 6 feet outside his own fence.

Pieter Johannes Zoutendyk, of the firm of Stamper and Zoutendyk, auctioneers, said that he was acquainted with the plaintiff's property at Botany Bay. He estimated that the value of the lots before the fire was £400 a lot, while to-day it was £300 a lot; in other words, that the lots had depreciated £100 each in consequence of the fire.

Cross-examined: He had not sold lots in the neighbourhood of the plaintiff's property; the ground was not level, and it was some distance from town. No property had been sold by auction in the particular vicinity of plaintiff's estate. The Freenaye Estate was about 200 yards from the plaintiff's property.

Mr. Upington: Mr. Behr, I believe, sold that estate?

Witness: Well, we all had a finger in the pie.

Further cross-examined: There were no sellers to-day at the price that buyers were willing to pay. There had not been many forced sales, except in District 6. There had been very few residential properties forced into the market. He had a very successful sale on Tuesday afternoon at the Grove Estate, Claremont. He sold lots on that estate at £150 a lot twelve months ago, and on Tuesday the lots made £285 a lot.

Mr. Upington: In your opinion, the land market is "booming"?

Witness: No, it is not by any means.

However, in that part of Claremont?—Well, it did yesterday afternoon.

Witness, in further cross-examination, referred in appreciative terms to Mr. Warner's property, and was proceeding to refer to the beautiful view and so forth, when

Mr. Upington interposed with the remark: We are not going to compete with you, you know, Mr. Zoutendyk.

Witness, replying to further questions, said that Mr. Van Zyl had turned a desert into a park, and he had often admired that gentleman's enterprise. Witness was answering further questions, when

Mr. Upington observed: We did not get you here to tell us platitudes, Mr. Zoutendyk; you must credit even counsel with a certain amount of common-sense.

Gerhard Hendrick Moller, auctioneer and sworn appraiser, said he took the value of the ten lots to-day to be about £150 a lot. In 1903 and 1904 he valued the ground at £300 a lot.

[Maasdorp, J.: Now, what would be the value of the ground to-day if the trees were still on it?]

Witness: That would be hard for me to say, because I have not much idea about trees and their value.

Answering a further question by his lordship, witness said that, according to the times, he would say that the ground would now be worth £200 to £250 a lot if the trees had still been standing.

Gideon Brand van Zyl (son of the plaintiff) said he did not consider the conditions of sale to be onerous. Similar conditions were used on the Orangezicht Estate, and also an estate at the top of Mill-street, Gardens. Witness had had offers of £400 a lot within the past year. He had had no offers since the fire. The plans for the defendant's house were passed in 1901, and the building was erected in 1902. The sale to the defendant took place in 1903.

Samuel Woodhouse, gardener and florist, Cape Town, said that the burnt trees would be of no use in the future. He estimated that it would take £500 to replant the trees, and put everything in order for a period of twelve months. His estimate for all expenses of replanting, retying, restaking, watering, and so forth, would be for a period of ten years £1,550. He had made the estimate on the basis of 1,000 trees.

Cross-examined by Mr. Upington: Witness denied that he had put the figure too high. He could get the same results from tree-planting in Cape Town in two years as he could get in seven years in Sea Point.

William Henry Higgo, chief forester, employed by the Cape Town City Council, said he considered that £1,000 of damage had been done to Mr. Van Zyl's property. He considered that the differ-

ence in the rate of growth between the Cape Town side of the mountain and the Sea Point side was as four years to six.

Mr. Searle closed his case.

Mr. Upington said that he did not propose to lead evidence on the whole of the circumstances of this matter, but to confine himself entirely to what the damage was. It appeared to him that the sole issue to go before the jury was "How much."

His Lordship assented.

Mr. Upington then called evidence.

Eustace Pillans, horticultural assistant in the Agricultural Department, said he found that about 700 trees were burnt on the plaintiff's ground, but he did not include in his count any trees which had not been singed or destroyed, and which stood in the Kloof. There was only a small number of scarlet flowering gums on the ground; he should say that nothing like 150 had been growing on the ground. He thought £150 would be sufficient to replant the 700 gum trees and keep them for twelve months—good, strong trees in tins, such trees as they could get from Tokai.

Cross-examined by Mr. Searle: Witness did not think the trees would require much watering after the first twelve months. His gospel of tree-planting was rather different to some people's. Witness's estimate of 700 trees did not include partially-scorched trees, which had since revived. He would not call the box thorn "a tree"; it might be placed in the Government's catalogue, but he scarcely thought it would be called a tree.

Mr. Searle: You put down in your estimate the excavating of the holes at fourpence per hole. I suppose that would be by convict labour?

Witness: Oh, no.

Further cross-examined, witness said that he allowed in his estimate £70 for loss of trees until the new trees were grown. He had not included anything in his estimate for supervision for the first year.

Re-examined: Witness thought that in four or five years they could get the place back again to its old state. He considered that 10s. a week would be a fair allowance for a man to water the trees.

Joseph William Matthews, florist, Cape Town, said that he found about 730 trees damaged or destroyed on the plaintiff's ground. He had tendered to Mr. Warner to replant 1,000 trees, and look after the trees for a period of two years, for £180. That amount did not include the cost of water. He was prepared to repeat the tender to Mr. Van Zyl.

Cross-examined: Witness had been mostly engaged in laying out gardens; he had not had charge of any plantation.

Charles P. Behr, auctioneer, Cape Town, said that he thought it was impossible to value the ground as building lots. He took the seven lots as a whole to be of the value of £525. Taking the whole ground, he thought the value would be enhanced if the trees were standing. As building lots, he considered the ground would not be of any more value because of the trees. He had taken the plots at 80 feet by 90 feet.

Cross-examined: He had deducted 40 feet from the lots for a road.

Mr. Searle: But there is no road.

Witness: I was told that there was.

By the Court: Taking the ground as a whole, the trees would make a difference in the value of £100.

Joseph Fock, valuator, said that three years ago he was valuer for the Sea Point Council, and he valued the house where Mr. Warner now resided, and the whole of the eleven lots of ground, at £2,500. He had valued the land that day (Wednesday) for the purposes of the present case. He valued the ground as building lots at £775—three lots at £150 each, three at £100 each, and one (in the ravine) at £25. The trees were a nuisance really, if they were going to build.

Cross-examined: He had taken the value on the basis of what the lots would fetch at public auction.

Mr. Upington closed his case.

Counsel having addressed the jury, Maasdorp, J., summed up on the facts.

The jury, without leaving the box, intimated that they found for the plaintiff for damages in the sum of £250, the amount tendered.

Judgment was entered for the plaintiff for £250, defendant to pay costs to date of plea, and plaintiff to pay costs subsequently incurred.

[Plaintiff's Attorneys: Van Zyl and Buissinné; Defendant's Attorneys: Fairbridge, Arderne, and Lawton.]

SUPREME COURT

SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

ADMISSIONS.

{ 1905.
May 4th.

Mr. Sutton moved for the admission of David Duncan, Stormont, as an advocate.

Application granted, the oath to be taken before the Registrar of the Es-

tern District or the Registrar on Circuit.

Mr. J. E. R. de Villiers moved for the admission of Albert Reinhold Fleischack as an attorney.

Application granted and oaths administered.

Mr. P. S. T. Jones moved for the admission of William Charles Eaton Stent as a conveyancer.

Application granted and oaths administered.

PROVISIONAL ROLL.

PITTMAN V. MUTTER. { 1905.
{ May 4th.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £600, with interest and costs, and that the property specially hypothecated be declared executable. The bond had become due by reason of non-payment of interest.

Granted.

MALMESBURY BOARD OF EXECUTORS V. LAUBSCHEER.

Mr. Douglas Buchanan moved for provisional sentence on three mortgage bonds, with interest and costs, and that the property specially hypothecated under the two second bonds be declared executable.

Granted.

CASTLE WINE AND BRANDY CO. V. HEINEMAN.

Mr. Sutton moved for provisional sentence on a promissory note for £76 10s., and for judgment under Rule 329d for £32 8s. 9d.

Granted.

LINDSAY V. FORD AND STOKELL.

Mr. P. S. T. Jones moved for judgment on an acknowledgment of debt for £270, with interest and costs, less £6 15s.

Granted.

VAN RYNEVELD V. GOUS.

Mr. Alexander moved for provisional sentence for £600 on a mortgage bond, with interest and costs, and that the property specially hypothecated be declared executable. The bond became due by reason of non-payment of interest.

Granted.

LEWIS V. RAPTON.

Mr. Swift moved for provisional sentence on a mortgage bond for £400, with

interest and costs, and that the property hypothecated be declared executable.

Granted.

MYERS AND GOLEMAN V. DE VILLIERS.

Mr. Roux moved for provisional sentence on a mortgage bond for £250, with interest and costs. The bond became due on 15th April.

The defendant appeared, and applied for a stay of execution for a couple of months to give him time to meet the bond.

Buchanan, J., said he could not force the plaintiffs to give him time, and suggested that the defendant should approach the plaintiffs' attorneys.

Order granted.

STEYTLER AND CO. V. SAND.

Mr. Close moved for provisional sentence for £1,000 on a mortgage bond, which became due by reason of non-payment of interest, and instalments, and that the property be declared executable.

The defendant appeared in court and asked for time, and he was referred to the plaintiffs, or their attorneys.

Granted.

BUYSKES V. MARGOLIN.

Mr. Gutsche moved for provisional sentence on a mortgage bond for £910, with interest and costs, and that the property specially hypothecated be declared executable. The bond became due by reason of non-payment of interest.

Granted.

HUTT AND HERRING V. LE GRANGE.

Mr. Sutton moved for the final adjudication of the defendant's estate as insolvent.

Granted.

DE VILLIERS V. BOTHA.

Mr. Rowson moved for provisional sentence for £83 17s. 6d., due on a promissory note.

Granted.

VAN NIEKERK V. ALLEE.

Mr. P. S. T. Jones moved for provisional sentence on a mortgage bond for £300, due by reason of non-payment of interest, and that the property be declared executable, and for judgment, under Rule 329d, for £47, money lent.

Granted.

ESTATE PRITCHARD V. BLYTH.

Mr. Swift moved for provisional sentence on a mortgage bond for £750, with

interest and costs, and for £3 11s. 9d., certain expenses incurred, and that the property specially hypothecated be declared executable.

Granted.

WILSON AND CO. V. PFUHL.

Mr. Sutton moved for the final adjudication of the defendant's estate as insolvent.

Granted.

VISSEER V. GOEDHALS.

Mr. Alexander moved for judgment, under Rule 329d, for £80, rent for six months, with interest and costs.

Granted.

BONDEBO'CH HIGH SCHOOL V. TAIT.

Mr. P. S. T. Jones moved for judgment for £31 12s. 10d., fees due for the tuition of the defendant's children, with interest and costs.

Granted.

COLONIAL GOVERNMENT V. MAIDMENT AND DE BEER.

Mr. Howel Jones moved for judgment for £48 3s.

Granted.

VAN DER MERWE V. GOLDBERG.

Mr. Roux moved for judgment, under Rule 329d, for £27, the purchase price of two horses sold to the defendant, with interest and costs.

Granted.

GENERAL MOTIONS.

Ex parte THE TOWN COUN- } 1905.
CIL OF RIVERSDALE. } May 4th.

Mr. Sutton moved for an order amending the description of certain property in a rule which was issued under the Derelict Lands Act.

Application granted, and an order granted for the sale of these properties, the rule to be advertised as before and returnable on the 8th June.

Ex parte CAPE GOVERNMENT RAILWAYS.

Mr. Howel Jones moved to make absolute a rule granted under the Derelict Lands Act.

Rule made absolute, to the extent of the land specified in the consent paper.

OBREE V. MASTERTON.

This was the return day of a rule nisi calling on the defendant to show cause why he shall not be sued *in forma pauperis* for a full statement of the petitioner's affairs.

The affidavit of Thomas Masterton, who was the assignee of the estate, set out that the creditors agreed to accept 15s. in the £, and the balance was to go to the maintenance of the petitioner's wife and himself. The respondent was always willing to give the applicant every facility of examining the affairs of the estate. The respondent would gladly welcome an action, but he feared that the applicant, who was unable to pay, would mulct him in heavy costs. The respondent was quite prepared to submit everything to an accountant appointed by the Court.

Mr. Roux was for the applicant, and Mr. Gardiner was for the respondent.

Mr. Roux said he was instructed to consent to the Court appointing an accountant. The replying affidavit of the petitioner set out that the defendant had persistently refused to allow deponent to examine the books. Counsel asked that the petitioner be allowed to be present when the books were examined.

An order was granted appointing Mr. Maynard Nash as referee to go into the books, to see what, if anything, was due to the applicant, the referee's fees to be paid out of the balance in the possession of the respondent.

VAN ROOYAN V. FELE.

This was the return day of a rule nisi ordering the respondent not to part with two cattle, and authorising the Deputy-Sheriff to get possession of the cattle pending an action to recover them from the respondent, who wrongfully took them into his possession. Counsel now applied for an order compelling the respondent to immediately restore the animals to the applicant.

Mr. Struben was for the applicant, and Mr. J. E. R. de Villiers was for the respondent.

Buchanan, J., said it would be better to let the Magistrate of Uniondale settle the question.

It was ordered that an action be brought by the applicant in the Court of the Resident Magistrate of Uniondale, to declare the ownership of the cattle, and upon such judgment the Deputy-Sheriff to restore the cattle to the right owner, the costs to follow the result.

BOSIKI V. WHYTE.

This was an application for an order on the respondent compelling him to

deliver up certain documents, in order that transfer might be passed of a certain farm in East Griqualand.

Mr. Pyemont was for the applicant, and Mr. Roux was for the respondent.

Order granted as prayed, the respondent to forthwith deliver up to the applicant the title-deeds in his possession, and to pay the costs of the motion.

Ex parte WILLEMSSE.

This was the return day of a rule nisi calling on the respondent to show cause why he should not be ejected from certain premises at Stellenbosch, and counsel now moved to make the rule absolute.

Mr. Roux for applicant; Mr. Gardiner for respondent.

Rule made absolute, with costs.

RATNER AND SIMAN V. RECARDO.

This was an application to make absolute a rule restraining one Moskovich from paying out certain money pending an action to be brought by the petitioners for the commission as brokerage on the sale of certain premises in Primrose-street. Affidavits were put in to the effect that the respondent would leave the country as soon as the balance of the purchase price was paid him. The replying affidavit of the respondent stated that he never gave the applicants any instructions to sell the property, and that he had no intention of leaving the country.

Mr. Gardiner was for the applicant and Mr. Sutton for the respondent.

Buchanan, J.: Without expressing any opinion as to the merits of the case, the order will be discharged, with leave to sue for the costs in the action.

TABLE BAY HARBOUR BOARD V. LIQUIDATORS COLEMAN AND CO.

This was an application to have a certain matter referred to arbitration, and it came before the Court because the respondents could not agree to the deed of submission.

Mr. Searle, K.C., was for the applicants, the liquidators of A. J. Coleman and Co., and Mr. Close was for the respondents.

Counsel having been heard in argument on the facts,

Buchanan, J., I cannot make an order compelling the respondents to go to arbitration. As to the costs, they will stand over for the decision of the case.

Ex parte THE KUILS RIVER PUBLIC SCHOOL.

This was an application to make absolute a rule enabling the petitioners, the committee or board of management of the public school, to pass transfer of the school property to the Consistory of the Dutch Reformed Church at Kuils River. The Registrar of Deeds refused to pass transfer without an order of Court. Counsel, after outlining the history of the school, urged that the money that established the school came from the members of the Dutch Reformed Church.

The affidavit of Dr. Muir, the Superintendent-General of Education, set out that the school, which had since 1869 been conducted as an undenominational school, had received grants from the Government, and that it was always looked upon as a public school. The school-room had also been used for services of the English Church. It would be entirely wrong to transfer such property to the Dutch Reformed Church or any other church.

Mr. McGregor was for the applicants and Mr. Howel Jones appeared to oppose on behalf of the Superintendent-General of Education.

Counsel having been heard in argument,

Buchanan, J.: Under the regulations, the Government have contributed to the upkeep of the school, and it is clear, if it had not been a public undenominational school, the regulations would not have allowed these contributions. In the title deeds it will be seen that the board of management stand in the position of trustees. It would be a grave deviation from the trust to enable the board of management of an undenominational public school, which has been raised by public funds, to transfer it away to whoever they liked. Under the circumstances, the rule must be discharged.

Ex parte ESTATE DEUBY.

Mr. P. Jones moved for leave to pass a general covering bond on property in which certain minors were interested. The Master's report was favourable. Granted.

Ex parte GREENING.

The applicant appeared in person, and Mr. Alexander was for the Law Society. The petitioner renewed his application for reinstatement as an attorney of the Supreme Court. Mr. Alexander applied for a further postponement until June 1, in order to get material particulars of charges against the applicant, in order to oppose the application.

Buchanan, J.: While charges are hanging over the head of an attorney of

the Supreme Court, I cannot see my way to admit him, but I think the charges should be investigated within a reasonable time. The affidavits must be served on the applicant before the 1st June, and the case will be postponed until the 8th June.

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

TRIAL CAUSES.

RING V. RING. { 1905.
May 5th.

This was an action brought by Jessie Ring against her husband, George Ring, for restitution of conjugal rights, failing which, a decree of divorce. Mr. Joubert was for the plaintiff, and the defendant was in default. The parties were married at Kimberley in April, 1900. They remained at Kimberley for a few weeks, when her husband went to Bloemfontein, where the plaintiff subsequently followed him, and found him living with some very undesirable people. In November, 1900, she left Bloemfontein, as she was starving, and the doctor ordered her to return to her mother at Kimberley. The defendant worked at intervals, but sent the plaintiff no money. Towards the end of 1900 the defendant joined the Scottish Horse, and subsequently went to Johannesburg, where several letters were sent to the defendant, but he failed to reply. A letter was sent to him through his sister, asking him to return, but he refused to do so. In December, 1903, the defendant wrote the plaintiff to the effect that he had committed adultery, and that he had no intention of returning to her. He was totally indifferent as to what course she pursued. There was a child eighteen months old of the marriage, and plaintiff claimed custody of it.

Decree of restitution granted, the defendant ordered to return by the 1st June, or to show cause on the 15th June why a decree of divorce should not be granted.

Postea (June 15th). The rule was made absolute.

WERNER V. MILLS.

{ 1905.
May 5th.
" 15th.

Personal injury — Contributory negligence.

This was an action to recover £2,500 damages for the defendant's negligence in not keeping a brick-pressing machine in proper order, by which the plaintiff lost a hand.

The plaintiff, in his declaration, set out that when it was necessary to clean the plunger it was sufficient to shift a band from a fixed pulley to a loose pulley. On the 10th November he was endeavouring to take out a little clay, when one of the forks snapped and the accident occurred. The engine had a governor, but no belt, which rendered it useless. The machine was also out of the level. The plea set out that the plaintiff acted contrary to definite instructions, and that the accident happened through his own negligence. The machine was in perfect order prior to the accident.

Mr. Gardiner was for the plaintiff, and Mr. P. S. T. Jones was for the defendant.

Theodore Werner stated that at the works at Kloof-road he worked under a Mr. Pickering, who was in charge of the brickfields. On the 10th November the machine was out of order, it being necessary to clean it every few minutes. At first when he wanted to clean the machine he stopped the engine, and the defendant told him that that was a waste of time and labour, and said it would be sufficient to slip the band on to a loose pulley and so stop the machine. Witness reported the state of the machine to Mr. Mills, and the defendant promised to have it made right, but he had never done so. The defendant very often saw the plaintiff put his hand in to clean the die. Personally he could supervise other men, but he could not now make bricks himself. The cause of the delay in bringing the action was a promise from the defendant that he would always find him employment. After a couple of months the defendant said he would have to dispense with witness's services, as trade was too bad. Witness knew of no other way of cleaning the die.

Cross-examined: Witness was in charge at Kloof-road before Pickering came. Pickering relieved witness of the managementship of the brickfield. Mr. Bygott did not explain the machine to witness and warn him not to clean it with his hands. There was an iron hoop which was used when the material was hard, but the iron hoop could not be used round the corners. He denied that he was cleaning the die while the machine was in motion. The defendant said he was sorry he could not pay

witness his wages during the time he was in the hospital. The defendant said that the accident would not prevent witness earning his living from him. Witness had failed to pay certain labourers, but that was due to the defendant's action in breaking the contract. Just prior to the accident Hoffman did not pull witness away from the machine and warn him that he would lose his hand.

Re-examined: There was only the boy present when the accident occurred.

Frank Palmer, an engine-driver, who was in the defendant's employ at the time of the accident, said the plaintiff was manager until Pickering came. Mills was acquainted with the faulty state of the belt. Without a governor belt the engine would race. The defendant was told by witness that the machine was out of the level. After the accident he found that one of the pins was broken.

Cross-examined: The increased speed was liable to break the fork. He did not say to anyone that he believed the accident was caused through the breaking of the fork. It was quite possible that witness warned the plaintiff against the dangerous process of cleaning the machine. The plaintiff to witness's knowledge had cleaned the machine while it was working.

Re-examined: He had also seen Pickering clean the machine while the plunger was going up and down.

John Benson, the boy who was present at the time of the accident, said that before the plaintiff started to clean the machine he stopped it, and witness held the knob. The belt had slipped between the two pulleys. After the die had been released witness noticed that one of the pins was broken.

Cross-examined: Witness had seen the plaintiff clean the machine while it was in motion, but on the occasion of the accident the plaintiff stopped it.

Mr. Miller, engineer, stated that in his opinion the pins were very weak. It would be safe to clean the machine while the belt was running on the loose pulley. As far as brickmaking machinery went, he found that generally it was very indifferently erected. The forks seemed to him to be very weak.

Cross-examined: The belts very often cut through the forks. The machine appeared to be a fairly good one.

Mr. Gardiner closed his case.

The witness Palmer (recalled by His Lordship) stated that after the accident he got a new governor belt; the machine was wooded round for safety. The day the accident happened there was no governor belt on the engine.

Samuel Mills, defendant, stated that Pickering was introduced to him as a practical brickmaker, and he was sent up to Kloof-road brickfields, but he was not to interfere with the plaintiff, who was only there until the plant for

the contract at Sea Point arrived. Bygott, who showed the plaintiff how to work the machine, warned him against attempting to clean the die while the plunger was in motion. The plaintiff was shown how to clean the machine by means of a piece of hoop iron. The fork was not broken a couple of days after the accident. The plaintiff, in reply to witness, said that he did not blame him for the accident. Witness promised, without recognising any liability, that he would endeavour to find him employment.

Cross-examined: Even if a machine was in perfect order, there was always a danger of the belt slipping. It was correct that Palmer told him that the machine was not quite level. Palmer drew his attention to the governor belt being considerably worn. Within four days of the accident he examined the machine and found nothing broken. The only time he ever saw the plaintiff clean the machine was while it was in motion.

Nicholas Hoffman, brickmaker, who was in the employ of Mills in November, 1903, stated at the time of the accident he was wheeling bricks from the machine. Previous to the accident witness saw the plaintiff clean the die with his hand, and pulled him away from the machine, telling him that he would get his hand off if he continued that practice. A minute or so later he heard a shout, and, running back, saw the plaintiff's hand caught in the machine. There was some delay before the men were able to reverse the machine, and so release the plaintiff's hand. The machine was worked five minutes after the accident. The same machine continued to work until the works were closed down. At Sea Point witness saw the plaintiff clean the knives of the pug with a shovel while the machine was working—a very dangerous practice.

Cross-examined by Mr. Gardiner: Witness never saw a piece of iron put in the ground to guide the belt. It was necessary to use a block of wood to keep the plunger from coming down. The first he saw of the broken fork was a month after the accident. Witness always used the hoop iron to clean the machine.

Re-examined by Mr. Jones: The weight of the plunger would bring it down even if the belt was on the loose pulley. If the fork had been broken at the time of the accident, the lever could not have worked the transfer from the fast to the loose pulley.

By Maasdorp J.: At present he was working for the defendant.

Witness told Pickering the day of the accident what he had seen.

Thomas Pickering, brickmaker, who was engaged by the defendant in November, 1903, to work at the Kloof-road works, stated that witness was

engaged to manage the works after Werner left. The day of the accident witness was standing outside, when he heard a scream, and, rushing in, he saw the plaintiff caught in the machine. Witness helped to release the plaintiff, and had his hand bandaged. There was a piece of a brick in the machine, on which there was an impression of the plaintiff's hand, but witness threw it away. The machine was worked after the accident, and witness was certain that the fork was not broken. The block of wood was only used as an extra precaution. Witness had seen Werner clean the die with his hand while the machine was working, and while it was stopped. Witness cautioned him of the danger in putting his hand in while the plunger was in motion. At Sea Point the plaintiff used a shovel to clean the pug, and witness considered that was dangerous to the man and to the machine. The fork was broken a month after the accident.

Cross-examined by Mr. Gardiner: When he was asked to give evidence he was in Mills's employ. After the accident they had a trial every morning with the machine. Witness never cleaned it with his hand. Witness was getting £1 a day, and Werner 9s. a day, and yet he was under Werner. There never was a piece of iron put in the ground to keep the belt from slipping. The belt might have been running when he examined the forks. He could not explain why he put a piece of wood under the plunger when he cleaned the machine. He believed there should be no danger of the plunger coming down when the belt was slipped from the fast to the loose pulley if the machine was in good order. Shortly after Mills's return from Caledon, Palmer reported to him that the fork was broken.

John Bygott, practical engineer, said he had twenty-five years' experience of that particular machine. He superintended the erection of the machine, the working of which he explained to the plaintiff, and cautioned him especially about putting his hand under the plunger. Mr. Miller did not understand the working of that particular machine. The blocks of wood were to be used to keep the plunger up. The same governor belt was on the machine now as when witness handed it over. The lever was designed to work lightly, but no vibration could throw it over.

Cross-examined by Mr. Gardiner: He left the machine in perfect working order. Every belt had a bias one way or the other, and this belt was true enough. He had no diplomas; he always fought shy of people who had. Except that it was exactly at the top, the plunger was bound to come down when the belt was slipped on to the loose pulley. The governor belt might have been lengthened. The blocks

of wood were not, as a rule, supplied with a machine of that description.

Mr. Jones closed his case.

Counsel having been heard in argument on the facts,

Maasdorp, J.: The plaintiff alleges that, by reason of the defendant's negligence, the accident happened, and he claims £2,500 damages. The defendant pleads that it was necessary in stopping this machine that proper care and caution should be taken, not only to throw the belt on to the loose pulley, but also to put a couple of blocks of wood under the cross-heads which are attached to the plunger. The case for the defendant is that, even if the belt is over, and the blocks not used, the weight of the plunger would bring it down and cause injury to anyone who was working at the die at the time. Now, it is necessary to inquire whether the accident happened in the way it was stated to have happened by the plaintiff, or whether the defendant is correct in saying it arose from the negligence of the plaintiff himself. To support the defendant's case as to the occurrence on the day in question, only one witness was called. He was a little boy helping at the working of the machine. That little boy states he drew the lever back to throw the belt on to the loose pulley. He placed a block behind the lever to prevent it coming back again, and notwithstanding these precautions, the machine was set in motion by the belt becoming attached to the fast pulley. With regard to the evidence of the boy as to the placing of a block behind the lever, I must say that that evidence is wholly unsupported, and it is material to see whether the boy is truthful in that respect. Witnesses have been called for the defendant, who state that it is wholly unnecessary to put a block there, as the lever, if left alone, would not fly back again. I am inclined to believe that the boy is mistaken in stating that he put a block behind the lever. That would not be done in the ordinary course of working. The only evidence to support the theory that the fork was broken at all is the statement of the boy that he discovered a bit of iron lying under the machine, but there is no proof that this was really part of the fork. I come to the conclusion that the machine was in motion, not because the belt had slipped back to the loose pulley, but because the machine was never stopped. The plaintiff had been warned not to put his hand under the die while the machine was in motion, and I am of opinion that the accident happened through the plaintiff's own negligence. It appears Mr. Mills wished to do his best for the plaintiff, in order that he might not be utterly thrown out of employment, and it is only to be hoped that, notwithstanding these proceedings, if it should be

in the defendant's power, that he will do something for the plaintiff. Judgment will be given for the defendant, with costs.

[Plaintiff's Attorneys: Syfret, Godlonton and Low; Defendant's Attorneys: Silberbauer, Wahl and Fuller.]

Ex parte THE B.S.A. ASPHALT CO.

Mr. P. Jones moved as a matter of urgency for an order restraining Bridie and Co., of Strand-street, from removing any goods from their premises, pending an action to be brought against them by the B.S.A. Asphalt Company for £46 17s., rent due.

Interdict granted, pending an action to be brought, with leave to the respondent to move to set it aside.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY]

EBRAHIM V. DEHNING. { 1905.
May 5th.

Mr. Alexander moved as a matter of urgency for an order requiring the respondent to restore possession of two shops, of which the applicant alleged that he had been deprived by spoliation. Counsel said that the respondent had filed an affidavit denying the forcible ejectment, and stating that he had tendered the key to the applicant. He desired to file answering affidavits, and asked leave to mention the matter later in the day.

Mr. J. E. R. de Villiers was for the respondent.

Hopley, J., said that as long as the respondent had returned the key to the applicant, he failed to see how there was any urgency in the matter.

Mr. Alexander said that the question of costs was urgent.

Hopley, J., said that if there was any urgency counsel might mention the matter later in the day, but it was difficult to see how there could be any urgency in a question of costs.

KING BROS. V. ESTATE { 1905.
WASSERFALL. { May 5th.
" 8th.
" 9th.

Prescription — Title to land —
Transfer.

This was an action brought by King Bros., of Durbanville, against the estate Wasserfall to determine their rights in respect of certain two erven on the farm Johannesburg, Durbanville.

This case arose out of an application by the plaintiffs under the Derelict Lands Act. The plaintiffs claimed a number of erven at Johannesburg, and the Court granted a rule nisi under the Derelict Lands Act. On the return day claims were made to one of the erven on behalf of the estate Myburgh and to two of the erven on behalf of the estate Wasserfall. After hearing counsel, the Court directed that the rule be discharged, with costs, so far as concerned the erf claimed by the estate Myburgh, and as to the erven claimed by the estate Wasserfall, the rule was discharged, costs to abide the result of any action the petitioners might bring to decide the ownership of the land claimed; in case no such action was brought, the petitioner to pay the costs. Leave was given to try the action on the information before the Court. Consequently, no pleadings had been filed. The two erven in dispute were Nos. 3 and 7 of the farm Johannesburg.

Mr. Searle, K.C. (with him Mr. McGregor), was for the plaintiffs; Mr. Burton was for the defendants.

Mr. Searle briefly traced the changes in the ownership of the erven from the year 1860, among the owners having been Melt van der Spuy (who originally divided the land into erven), Jacob van Renen van Niekerk, Hendrik Cornelius van Niekerk, K. C. Dekenah, R. M. Ross, Mr. Rowan, and Mrs. Lawrenson. The plaintiffs bought from Mrs. Lawrenson in 1902 the two erven in dispute. They claimed that the erven were their property by adverse prescriptive user of their predecessors in title and themselves. The two lots in question were situate one in front and the other behind the homestead.

Mr. Burton asked for leave for the evidence of Mr. Dekenah, who was an invalid, to be taken on commission. Mr. Dekenah was, he said, quite unable to attend the court.

Mr. Searle said that Mr. Dekenah lived at Black River, on the Flats, and he should raise no objection to the proposed application for a commission.

Hopley, J., said that he also had a letter from Mr. A. J. Smith, sergeant of police, stating that he had been subpoenaed as a witness, but that he was unable to attend owing to illness.

Mr. Searle said that he did not propose to take Mr. Smith's evidence on commission.

Mr. Burton applied for a commission to take the evidence of Mr. Dekenah, and suggested the name of Mr. Advocate Giddy, or failing him, Advocate Greer, as commissioner.

The application was granted.

John King, a partner in the firm of King Bros., said that they purchased the property, Johannesburg, from Mrs. Lawrenson for £4,000 in the year 1901. Mr. Montgomery Walker took an option

on behalf of witness, it being arranged that his (Mr. King's) name was not to appear. Witness had always lived in the immediate neighbourhood of the farm. Witness purchased from Mrs. Lawrenson in 1901, his impression being that he purchased the entire block of land. He had since made inquiries, but he had been unable to trace the whereabouts of Mrs. Lawrenson, though he believed that she was now living in Johannesburg. Witness, after the purchase, let the property on the upper side of the cross street to Rowan on lease. Mrs. Lawrenson had up to that time lived on the farm. When he made his purchase he bought without a diagram. He was told that Mrs. Lawrenson had no transfer in respect of certain lots. There was a transfer in regard to a certain lot 3, but he had discovered that that lot 3 did not apply to the farm Johannesburg. In 1903 Rowan, who had an option of the property, advertised Johannesburg for sale. Witness thereupon obtained an interdict against Rowan, who had not exercised his option.

Hopley, J.: Evidently he wanted to see whether he would be able to sell the property for a higher figure than his option, and he left over the option until he had found out whether he would be able to secure a profit on the option.

Witness (continuing his evidence) said that while he was in possession of the property, and also before, he had not heard of any person called Wasserfall, except the Wasserfall in Cape Town. The property was in the area of the Durbanville Village Management Board and their successors, the Municipality. The local authorities rated Johannesburg as one property; the erven in question was not separately rated. The rating was based on the occupation.

Cross-examined: Plaintiffs had thought that the land now occupied by the widow Van Niekerk was also part of the property they bought, but they had given up that portion. He had had some bother with Rowan about the breaking open of certain doors of a building on this ground, and it was after this bother had occurred that he found that Mrs. Van Niekerk was entitled to this particular part. He had understood, when he purchased from Mrs. Lawrenson, that there was some dispute as to one or two of the erven. As far as witness knew, neither of the lots in question had been cultivated, but had been used as a kraal, and to put carts and implements on.

Benjamin Francois van Niekerk said that his father bought Johannesburg about 39 years ago. As to the disputed erven, they used one lot as a cattle kraal and on the other they had a wheat stack, and used to do their threshing there. He had seen the lots used for similar purposes by subsequent owners.

All the lots were used except the two bottom ones.

Cross-examined: Dekenah used the lots in the same way as witness's father had done. Witness was present when the farm was sold in Dekenah's insolvent estate. Witness was also present at the sale in Rowan's insolvent estate.

Witness had never heard Dekenah say that one of the disputed lots belonged to Wasserfall, and that the others belonged to somebody else.

Andries Jacobus V. van Niekerk, Field-cornet, Koeberg district, said he lived on the farm with his father in 1873, and stayed until the 1st April, 1875. Witness's father bought from his cousin, Jacob van Niekerk. His father bought the whole of the property, except a bit at the bottom, which an old Malay boy had, and from whom his father bought. About that time the rush to the goldfields took place. Witness rode transport. They had up to six and seven wagons and from 80 to 100 mules. During his father's time witness heard no question raised in regard to the ownership of lots 3 and 7. There was some question about the stable, which an old man in Cape Town, who wore a helmet, said belonged to him. He never saw the old man on the farm. Witness saw the place several times after he had gone to reside in the Paarl in 1875, and found that the lots were being used in the same way as his father had used them, both by Dekenah and Rowan. Witness had never heard of Wasserfall owning part of the property.

Hopley, J., remarked that from this case it appeared that the most elementary rules of conveyancing had been neglected. He should take it that it was the duty of a conveyancer to look into the titles before he conveyed the property. Of course, they had to take things as they found them, but at the same time there did appear to have been a great deal of carelessness.

Mr. Searle said that that seemed to be so.

In cross-examination, witness said that in September last Rowan told him that Wasserfall claimed lots 3 and 7, and that if they could prove that, they could make a good deal of money.

Sidney S. Jacobsohn, of the firm of Walker and Jacobsohn, plaintiffs' attorneys, put in a list of owners of the property extracted from records in the Deeds Registry, from the time of Jacob van Niekerk.

Johannes Jacobus Huys, of Durbanville, said that he was 80 years of age. He was born at Johannesburg. His grandfather was the original grantee.

Mr. Searle: That takes us back, I think, to 1813.

[Hopley, J.: To 1801.]

Witness (continuing) said he remembered Mr. Jacob van Renen van Niekerk coming to the farm. Behind Mr. Van Niekerk's house there was a kraal;

the lot in front of the house was used by Mr. Van Niekerk for his vehicles and cattle. Mr. Hendrick Cornelius van Niekerk, who followed Jacob, used the two lots in the same way. Mr. Dekenah, the next owner, used the two lots, the one as a kraal and the other for his carts and cattle. Mostert next hired the farm, and then came Louw, both the occupiers using the two lots.

By the Court: The farm took its name from witness's grandfather.

Witness, in further evidence, spoke as to the user of the lots by Rowan, who used to slaughter sheep in the kraal. Then came Mrs. Lawrence, who used the lots as her predecessors had done.

B. F. van Niekerk (recalled at the request of Mr. Burton) said that he did not remember seeing Mr. Row, of the Board of Executors, produce a plan of the property at the sale of Rowan's insolvent estate in 1899. He did not hear anything said as to lots 3 and 7 being kept out of the sale.

Colin Graham Botha, clerk in the Civil Commissioner's office, said that the books in the office did not show that quitrent had been paid in respect of any portion of Johannesburg by anyone named Wasserfall.

J. W. Parmen, of the Divisional Council's staff; Johannes Marais, Government land surveyor; Henry Paton Baxter (70 years of age), a resident of Durbanville for 43 years; Thomas Sampson, another old inhabitant; and David Stephanus Malan, agent and valuator, Durbanville, also gave evidence.

Mr. Burton, replying to his lordship, said that Mr. Advocate Giddy had consented to conduct the commission appointed to take the evidence of Mr. Dekenah to-morrow (Saturday).

George Milne Baxter, a valuator to the Municipality, stated he had known the property since he was a small boy. Whether a house was erected on the lots or not, he valued the property. He remembered a kraal on lot 7, and cattle grazing on lot 3. Rowan and Dekenah used the lots. Witness was present at the sale of Rowan's estate, and bid for the property, which he believed at the time included lots 3 and 7. He did not remember seeing a plan at the sale.

Cross-examined: He was not a very keen buyer; he might have seen a diagram produced by Mr. Roos, who was trustee in the estate. The farm was put up as a whole. Previous to 1901 he used to value Mr. Myburgh's lot with the whole farm, but subsequent to that, he heard there was a separate claim to it.

Benjamin Thompson, blacksmith and pound master, stated he had been on and off the property all his life. He remembered Van Niekerk and Dekenah living there. About thirteen or fourteen years ago, he went to live in the house. Rowan allowed him to erect a

kraal about ten yards from the back of the house. Witness remained in the house about twelve months, and during that time Rowan used the front and back erf. Dekenah also kept cattle there.

Cross-examined: He did not exactly know where the lots were, but he knew the front and back of the house. He did not know that other people grazed there.

James Downing, who remembered the place from the time of Mr. Rowan, stated that in 1902 he was about ten yards in front of the house, when Mr. Rowan ordered him off the ground.

Cross-examined: Rowan and he were not very good friends during martial law.

John Phalant, a coloured transport driver, 49 years of age, remembered the Van Niekerks, Louw, Rowan, Lawrence, and King on the property. There was a kraal erected convenient to the house, and on the opposite side wagons were kept. Mr. Rowan kept a racehorse there.

Witness (continuing) stated there was also a small tent lent to a cattle herd in front of the house. Witness was between the gum-trees and the house when Rowan said that he did not wish to see him on his (Rowan's) ground.

Another witness stated that Rowan placed a vegetable garden close to the kraal.

George Montgomery Walker, partner in the firm of Walker and Jacobson, stated in December, 1901, he obtained an option from Mrs. Lawrence on Johannesburg. Originally, he was brought into touch with the property by Mr. Rowan. What he went over with Mr. Rowan included the erven 3 and 7. There was no question if he purchased as to his right of ownership to the lots 3 and 7. Subsequently, King's name was substituted for that of witness as the purchaser of lot 1. If he had thought there would be difficulty about lots 3 and 7, he would not have purchased.

Cross-examined: Rowan mentioned there were some lots to which transfer had not been given, but he did not specify them.

Mr. Searle closed his case.

Mr. Burton read the evidence of Dekenah, taken on commission, which set out that he was the owner of the place Johannesburg more than twenty years ago. He was told by one of the oldest people in Durbanville that the ground on which the thrashing floor and the kraal were erected belonged to Wasserfall. He never troubled which erven belonged to him as long as he got the use of it. Nobody at Johannesburg ever paid a penny of quitrent; he paid the lot. He never thought that the man who built the house would be such a fool as to sell the erf in front of him. Benjamin Thompson never lived with him.

James Robert Madlay said he was 62 years of age. Witness knew Johannesburg for about 50 years, and was at the sale when it was cut up into lots. Wasserfall bought the lots at the front and back of the farmhouse. Witness never remembered a kraal being on erf number 7. He never saw erf number 3 in use, and never saw farm implements or wagons on the erf.

Cross-examined: Witness was away for a number of years, but returned in 1891 or 1892, when he purchased a farm. Witness remembered Van Niekerk coming into occupation of the farm. Witness was at that time living at Cape Town. In order to approach the farmhouse with a cart, it was necessary to drive across lot 3 or leave the cart on the road.

C. P. Rowan said he was one of the former owners of Johannesburg. Witness bought it from Ross. At that time witness knew nothing of lots 3 and 7, but was informed of it some time afterwards, when one of the oldest inhabitants informed him that lots 3 and 7 belonged to Wasserfall. In 1886 or 1887 his mother leased the farm from Dekenah, and at that time there was no kraal on the lots 3 and 7. During his mother's time he did some butchering on the premises, but lots 3 and 7 were not actually used. As far as witness knew, lots Nos. 3 and 7 were not cultivated. Witness always outspanned his wagons on lot No. 1. No sensible man would outspan in front of his door. Witness knew that lot No. 3 did not belong to him. When witness went insolvent in 1899 he informed his trustee that the lots 3 and 7 did not belong to him. Witness was at the sale. Mr. Marais produced a plan in the dining-room.

Cross-examined: Witness went to Mr. Steytler to start the case. Witness knew the plots did not belong to him before he applied for the amended title. He believed he cultivated lots to which he had no title. After the interdict he was not on good terms with the plaintiffs. Witness had not paid the costs of the interdict, but King had not paid the cost of the damage to the furniture.

By Hopley, J.: When he came on the farm he was told by old people that he had no right to the lots in question. No special use was made of No. 7 in his mother's tenancy.

Johannes Roos, Secretary of the Board of Executors, stated that in April, 1899, he was appointed first trustee in the estate of Rowan. The sale took place in May, 1899. Prior to the sale, he found that all the title-deeds were not in order. He had to get a copy of one of the diagrams. Rowan drew witness's attention to two lots, one in front and one at the back of the house, which he could not sell. Those would be evidently lots 3 and 7, which must have been clearly shown at the sale,

according to the plan produced by Mr. Marais. He remembered perfectly well it being thrown in his face that he could not sell the lots in question. Witness explained to Lawrenceson and to the buyers that he could not sell the lot in front and the lot at the back, and that he was only selling the lots to which he had the title. If witness could have disposed of the two lots in question he would easily have got £1,500 for the property.

Cross-examined: The lots in front and at the back of the house were the lots mentioned by the people present at the sale of which there was no transfer. He sold what was described in the transfer deed, and nothing else. According to his advertisement in the "Government Gazette," he did not sell a piece of the property in question. There was no mention of the house in the advertisement of the sale.

Mr. Burton stated that the witness whom he had expected to call from Malmesbury was unable to attend owing to illness. Counsel, therefore, proposed to close his case.

Mr. Walker, of Messrs. Walker and Jacobsohn (the plaintiffs' attorneys), recalled by Mr. Searle, was about to give evidence in regard to a conversation that Rowan had with him in 1901, when

Mr. Burton objected to the evidence, on the ground that it was not material to the question of prescription. The only ground on which it could be admitted was that it bore on the credibility of Mr. Rowan.

Mr. Searle said that that was precisely the reason why he desired to lead this further evidence, inasmuch as the evidence directly affected the credibility of the witness Rowan. Counsel argued that the evidence was admissible.

Mr. Burton contended that the evidence was not relevant to the subject-matter of the action.

Hopley, J., ruled that the evidence was inadmissible. The evidence, he said, came close to the borders of relevancy, but it seemed to him that, as Rowan ceased to be owner in 1899, he could not be held to bind the land by anything he said in 1901.

Mr. Searle said that he would call evidence bearing upon statements made by Rowan when he was owner in 1898.

Mr. Marais, Government land surveyor, was thereupon recalled. He stated that in November, 1898, he was preparing an amended title for Rowan. Witness told Rowan that he had no title to lot 7, but that he had title to lot 3. Rowan seemed to be surprised. Witness subsequently found that he was mistaken in regard to lot 3. Witness denied that Rowan mentioned Grundlingh's name to him. Rowan was anxious to obtain title to the lots

for which he had no transfer, and witness advised him to proceed for title by moving the Supreme Court under the Derelict Lands Act. Witness advised Rowan to instruct an attorney.

Cross-examined: Witness only found that he had made a mistake in regard to lot 3 after King Bros. had become the owners, and that the lot 3 mentioned in the diagram did not refer to Johannesburgtein at all.

This concluded the evidence.

Mr. Searle said that the question in this case was whether prescription of lots 3 and 7 of the farm Johannesburgtein had been proved. He thought there would be no difference of opinion between his learned friend and himself as to the law. Counsel proceeded to quote from Sir Andries Maasdorp and Voet, and also from cases decided in this court. He said that, clearly, it did not matter what knowledge a man had as to the land, the real point in the case was, what had been the user of the land, what had been the occupation? On the facts, counsel submitted that it had been shown beyond all question that for over thirty years the land in dispute had been used as part of the farm by the occupier of the homestead. Coming to the evidence, he urged that, although Mr. Dekenah gave evidence on behalf of the defendant, he was actually on the side of the plaintiff. Mr. Baxter was a bidder, and he heard nothing about lots 3 and 7 not being included in the sale, as stated by Mr. Roos. The impression among the intending purchasers was undoubtedly that the whole of Rowan's property was being auctioned. The rates had always been paid as if the property belonged to the person who owned the farmhouse. Counsel submitted that the plaintiffs had clearly established their right of prescription for thirty years, and that it was entirely an afterthought for Mr. Rowan to say that he did not intend to occupy it as an owner during a considerable portion of his time.

Mr. Burton said the question was whether, as against the registered owner, the plaintiffs had made out their claim. They claimed upon prescription. One thing was clear—that the onus of proof lay heavily upon the plaintiffs. The main element was that the possession of the person who claimed a right of prescription must be upon some just title he believed in. The use made of the property was never of such a nature as to disturb the rightful ownership. It was a curious thing that all these years use was made in a superficial way, and there was nothing to show at what stage it could be said that the owners of that place dealt with the two lots with the object of acquiring the property. Occupation of these lots was part and parcel of the occupation of the farm

Johannesfontein. It was not enough to say that they took whatever were the rights of their predecessors. Did they, as a matter of fact, get the rights of their predecessors? It was clear from the evidence given by Mr. Roos on the point that nothing passed in connection with these two lots. From the evidence of the different owners, it did not appear that they made use of this property with a view of acquiring it.

Mr. Searle having been heard in reply.

Hopley, J.: The farm Johannesburgtein was for some years, at all events in the year 1860, owned by a gentleman named Van der Spuy, who seemed to have been indebted to Mr. Daniel Mills about that time. Van der Spuy had the farm cut into lots for building purposes, and apparently at that sale lots 3 and 7 were purchased by Wasserfall. That was in 1862. Mills bought the house for the Niekerks somewhere about 1866, and in 1868 they built a kraal behind the house, and Benjamin Niekerk states that his father told him that Mills had bought back, with the exception of one lot, all the erven, and that the whole of the land around the house was part of the farm Johannesburgtein. They clearly thought the land was their own, as they used it just as if it was. Then again, in addition to the actual occupation of these erven, Jacob Niekerk paid the rates and taxes, and he did all the acts of *dominium* which the ordinary owner of land would do. That continued with his successor, H. C. Niekerk, who bought in 1873. The land was then sold to Dekenah. Dekenah thought he bought the whole thing, and he also used the lots in exactly the same way as the others. Although someone threw out a hint to him that a couple of lots near the house belonged to Wasserfall, he paid no attention, and continued to use the lots as before. In 1888 Dekenah seemed to become insolvent, and R. M. Ross had to take over this farm. In his (Ross's) time he leased it to tenants, and the tenants made no difference as to how they used these lots. In 1889 Mr. and Mrs. Rowan apparently came to live on the farm, and during that time he could not see that Rowan had abstained from making use of these particular lots. Rowan said in his mother's time there was no kraal, but he did not say that his mother did not use lot 7 just as she chose. Rowan occupied the lots for something like ten years, and during that time I think he made use of the place just as the others had done, and in his case there was evidence that he actually ordered people off lot 3 as though it belonged to himself. I don't think I can quite accept that portion of his evidence, although he may not be telling an untruth, where he says that he was told that the lots belonged to Wasserfall, as there is no

mention of it in his affidavit. In 1899 Rowan was insolvent, and then we have Mr. Roos coming on the scene as trustee of the estate. Mr. Roos says that he explained that he did not hold the title of these erven, and that he was selling the thing as a whole, and, further, that it was thrown in his face that he could not give transfer of these lots. It seems to me that he was simply selling the insolvent's rights, and with that knowledge Mr. Lawrenceeson bought. I don't think Lawrenceeson's purchase in that way would make any difference in the lapse of time necessary for the acquisition by prescription. Up to that time I hold that the various owners from 1866 onward had been using these lots as though they were their own property. Mr. Roos says he said: "I cannot give you transfer," but he does not say: "I cannot pass any rights on to you." Lawrenceeson goes on using this ground just as the others before him, and he also paid the rates and taxes. In 1902 King Bros. bought from him, and they went on in possession until 1904, when they applied under the Derelict Lands Act to get a perfected title. The executor of the Wasserfall estate was discovered, and when the rule came to be affirmed the Court could not, on the facts disclosed, grant the application. Now, my view on the case is that the various owners had been possessing this property perfectly peaceably until 1904, when King Bros. tried to get the property into their own name, and then the Wasserfall Estate for the first time came in. It appears to me that King Bros. acquired these rights in 1902, and they have a right to have the lots 3 and 7 registered in their name. The judgment will be that the plaintiffs are entitled to registration in their names of lots 3 and 7 in the diagram attached to the petition, with costs, and Mr. King to have his personal expenses.

[Plaintiff's Attorneys: Walker and Jacobsen; Defendant's Attorneys: Sauer and Standen.]

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

VAN NIEKERK V. WILL AND OTHERS.	{ 1905. May 8th. " 9th. " 10th. " 12th.
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Title to land — Registration —
Illegal sale.

One F. B., acting under an alleged power of attorney from P. B., had sold certain land to W., and the sale was duly registered and endorsed on the title deeds, and W. thereafter dealt with the land as his own. Subsequently P. B. repudiated the sale, on the ground that he had not been paid the purchase price, and sold it to the plaintiff, who took possession and applied to have it registered in her own name. Her application was refused. A man who alleged that he was W.'s partner, and had formerly held possession of the farm, having become insolvent, and the farm having been attached, the plaintiff obtained an order restraining the Sheriff from dealing with it, claimed it as her own, and alleged that W. had obtained transfer by forging signatures to the declaration of seller and to the power of attorney from P. B. to F. B.

Held, that these disputed signatures were genuine and that W. must, therefore, be regarded as the legal owner of the farm.

This was an action for declaration of rights in respect to a farm known as Leutland's Pan, in the district of Gordonia.

Mr. Close, in opening the case, said from the pleadings it appeared that this action was one in the nature of a claim for declaration of rights in regard to the farm Leutland's Pan. The case arose out of a rule nisi granted in April of last year. (See 14 C.T.R. 424). The defendant Will

resided at Upington, and the farm in question was one granted in the old concession days of the Chief David Vilander, who granted farms to various people, mostly natives. After the annexation of Bechuanaland there was a Land Concession Court held, in which the titles of people having concessions under this old chief were inquired into. If they were found to be valid, quitrent grant was issued, and it appeared that this particular farm was under one of these titles. It was originally granted by the Chief Vilander to one Piet Boch, who was now dead. The latter got his concession ratified by the Concession Court, and the claim was in respect of that property. Prior to the quitrent grant being issued, the defendant Will claimed to have purchased the property. The quitrent grant was issued in October, 1895, and he claimed to have purchased it by virtue of a deed signed in June, 1894, sixteen months before the quitrent grant was issued for Piet Boch. In those days in Bechuanaland, when Will got his title, one would get title either before the Registrar or before a notary. Will claimed to have bought under the old burgher title before a notary. In 1897 the plaintiff approached Piet Boch with a view to purchasing the property, she being wholly unaware of Will's position in the matter. Subsequent to that the necessary documents were obtained, and Boch signed a power containing the usual clause that he had never sold the property to anyone before. Mrs. Van Niekerk put the matter into the hands of her attorney to pass transfer, but no transfer had been passed. To her surprise, in February, 1904, she was served with a notice of attachment of this property, and upon its receipt she became for the first time aware of the allegation that Will was the owner of the property. The notice of attachment was given as the result of a suit brought by the second named defendants, Messrs. Rosenblatt and Wessels, on a certain bond covering the property. Judgment was taken in the High Court of Kimberley. On a previous occasion, when the plaintiff had been in Upington consulting her attorney with regard to transfer, it was ascertained that transfer duty had already been paid by Will. The matter was left in the hands of the attorney, and no further steps were taken prior to the attachment, because of these facts. On it being ascertained that Will had paid transfer duty, Mr. Lennox and plaintiff, who resided on the farm, made inquiries, Lennox, who had once been a partner of Will, having an intimate knowledge of certain transactions. In 1898 he was informed that the signatures of two witnesses to the documents covering the will were forgeries. After much trouble one of these alleged witnesses had been found in England, and had made an

affidavit. The other was dead. Lennox saw Piet Boch, and the attorney assured him (Lennox) that Will could do nothing in face of the forgeries. Being in possession of the farm, plaintiff took no active steps to assert her rights. Considerable amounts of money had been spent on the farm in improvements, and the plaintiff had paid quitrent and taxes and borne all the burden of the liability of the estate, and had never been turned off by Will, who had likewise not claimed rent. However, in 1902 Will wrote to Lennox, saying that he and plaintiff must clear from the farm and pay rent at the rate of £75 per annum. Lennox submitted the demand to his attorney at Upington, and then, in 1904, the following position was developed: Judgment was taken on the bond, and notice of attachment was given to Mrs. Van Niekerk, who promptly applied for an interdict against Will. On that a rule nisi was granted in April, 1904, and on June 1, 1904, it was confirmed, and proceedings were stopped. The case was complicated by the fact that Lennox had been the partner of Will in certain land speculations, but in 1896 there was a quarrel, and although the partnership remained for purposes of account, Lennox cancelled the power of attorney he had given Will for partnership purposes, and no further selling transactions took place between them. The cause of the quarrel was that Will, who was the active business man of the firm, had got a number of farms which had been bought by Lennox on joint account for the partnership. He had them registered in his own name, whilst really they belonged to the partnership. He had bonded them for private debts of his own, and this resulted in an action by Lennox against Will. In 1897 Lennox was made insolvent by Rosenblatt and Wessels, to whom Will owed money, but the trustee of the estate was directed by the creditors to bring an action against Will to compel him to hand over the assets of the partnership estate, which the trustee held Will had dealt with in such manner as to be a breach of trust. The case was heard in the High Court of Griqualand West. The trustee claimed that Leutland's Pan was part of the partnership transactions, and that, therefore, he was entitled to a half-share. The position of the defendants was that Will held that the documents were *bona fide* mortgages for value, and the second named defendants alleged that they acted in a perfectly open manner, and had no knowledge of the alleged forgeries.

Mr. Close (with him Mr. Upington), for plaintiff; Mr. Gardiner (with him Dr. Rainsford), for the first defendant; Mr. P. S. T. Jones, for the second and third defendants (Rosenblatt and Wessels).

On the application of counsel, all witnesses were ordered out of court.

Gordon Krimlick, clerk in the Attorney-General's Office, produced certain records referring to the transaction in 1894 between Boch and Will.

George St. Leger Lennox deposed that from 1892 until 1896 he was in partnership with the defendant Will as speculator in land and stock. Will did the official work—registering, transferring, and so on—and witness and Rautenbach travelled around getting powers of attorney in respect of concessions by the Land Court relative to titles given by David Vilander. Witness got certain land on behalf of the partnership, and found subsequently that Will had registered these properties in his own name, and had bonded them for private debts. They quarrelled on that account, and witness proceeded against Will in the High Court of Griqualand West. He (witness) was made insolvent, and the trustee continued the action, recovering about £800. Certain land, witness claimed, he obtained by judgment of the Court. Prior to 1896 witness had been to Leutland's Pan, where he was now living. His first visit was to inspect the beacons. On a second occasion, he went because he understood Will had bought the farm—the latter told him so. This was in about 1894. On that occasion he saw Piet Boch, with whom he had a conversation.

Counsel was proceeding to question the witness as to what Boch told him, when

Mr. Gardiner objected that it was not evidence.

Mr. Close contended that the evidence was admissible. Boch was dead, and the witness was at that time acting as agent for Will.

In reply to the Court, the witness said the farm was partnership property—if Will had bought it. Will asked witness to go and see what the farm was like.

Maasdorp, J., said that the agency was not established, and unless further evidence were forthcoming, the statement made by Boch to the witness could not be admitted. If the witness's agency extended no further than to go and see what the ground was like, a statement made by Boch to him was not evidence. A casual conversation, such as the witness had with Boch, could not be admitted.

The witness said he afterwards reported to Will that he had met Piet Boch, and that the latter had told him he had not sold the farm to him (Will). Will said he understood that Rautenbach had bought it for him. Witness subsequently went to see Piet Boch, near Keimos, close to Upington; he was accompanied by Mrs. Van Niekerk. Both Boch's brothers were present, George and Fred. There was a trans-

action between Mrs. Van Niekerk and Piet Boch, as a result of which the latter signed the documents (produced)—a declaration for seller and a power to transfer the farm. Mrs. Van Niekerk bought the farm Leutland's Pan from Piet Boch for £50; this price was to be paid by a horse, merchandise, and food to George Boch. George was supporting the father at the time. Witness saw the document of receipt of purchase price signed by George. Mrs. Van Niekerk went on the farm in 1897 or 1898, and she had since occupied it. Later on, witness discovered that the farm had been registered in Will's name, and that he had taken out an attachment. Mrs. Van Niekerk, when she went on the farm, gave her general power of attorney to her local adviser, Tillney. When the real state of affairs was discovered, they took the whole matter out of Tillney's hands. About 1900, Will was military prosecutor at Upington; witness later on held a position on the military headquarters staff, and he came into contact with Will. Will never made any reference to his title to the farm, and never made a demand for rent. Witness saw the documents produced in the Magistrate's clerk's office. The first that witness heard about the farm having been transferred in Will's name was when the writ of attachment was received. He had not previously to that time heard that Will had a bond on the farm. After the suit brought against him by Rautenbach, witness did not authorise Will to send to Miss Van Niekerk a letter instructing her not to admit to the Sheriff that any of the goods belonged to him (witness), and to say that they belonged to him (Will). Will also advised her to be very careful in her conversations with the Sheriff, and to be on her guard against "catch" questions.

Cross-examined by Mr. Gardiner: Witness spoke to Will about the farm not belonging to him (Will), and the latter replied: "See Rautenbach." The money was paid to George Bok, at the Court-house, and he gave Mrs. Van Niekerk a receipt.

The first time witness saw the signature he said it was not genuine.

Alwyn Jacob Rautenbach stated that he did not recognise the document of purchase produced. Witness travelled round in 1892, getting powers of attorney for the land court. Witness and Kennedy never witnessed Piet Bok's signature.

Cross-examined by Mr. Gardiner: Of the signatures now submitted witness admitted the first and last, but the others were dubious.

Mr. Gardiner then tested witness by giving him various Dutch and English phrases to write.

In further cross-examination by Mr. Gardiner, the witness said he had written to Will saying that Bok had been to

him for the money, and that if he did not send money Bok would cancel the sale. Will sent witness £10, which witness paid to the chief, Vilander, for Bok. Vilander gave a receipt.

[Maasdorp, J. (to Mr. Gardiner): How do you say the £50 was paid?]

Mr. Gardiner: £10 was paid in notes, as the witness has stated, and for the remaining £40, Will had a set-off for professional services on behalf of Bok in the Concession Court.

Cross-examination continued: He did not sign any part of the declaration for seller, or of the power of attorney.

Mr. Gardiner pointed out that in these documents the words "Peit" and "Kleinmeir" appeared wrongly spelt, just as they were in the sentences written by the witness since entering the witness-box.

The witness said that in the sentences written in court he spelled the words as they were generally spelled in the district. Continuing under cross-examination, Rautenbach said that, although he was writing to Will after he discovered his name had been forged, he never mentioned the matter to Will.

Witness could not say if the signature produced on the power of attorney was his or not. Witness could not remember Will forwarding a declaration of seller and other documents. If he had his papers he could perhaps ascertain. His papers were at Reitfontein, 180 miles north-west of Upington. On June 30, witness wrote Will that he was trying to get Bok to sign the documents. Fred. Bok refused to sign. Witness only saw Piet Bok twice. Will got Bok's burgher grant confirmed. Witness was living at Upington. Witness had made two or three affidavits for Lennox and Tillney.

Re-examined: Witness told Lennox that he had a refusal of the farm from George Bok. The money was to be paid in three months to Fred. Bok. Witness never paid Fred. Bok more than the £10. Witness repeatedly asked Will to pay, otherwise Bok would cancel the sale. Will sent him £10, and promised to send the rest later. This, however, he never did. Witness never signed any documents with or without Kennedy. Frederick Bok sold his farm to Kennedy.

M. L. Roux said he knew Kennedy, and was well acquainted with his handwriting. The letter produced was received by witness from Kennedy in 1894. Witness was not prepared to swear to the handwriting.

John Hunter Kennedy, farmer, residing at Gordonia, said that on February 23, 1903, he swore an affidavit denying his signature to certain documents. Witness saw Lennox in 1898 or 1899. Witness knew Rautenbach in 1894. Witness and Rautenbach acted as valuers in the estate of Bok, but witness did not think the valuation produced was the one then drawn up. He believed the document

he signed was foolscap. The declaration of seller produced was not drawn up at Klein Meer, nor did witness or Piet Bok sign it. He knew nothing of the power of attorney produced.

Re-examined: Witness never signed a power of attorney authorising Will to act for Andries Bok in the Commission Court. In 1898 or 1899 Lennox came to witness and asked him if he had witnessed a declaration of sale to Will, of Leutland's Pan. Witness said he had not, and swore an affidavit to that effect. Witness did not think Rautenbach forged the signature, and believed Will was too much of a gentleman to do it.

Frederick George Bok said his father was Piet Bok, and his brother was Klein Piet Bok. Klein Piet got the farm, Leutland's Pan, from the chief, Vilander. Witness arranged for the sale to Will, and was to receive the money, but had never seen it. Witness was present when Mrs. Van Niekerk bought the farm from Klein Piet.

Cross-examined: Klein Piet told witness he could sell the farm. Witness had authority from his brother to sell the farm, but did not tell Rautenbach to give the money to Vilander. Witness gave Rautenbach three months in which to pay the money, and asked him three times for the money. Vilander married a sister of witness. Witness told "Scotty" Smith and Mrs. Van Niekerk that the farm was for sale. The money was paid to witness because he had to maintain his father.

Mrs. S. van Niekerk (plaintiff) said she was living on the farm with Lennox, and described at length her negotiation for the purchase.

Mr. Close closed his case.

James Herbert N. Will, attorney, said he practised at Upington from 1891 to 1902. Witness obtained several powers of attorney in 1893, including Bok's. The writing on the document was Rautenbach's, as was the signature. The other signature was, witness believed, that of Kennedy. Witness acted for Piet Bok, and his account against Piet was £150. Rautenbach came to witness, and said he could get Leutland's Pan farm for £50, and witness told him to do so. On June 15, 1897, witness received a written contract. Witness sent £10 on account, but did not send any more, as he was settling some of Rautenbach's debts, and thought Rautenbach could pay Bok.

Witness spoke as to the signatures on certain documents, and the handwriting on the same. Lennox had been his partner, and he gave him notice to quit the farm Leutland's Pan on hearing that he was cutting wood. Witness had the farm surveyed in 1896, and also paid the transfer fees and expenses of getting title. Witness had expended £150 upon the farm. Witness never received any advice from Lennox or Mrs. Van Niekerk that she had purchased the farm. The first intimation

witness had that the signatures were alleged to be forged was when the affidavit in connection with the rule nisi were put in. When witness authorised Rautenbach to buy Lentlands Pan it was understood that Rautenbach was to get a percentage.

Cross-examined, witness never agreed to give Rautenbach 7s. per cent. commission. Witness was anxious to get the power of attorney signed before he put in his bill of costs. When witness wrote to Rautenbach that he would insist upon the sale being carried through, it was probably because there had been a threat of cancellation of the sale. Witness was not trying to force a sale on Bok; he was merely endeavouring to hold him to what he had done. He was not altogether dissatisfied with Fred Bok's signature to the deed of sale, but he wrote to Rautenbach asking him to get Piet's signature. Rautenbach was the man with whom witness was to settle. Rautenbach was repeatedly told about the Bill of costs, but an account was never forwarded. The bill of costs had not yet been taxed, and witness anticipated when it was it would be reduced from £150 to £51. He repeatedly told Rautenbach that an arrangement would have to be made about his bill of costs before the purchase price was paid. The first reference to setting off the costs against payment of the purchase price was made on Monday. He considered he had settled with Rautenbach when he sent him £10, and said that the bill of costs would be set off. There was more due to witness than he had to pay. Witness did all the work for Bok in the Concession Court through Rautenbach. Witness could not understand why Kennedy and Rautenbach should deny their signatures. Witness was perfectly certain Kennedy signed, but also believed that Kennedy had forgotten about it. The rule nisi was granted last year.

By Mr. Jones: If the bond had been set aside in 1896 he would have been in a better financial position than at present.

Further cross-examined: If he could recover all that was outstanding to him he would be solvent at present.

By Mr. Gardiner: He drew up the inventory as he was appointed executor in the estate of Vilander. He was perfectly certain he paid the quitrents.

Herman Rosenblatt, attorney and notary, of Vryburg, said formerly he was in partnership with a Mr. Weessels, who was also interested in the decision with regard to the bond. In 1895, Concession Courts, to go into titles, etc., sat at British Bechuanaland. According to the Government proclamation, transfers of unsurveyed property could take place by notarial deed. That would account for the transfer to Will, and the bond being by notarial deed. On the second bond on Lentlands Pan, witness had obtained judgment against Will. The amount of the writ issued against Will

was £1,491 6s. 1d., with interest. The transfer to Will went through witness's office on a power of attorney. He would have no knowledge whether the signatures were forgeries or not. The properties attached realised about £1,500, leaving £1,500 short. In 1897 or 1898, Croxford came to witness's office and saw the mortgage and the transfer deed.

By Mr. Gardiner: He thought that the quitrent would run from the time when the country was annexed. He had no doubt that the signature on the declaration of seller was that of Rautenbach.

Cross-examined by Mr. Close: If he had known that the signatures were not genuine, he would not have passed transfer. Croxford told him that he had purchased the property for Mrs. Van Niekerk, and witness told him that Wills had already purchased it, and that he (witness) had a bond on it. As far as this case was concerned, the reserve of £3,000 was too high on the other property.

By Mr. Jones: If Lentlands Pan were withdrawn from the bonds, witness would suffer financially.

Mr. Gardiner called

Charles Matthews, clerk in the Surveyor-General's Office, who produced the claim made by Piet Bok for the farm Lentlands Pan.

Cross-examined: The Imperial Government only claimed quitrent from the date of the judgments. This closed the evidence.

Mr. Close contended that the arrangement in 1897 was a good one. In the case of Will, having got a power of attorney, signed with a X by Bok, it was possible for him to get all the other papers without the native knowing anything. He submitted that a solemn declaration, duly signed and witnessed, must be before the notary before any transfer could be given. If the documents in the case were held to be good, and that there was a sale in 1894, the case of the plaintiff fell to the ground, but the plaintiff took the step of alleging that the documents were forgeries committed at the instigation of the first defendant. The witnesses Rautenbach and Kennedy denied their signatures, or that they had ever seen the documents. There was no allegation against Rautenbach, except that he drank, to weaken his evidence. Then there was the evidence of Kennedy, and he was the one witness more clear than any other as to what he did and did not do. Four signatures were shown him, and he immediately identified two, which on examination proved to be genuine. A third, of which he said, "This I don't know, but I don't think it is mine," turned out to be the signature to the power of attorney.

Maasdorp, J., asked what Mr. Close had to say as to the signature on the inventory, because Kennedy denied it,

Mr. Close said that in the case of the power of attorney Mr. Kennedy not only denied the signature, but said Piet Bok was not at the place. As to the inventory, Kennedy was not so clear.

In further reply to the Court, Mr. Close said that the deed of sale produced, and signed by Fred Bok, came as a great surprise to them. He did not dispute it being a valid sale. Kennedy admitted having signed an inventory, but not the one produced.

Maasdorp, J., said the document was drawn up by Rautenbach, and he said the signature was his, and that Kennedy also signed. Was it alleged that the signature of Kennedy was a forgery?

Mr. Close said Kennedy asserted it was not, and he accepted Kennedy's statement, and would urge upon the Court that Kennedy's evidence was absolutely reliable, and that he had not been proved incorrect in one particular. Assuming Kennedy's evidence to be correct, the signature on the power of attorney was not that of Kennedy. Piet Bok was not at Klein Meer on the date alleged, and Kennedy and Rautenbach never signed together to Piet Bok's signature, and therefore the signatures were forgeries. It would be remembered that Will admitted the matter lay between himself and Rautenbach. Taking the question of motive, there was nothing alleged against Rautenbach. Will, however, had started the system of touting for business, and thus showing no respect for his profession. Then there was the attempt to defraud Van Niekerk. There were other matters of a fraudulent nature. He, therefore, submitted that when it came to a question between Rautenbach and Will, the version of Kennedy and Rautenbach was correct, and that Bok never did sign at Klein Meer, and that the signatures were not there. The arrangement of 1897 was absolutely in favour of the plaintiff, if there was nothing previous, and he submitted there was not.

Mr. Gardiner said the first point he would urge was that a sale by Bok to Will was clearly proved, yet the plaintiff came into court and said there was not a sale. The attitude, however, taken up now appeared to be that there was a sale between Frederick Bok and Will, but that Frederick Bok had no power to sell. This was directly contradicted by Frederick Bok, who said he had his brother's authority to sell. Frederick Bok said he sold the farm, and Piet Bok ratified the sale. The fact that plaintiff waited ten years threw no doubt on her claim. Lennon and Mrs. Van Niekerk found these forged documents in 1898, and that the transfer duty was paid. However, they wait until Piet Bok died in 1901, and yet they wait until now before bringing this case. Rautenbach's evidence, he submitted, was not to be relied upon. He could not identify his signatures unless he

saw the documents. Rautenbach had a bad memory, to say the least of it. Rautenbach could not have written the signature of Kennedy. The probability was that Kennedy's signature was a genuine one. What stronger proof could there be that Kennedy had signed the inventory in question than Kennedy's own evidence? Was it likely that such an old document as the power of attorney given by Andries Bok would be forged by Will? Was it likely again that a witness would ask to look into the contents of a will before he signed it? If the Court once found that Kennedy's signature was a genuine one, then it must be held that the mark was made by Piet Bok. On the point of forgery there was no proof that Will instigated the forgery. Counsel submitted that the plaintiff had no ground to upset the transfer.

Maasdorp, J.: It appears from the evidence in this case that Vilander, who was a recognised chief of a portion of Bechuanaland, which was subsequently annexed and became British territory, made a grant of the farm called Leutland's Pan to a man called Piet Bok. In 1893 a Land Court was appointed to inquire into the claims to title to land in that portion of the country, and on December 7, 1893, this Land Court confirmed the grant by Vilander to Piet Bok, and the necessary orders were subsequently issued by this Land Court for the purpose of effecting transfer to whoever might be entitled upon that grant. After the confirmation of this title by the Land Court many of these titles came into the market, and the defendant Will in this case tried to obtain as many of these as he could secure. On the 15th June, 1894, a sale was effected by a man called Frederick Bok, as the agent of Piet Bok, of this farm Leutland's Pan, to Will, for the sum of £50. Subsequent to that further proceedings were taken for the purpose of effecting transfer to Will, and it is alleged that on the 6th of November, 1894, a power of attorney was obtained from Piet Bok to effect this transfer, and that on the same day a declaration of seller was also made by Piet Bok for that purpose. Will then paid the necessary transfer dues, and appeared before a notary public for the purpose of having transfer executed that was done on June 27, 1895. After the transfer was executed before the notary public it was despatched to the Registrar of Deeds at Vryburg, and there duly registered, and upon the title deeds being put in evidence the fact that the registration had taken place was endorsed. The title deeds at that date were duly registered in the name of Will, and two bonds were passed over the property, one for a debt due to the second defendant, Rosenblatt, and the other to some other creditor. On the 21st October, 1895, a

grant which it was necessary to obtain from the Government upon the document which had already been executed at Vryburg, was made to Piet Bok, and that grant was also duly registered in the Register of Deeds Office with the endorsement upon it of the registration in favour of Will, which had been previously effected. Now, if all these documents were genuine, and all these transactions which had taken place were legal, Will would now be in possession of a legal title to the ground. After the registration of the title it appears that correspondence proceeded between Will on the one part and Lennox, who now appears as interested on behalf of the plaintiff in the case on the other part, which proves that up to April, 1896, Will was dealing with the property as his own, and had requested Lennox to see to certain improvements on the farm, and Lennox had evidently, from what one can judge by the correspondence, undertaken to do what Will had requested him to do on the farm. Consequently up to April, 1896, Lennox knew of the claim to the property, and that Will intended to deal with it as his own. Leaving the matter there, I shall endeavour to ascertain the position taken up by the plaintiff in this matter to give her a *locus standi* to question Will's title it appears that on March 4, 1897, it was ascertained that Frederick Bok was prepared to dispose of this property on behalf of his brother Piet Bok on the ground that Piet Bok had repudiated the sale to Will owing to not having received the purchase money. The purchase was then made from Piet Bok by the plaintiff, and the necessary contract entered into. The plaintiff thereupon set about obtaining the registration of the property in his name, but it was then discovered that the property was already registered in the name of Will and had been mortgaged. Nothing further seems to have been done, but in 1898 Lennox and the plaintiff took possession of the farm and occupied it. It was necessary to ascertain how it was that Will holding transfer on the one side and Mrs. Van Niekerk being in possession on the other never came into collision. Will alleges that he knew in 1898 that Lennox was in possession, but did not know of any claim by Mrs. Van Niekerk, and this is supported by a letter, written by Will in 1902, giving Lennox orders to quit, and pay for damages done and rent. Will alleges that he thought Lennox had taken possession under an idea that he had some right under a partnership. In 1904 the bond holders sued Will, and obtained judgment against him, and Leutland's Pan was declared executable, and the Sheriff proceeded to deal with it under the writ of execution. Thereupon the

plaintiff came forward and obtained an interdict to restrain the sale of the property upon a claim which she then set up by virtue of the sale which she had entered into with Piet Bok. The claim of plaintiff then first came to the knowledge of Will, and it was based upon the ground that the declaration of purchaser and power of attorney, upon the strength of which Will had obtained transfer of the property were forgeries, and the allegations to that effect depend wholly upon the evidence then adduced by Rautenbach and Kennedy. An affidavit was obtained from Rautenbach, in which he alleged that his signature as a witness to both the declaration of seller and power of attorney was a forgery, and that at the time of the execution of these documents he had not been at the place Klein Meer. The defendant became aware that he would have to meet that allegation, and it seemed that amongst certain documents which he then had in his possession, and to which Rautenbach had also been a party, he discovered an inventory in the estate of J. Vilander, and upon that document appears the signature of Rautenbach as one of the appraisers in an appraisalment which took place upon the sixth day of November, 1894. That document was placed in the hands of Rautenbach, who admitted that it was a genuine document, and that the appraisalment took place at Groot Meer on November 6, 1894. Here a very material point in the plaintiff's case was disposed of by proof that on the sixth November, as appears on a document signed by himself, and admitted in the evidence, Rautenbach was at Great Meer, and that upon his way there he passed by Klein Meer. Nevertheless, Rautenbach persists in saying that the signatures to the documents are not his. The question arises then: is there any evidence as to how Will became possessed of these documents? In referring to the correspondence I find a letter of the 11th July, 1894, which is written by Will to Rautenbach, telling him that he encloses the power in question, and asking him to kindly get it signed. Mr. Will has said that the documents there referred to were the documents relating to the purchase of the farm from Bok on the 30th July. The answer was received from Rautenbach "I have received your favours of the 20th June and the 11th instant. I will try to get Bok to sign the transfers as soon as possible." Here the documents sent are directly connected with Piet Bok. Will states the documents he received were the documents in question, that is the power of attorney and the declaration of seller.

We have it that Rautenbach did sign certain documents as a witness, and the question is whether the denial of the signatures to these documents satisfy me

that the documents in question are documents other than those. As to the handwriting there can be no doubt that the signature was the signature of Rautenbach. The spelling of some of the documents is somewhat peculiar, and I am satisfied that he also filled in certain words in the document. We have it therefore that the signature of Rautengach is perfectly genuine. I do not doubt Kennedy's veracity, as he has signed so many documents; but I believe on the evidence that the handwriting is that of Kennedy. I am satisfied that the documents were witnessed by Rautenbach and Kennedy, and that the signature attested by them is that of Piet Bok. I come to the conclusion that these documents are genuine, and that the plaintiff has failed to impeach his transfer in a legal and regular manner is now entitled to be regarded as the owner of that property. The prayer of the declaration is to the effect that the transfer of and registration of Will's title may be declared null and void, and there is a prayer with respect to the other defendants that their bonds may be declared null and void. Upon the facts I have found in this case, judgment must be given for both the defendants with costs, the defendant Will declared a necessary witness.

[Attorneys for Plaintiff: Fairbridge, Arderne and Lawton; Attorneys for Defendants: Van Zyl and Buisinne.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

GENERAL MOTION.

JOSEPH V. HOFFMAN AND } 1905.
GOTTLIEB. } May 8th.

Mr. Burton moved as a matter of urgency on notice of motion for an order compelling the respondents to allow the applicant free and undisturbed access to the premises of Gottlieb, the Dominion Tobacco Co., to remove certain machinery at any time during the current month. The machinery had been hired to Hoffman, and that respondent, after asking for several postponements, admitted that he was unable to meet the instalments. At the request of the applicant, the respondent Gottlieb allowed him to store the machinery for a month at a rental of £10. Hoffman's estate was surrendered on the 2nd May, and on the 5th May the applicants' workmen were ordered out of the premises by both respondents.

Mr. Swift appeared on behalf of an execution creditor, to ask for a short postponement, in order that inquiry might be made into the matter. He submitted if Mr. Joseph was entitled to the machinery, he could suffer very little real damage by a short delay.

Order granted as prayed, with costs against the respondents.

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon Sir JOHN BUCHANAN.]

RUTTER V. ASHENDEN. } 1905.
 } May 10th.

Patent—Infringement—Specification—Repeal.

In December, 1902, A. deposited a specification describing an invention for an acetylene generator; in March, 1903, R. deposited a specification describing an invention for a machine of the same class; in April, 1903, A. deposited an amended specification of his machine; letters patent were granted to A., and subsequently to R.

Held, that R. could not succeed in an action for infringement against A. in respect of machines made and sold by A., which were covered by R.'s specification and by A.'s amended specification, but not by A.'s first specification.

Held further, that R.'s machine was covered by A.'s previous patent and that R. was not the first inventor, and consequently that R.'s subsequent letters patent should be repealed.

This was an action brought by John Robert Rutter, tin-smith and gas-fitter, of Cape Town, against Percy Ashenden, civil engineer, of Rondebosch, for an interdict restraining him from selling and offering for sale a certain acetylene gas-making machine and for £500 damages.

The plaintiff, in his declaration, said that he was the first and true inventor of certain apparatus for generating acetylene gas, and that on the 21st March, 1903, he was granted letters patent running for fourteen years. Since the granting of these letters patent, and up to the commencement of the action, the defendant had infringed the rights of the plaintiff thereunder by unlawfully selling and offering for sale articles of the nature and description protected by the said letters patent, and, while knowing the premises, he had continued so to do. Plaintiff had lost the profits which he would have made from the sale, and manufacture of those articles, and sustained damages in the sum of £500. He claimed an interdict restraining the defendant from continuing to infringe his patent rights, and also damages in the sum of £500.

The defendant, in his plea, said that he was the first and true inventor of a certain new manufacture and invention, to wit, certain apparatus for making acetylene gas, and that, on the 31st December, 1902, letters patent were duly issued to him according to law. The articles which the defendant sold and offered for sale, and which were complained of in the declaration, were all articles protected by that patent. He said, further, that on the 21st March, 1903, the plaintiff wrongfully and unlawfully, under cover of the Act in that behalf existing, caused the letters patent described in paragraph 3 of the declaration to be issued, and an entry of the same to be made in the Register of Patents. The said letters were invalid owing to the letters patent granted to the defendant, and the said entry was consequently invalid. Subject to the above, the defendant denied paragraphs 3, 4, and 5 of the declaration, and prayed that the claim may be dismissed, with costs. In reconvention, he claimed an order repealing the letters patent granted to the plaintiff, and directing that the entry in the Register of Patents be expunged.

Mr. Upington (with him Mr. Russell) was for the plaintiff; Sir H. Juta, K.C. (with him Mr. Douglas Buchanan), was for the defendant.

Mr. Upington said he took it that the question between the plaintiff and defendant was, were the letters patent issued to the plaintiff valid, and, if so, was the machine sold by the defendant an infringement of that patent? The schedule attached to the declaration showed that defendant had sold to J. Cross for £6 an acetylene gas generator, which the plaintiff said was an infringement of his patent.

[Buchanan, A.C.J.: The first issue is, has the defendant done anything which he has not, under the letters patent granted to him, the right to do?]

Mr. Upington said that the whole case would turn upon the device at the foot of the hopper for the purpose of feed-

ing the calcium carbide into the water below. The plaintiff said that the device in the defendant's machines was an infringement of his patent, and the question would be whether the defendant, under the letters patent granted to him, was not departing from the specification. Counsel, by the aid of models, explained the system of working, and the points of similarity between the feeders in the respective machines.

Carl Brown, clerk in the Colonial Secretary's office, produced the specifications of the plaintiff's and defendant's patents.

John Robert Rutter (the plaintiff) said he was a plumber and gasfitter, carrying on business at Castle-street, Cape Town. He was the limelight operator at the Opera House, and had been employed in that position since the days of Captain Roebuck. Witness had made a special study of gas lighting, and had experimented in the manufacture of acetylene gas. He had his first machine at work in 1902, when the machine was installed in his house. He had known the defendant between three and four years; defendant saw the machine at work in his (witness's) shop in 1903. That was the machine substantially, as witness patented it. Witness had done work for the defendant, and had constructed some portions of his machine before he (defendant) got his patent. Witness did not construct the internal parts, but he saw them, and defendant asked him not to mention the matter to anybody. Defendant was often at witness's shop while he was experimenting. Witness lodged his specification with the Attorney-General on March 21, 1903. Ashenden laid an objection on June 9; witness knew that Ashenden's objection was heard a few days later. Letters patent were issued to witness on September 21, 1903, dating back to March 21. The machines that witness was now selling were identical with the machine that he showed to the Attorney-General when he made his application, and corresponded with the specification. The machine in Court was produced to him by one Cross; he had examined it, and found that so far as the feeding of the carbide was concerned it was identical with his own, except that the weight at the end of the lever was loose, while in his own machine it was fixed. The action in both machines was exactly the same. Witness's complaint was wholly directed to the infringement of the method of feeding the water with carbide. Witness had been harmed in his business; people had told him that they could not give him orders, because the machine was Ashenden's patent.

Cross-examined by Sir H. Juta: The defendant saw witness's machine working in May, 1902, at Rondebosch. Witness did not know that the defendant had a machine working at the Public Works

Department in July, 1902. Witness did not get his two halves from Ashenden's specifications.

In further cross-examination, the witness said the second valve was the cock on the top of the machine, and when that was opened the air escaped, and the gasometer sunk until the lever rested on the flange, and in doing so allowed a small quantity of carbide to escape.

Re-examined: The form of gasometer used was the one in ordinary use. Witness did not claim any patent on the cock, but claimed for the automatic valve and the general simplicity. He had not stolen the idea of his machine from Mr. Ashenden. It was "more like the other way."

By the Court: Witness had sold about 40 of the machines in the last two years, ranging in price from £6 to £120. Witness made about 20 per cent.

Mr. Cairncross, Engineer, also gave evidence. He said that there was only one valve. There had apparently been an error in drawing the specification, and the valve I was really the valve F.

Cross-examined: Witness did not agree with Mr. Rutter that valve I was the cock outside the holder. If the gasometer was very large, it might be necessary to have appliances to open the valve F.

George Lacey Good, engineer, said he had examined the specification and plans of the plaintiff and defendant in the case. Witness had particularly examined defendant's specification, and did not think Rutter's machine could be constructed from it.

Cross-examined: Witness considered that it was possible to construct Rutter's apparatus from the specification and plans produced by plaintiff.

Mr. Uppington closed his case.

Professor Henry Payne, Professor of Engineering at the South African College, said he had been through the complete specification of the defendant, and also the plaintiff. Witness could read no sense in the patent of the plaintiff as regards the two valves, nor was there any sense in the words "fourth end off a lever."

Cross-examined: Witness considered the two valves in defendant's specification was a vital defect.

Paul Daniel Hahn, Lecturer on Chemistry at the South African College, said he had considerable experience in acetylene gas plant, and, having examined plaintiff's specification, was distinctly of opinion that the person who drew out the specification intended there should be two valves.

H. C. Geering, mechanical engineer, said he saw a machine at work at Mr. Ashenden's house in May, 1902. The valve was actuated in the same manner as defendant's.

Percy Ashenden, defendant, said Rutter never showed him a generator with a valve, but showed him one without

a valve, and witness now had it in his possession. Witness was certain that he sent in the amended specification in January, 1903, to his agents.

Sir H. Juta closed his case, and counsel were heard in argument on the facts.

Buchanan, A.C.J., in giving judgment, said: The plaintiff obtained letters patent, dated 21st March, 1903, securing to him rights for what was alleged by him to be an invention for automatic feeding of carbide of calcium to a machine for generating acetylene gas. It was contended for the defence that plaintiff's specification of his invention had been drawn up in such an irregular and incomplete manner that no practical workman could ascertain the object of the patent, or manufacture a machine from the description given. Expert evidence has been called on both sides, and as is not unusual, the opinions of the experts incline to the side which engaged it. I, however, agree with the evidence led for plaintiff that from the specifications and diagrams filed, a practical workman could, even though a theoretical expert could not, construct a machine. We must, therefore, deal with this case on the merits. The defendant justifies his conduct on the ground that he also had secured letters patent at an earlier date than those of the plaintiff. There is no claim that the defendant's patent is invalid, but only that his specifications do not cover the device patented by plaintiff, and it is on this question that the case mainly depends. The defendant filed his first specification and acquired a provisional protection of his design on the 31st December, 1902. This specification was for an automatic feeder, which was actuated by means of a wheel and float. The plaintiff filed his specification and designs on the 21st March, 1903, showing an automatic feeder actuated by means of a lever and weight, a certainly more simple device than the one described by defendant. The defendant filed what is marked as a complete specification of his invention on the 13th April, 1903, and this second specification covers both devices. On the first blush it appeared that letters patent of December, 1902, could not cover an invention disclosed by the defendant only in the April following. But I find that although letters patent are issued within six months of the deposit of the specifications, by the 13th section of the Patents Act when issued they must be sealed and bear date as of the day of the deposit of the specifications. As a fact the defendant's patent was issued on the 30th June, and the plaintiff's in the following September, so that when the defendant obtained his patent his complete specification had been deposited. The letters patent do not describe the invention, this must be determined by reference to the specifications. The

defendant had a model of his machine in work, which was actuated by a weight and lever before he filed his first specification, and at first it seemed strange he should not have included this device in any specification until after the plaintiff had deposited his specification; but it would seem from the 20th section of the Act that the specifications deposited may not be inspected by the public until after letters patent are granted, so that neither party could have had access to the other's specifications. The defendant stated he handed the draft of his complete specification to his attorney to be filed within a day or two of depositing the first specification, and that he left town shortly after, and it was only on his return to town that his attorney obtained his signature to a clean copy, which was then deposited, and that this was done in ignorance of the terms of plaintiff's specification. In both specifications the object in view was to regulate automatically the feeding of the carbide into the generator, the difference of the two methods being in the mechanism. The principle of weight and lever is common to both the plaintiff's and the defendant's designs, though perhaps the plaintiff's is the more neatly designed and executed. But the idea is the same, and does not constitute a different invention. By the 4th section of the Act the Attorney-General may during the term of six months, for which the provisional protection is granted, and before the issue of the letters patent, allow either the original specification to be amended or another and sufficient specification to be deposited in lieu thereof, and every such amended new specification shall have the same force, effect and operation as if it had been originally deposited in its amended state. In the absence of any fraud therefore the defendant is entitled to refer to his complete specification as interpreting his patent, and as his letters are prior to those granted to the plaintiff for the same invention, he must be held to be justified in selling the machines of which the plaintiff complains. Judgment will therefore be given in convention for the defendant. As to the claim in reconvention, both on the ground that the plaintiff is not the first inventor and also that the defendant had obtained prior letters patent, which letters still stand and are not sought to be set aside, an order will be granted for the cancellation of the subsequent letters patent granted to the plaintiff. The plaintiff must pay the costs of this action.

Judgment accordingly for the defendant, with costs.

[Plaintiff's Attorney: A. W. Steer; Defendant's Attorneys: Reid and Nephew.]

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

ADMISSION. { 1905.
{ May 11th.

Upon the application of Mr. J. E. R. de Villiers, A. R. Fleischack was sworn as a translator to the Court.

PROVISIONAL ROLL.

SENIOR V. ATTWOOD.

Mr. Douglas Buchanan applied for provisional sentence on a mortgage bond of £800, together with interest, and that the property specially hypothecated be declared executable.

Granted.

S.A. MUTUAL V. NOESJIE.

Mr. Douglas Buchanan applied for provisional sentence for interest on a bond for £800, amounting to £24.

Granted.

ZENDERBERG AND DUNCAN V. JACOBS.

Mr. Douglas Buchanan applied for provisional sentence on promissory notes for £44 4s. 10d. and £38 16s. 6d., also for judgment on amounts owing of £2 1s. 2d., £3 11s. 3d., £27 7s. 4d.

Buchanan, A.C.J., said that defendant had until the afternoon to enter appearance on those latter amounts. There would be judgment for the promissory notes, the other amounts to stand over.

SLUITER V. VAN ZYL.

Mr. Swift applied for provisional sentence for £303 0s. 5d.

Granted.

BOARD OF EXECUTORS V. VAN ZYL.

Mr. Watermeyer applied for provisional sentence on a mortgage bond for £288.

Granted

SCHWEYES V. FRIEDGOOD.

Mr. Douglas Buchanan applied for provisional sentence on a mortgage bond for £2,000, with costs, less £18 18s. paid, also that the property be declared executable.

Granted.

OHLSSON'S BREWERIES V. BRADSHAW.

Mr. Struben applied for provisional sentence for amount awarded under a judgment.

An affidavit was filed by the defendant to the effect that he had been charged for beer he had not received.

Buchanan, A.C.J., said that as defendant was resident in the Transvaal he did not see what jurisdiction the Court had. The case of Benjamin settled the matter.

The case was adjourned until Saturday to give plaintiff time to file affidavits.

EATON AND CO. V. VAN ZYL.

Mr. Sutton applied for a provisional order of sequestration of defendant's estate to be made absolute.

Order granted.

ILLIQUID ROLL.

CAPE TIMES, LTD V. GARDI- { 1905.
NER AND EASTON. { May 11th.

Mr. McGregor applied for judgment, under Rule 329d, for an amount due for advertising.

Application granted.

STOOLSTAINER AND CO. V. TUCHTEN.

Mr. Swift applied for judgment for an amount for goods delivered, or a statement of account; also for an order calling upon the defendant to render to the plaintiffs, as agents for certain firms, an account in respect of various consignments of goods. Counsel read affidavits on behalf of the plaintiffs, in which they stated that they had always communicated with defendant at Cape Town, and that they did not believe that defendant was now domiciled in Johannesburg.

Judgment for plaintiff as prayed.

COLONIAL GOVERNMENT V. SCHWARTZ.

Mr. Nightingale applied for provisional order on two mortgage bonds for £1,360 and £582, with interest, and that the property specially hypothecated be declared executable.

Application granted.

VAN HOLT V. PORTER.

Mr. De Waal applied for judgment for an amount received by Porter for land sold.

Application granted.

HALL V. KAROO BORING CO.

Mr. Uppington applied, under Rule 319, for judgment for £121 19s. 1d. Judgment accordingly.

REHABILITATION.

Mr. P. S. T. Jones applied for the rehabilitation of Frederick Joseph Wells. The affidavit was to the effect that the insolvency took place ten years ago, and there had been a full and fair surrender. The applicant was a grocer. The trustee reported that the books were not satisfactory, but the applicant had given every assistance in liquidation.

Application granted.

GENERAL MOTIONS.

BOTHA V. PHILLIPS. { 1905.
{ May 11th.

This was an application for reasonable security for costs in an appeal noted by Botha. The affidavit of Botha stated that he had good ground for his appeal, and would be prepared to pay any costs awarded by the Supreme Court. Mr. Close was for the applicant (Phillips) and Mr. Gutsche was for the respondent.

Buchanan, A.C.J., said it was neither the custom nor the law of this country that persons should be required to give security because they were poor. The application must be refused.

LAWSON V. RESIDENT MAGISTRATE, CAPE.

This was an application for an order calling on the respondent to show cause why a certain memorial in connection with an application for a wine and spirit licence should not be given up. Affidavits had, however, been filed, and it appeared that proceedings were being taken against the person who collected the signatures. The memorial had been impounded in connection with that case, and under the circumstances the applicant did not intend to proceed with the application.

Mr. Uppington was for the applicant and Mr. Nightingale was for the respondent.

Application withdrawn accordingly.

HUNTER V. HEENEN.

This was an application for an order for compulsory liquidation of a certain partnership. From the petition it appeared that in 1904 applicant saw an advertisement for a partner with £400, and offering a

salary of £20 per month. In interviews defendant stated that he was making £40 per month, and that it could be increased. The business was the Eclipse Aerated Water Factory, Woodstock. Respondent said that the debts were about £400, and that the accounts outstanding were more than that. Applicant therefore paid £400 for a one-half share in the business. Applicant joined the business in December, 1904. Respondent shortly afterwards drew money from the bank to the amount of £75, and in consequence applicant could not draw his salary at the end of December. Applicant had only received £42 as salary for four months. Believing that the business was being run at a loss, applicant decided to terminate the partnership on March 15. In reply the respondent said if applicant wished to dissolve the partnership he must arrange for the sale of his portion, as respondent did not wish to buy it. Applicant asked for an order for liquidation, and for the appointment of a liquidator. The answering affidavits of respondent and Mr. Coats stated that the business was not run at a loss to their knowledge, and that the £400 put in by applicant was much less than half the amount paid into the business.

Mr. Douglas Buchanan was for the applicant, and Mr. Upington was for the respondent.

Counsel contended that the applicant must give reasonable notice of dissolution. If, however, the Court decided to order liquidation, then he was instructed to say that applicant objected to the appointment of Mr. Close as liquidator, and suggested a substitute in Mr. Maynard Nash.

An order was made liquidating the estate and appointing Mr. Maynard Nash as Receiver to the business, and to distribute the assets. The date of dissolution of partnership to be March 15 last.

JOHNSON V. CHIAPPINI.

Mr. Burton was for the respondent, and stated there was no appearance on the other side. Johnson obtained a rule nisi restraining respondent from dealing with a certain horse. Counsel now applied that the rule be discharged. Rule nisi discharged accordingly.

Ex parte THE RECEIVERS GRAND JUNCTION RAILWAYS.

Mr. Upington applied for an order authorising and empowering the Receivers to indemnify A. F. Hills from costs incurred in defending an appeal of the Colonial Government against a judgment. The action of Hills was for the benefit of the Receivers and the creditors.

Application was granted.

[Before the Hon. Mr. Justice MAASDORP.]

UMHLEBE V. UMHLEBE.

This was an application to make absolute a rule nisi restraining the executor in the estate of the late Zaccariah Umhlebe from dealing with certain property in Glen Grey, pending an action to be brought by the applicant.

Mr. Sutton was for the applicant, and Mr. Burton for the respondent.

Counsel having been heard in argument,

Maasdorp, J., said that with the information before the Court, the applicant was not entitled to the extraordinary remedy of an interdict, and refused the application, with costs.

PALMER V. CAPE COLD STORAGE CO.

This was an application on notice of motion, calling on the respondent, who was plaintiff, to show cause why a judgment given on 18th April, 1905, should not be set aside, and the defendants allowed to purge their default. No notice of set down of trial was given to the defendants' attorneys, who were defending the case on a question of costs, the plaintiff refusing to give any proof of his ownership of a certain horse.

Mr. Upington was for the applicants (defendants in the case), and Dr. Rainsford was for the respondent.

Maasdorp, J., said there was a bona fide intention on the part of the defendant to appear at the trial to defend the action, mainly if not wholly on the question of costs. That intention was not carried out through some mishap to the service of notice of trial. The judgment would be set aside, and leave granted to the applicant to purge his default, and to take the evidence of one Harry Saunders, on commission, Mr. Stapleton, of Graham's Town, appointed to act as commissioner, the question of costs to stand over.

ROBERTS V. ESTATE ROBERTS.

This was an application to have a certain order of Court restraining the applicant (the defendant in a former action), from disposing of certain goods attached by the Court discharged.

Mr. Roux was for the applicant, and Mr. Gardiner was for the respondent.

Order discharged with costs, including the costs of the former application.

Ex parte CHADDOCK.

Dr. Rainsford moved for leave to assume the death of the petitioner's husband, Edward T. Chaddock, and her

son, Robert J. Chaddock, and for an order authorising the Master to issue letters of administration. The petitioner's husband and son were respectively master and engineer of the S.S. Dee, which was wrecked in February last off the Albatross Rock.

Maasdorp, J., said this difficulty was that the application was somewhat premature.

These people might have been picked up by a passing ship. A rule nisi would be granted, calling on all concerned to show cause by the 1st August why the death notice should not be accepted by the Master, and letters of administration issued, one publication in the "Cape Times" and one in the "Cape Argus."

Postea (August 1). Rule made absolute.

Ex parte ESTATE VAN DER BERG.

Mr. Alexander moved for leave to the petitioner, who is executrix in the estate of her late husband, to transfer certain property which she bought out of the estate at a public auction. There was evidence that the price was satisfactory. Granted.

WHITE, RYAN AND CO. V. FLORIDA.

Mr. Lewis applied for leave to attach certain lots of ground at Retreat *ad fundandam jurisdictionem* against the defendant in an action to recover £50 5s. 11d., which the respondent owed to the applicants for goods sold and delivered. The respondent was last heard of in Ontario.

Order granted with leave to sue by edictal citation, personal service if possible, failing which one publication in the "Gazette" and one in a newspaper circulating in Freeborn, Ontario, and a copy of the citation to be addressed care of the Postmaster, Freeborn, Ontario.

Ex parte LIEBENBERG.

Mr. Du Toit moved for leave to the petitioners to transfer a certain share of 1,500 morgen in a farm on the payment of £900 into the African Mutual Trust Company or any other institution ordered by the Court.

Order granted.

Ex parte LOUW.

Mr. P. S. T. Jones moved for an order consenting on behalf of the minors to the partition of certain property.

Granted.

Ex parte LOYAL OAK LODGE.

Mr. Sutton moved for an order authorising the Registrar of Deeds to pass transfer of certain property at Uitenhage.

Granted.

Ex parte EXECUTORS ESTATE BLACK.

Mr. Watermeyer moved for an order authorising certain money, to the extent of £700 which had been advanced to one of the heirs to be repaid out of this portion of the estate.

Granted.

SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

GENERAL MOTION.

OHLSSON'S BREWERIES V. { 1905.
BRADSHAW. { May 12th.

Mr. Struben moved as a matter of urgency for the arrest of the defendant in order to found jurisdiction.

Order granted.

SUPREME COURT

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

ADMISSIONS. { 1905.
{ May 13th.

Mr. P. S. T. Jones moved for the admission of Malcolm N. MacInnes as an advocate. The applicant asked that the oath be taken in Johannesburg.

Application granted, oath to be taken before the Registrar of the Witwatersrand High Court.

Mr. Alexander moved for the admission of B. Ginsberg as an attorney and notary.

Application granted and oaths administered.

GENERAL MOTION.

OHLSSON'S BREWERIES V. BRADSHAW.

Mr. Upington moved as a matter of urgency for the discharge of writ of

arrest which had been issued on Friday against the defendant. The debt arose in the Transvaal, the contract was made there and performed there, and the defendant had no property in this colony. He was here on a temporary visit, and was leaving shortly for the Transvaal. Counsel cited the cases of *Solomon and Wolff* (8 C.T.R., 184, 519) and *Einwald v. The German South-west Africa Company* (5 Juta 86), and submitted there was no jurisdiction of any kind.

Mr. Struben read the affidavit on which the writ of arrest *ad fundandam jurisdictionem* was issued.

The affidavit set out that the defendant had no property in the Transvaal, and did not intend returning there. Although he had no property here, it was believed he was possessed of a considerable amount of ready cash. Counsel said he intended to apply for confirmation of the writ and for provisional sentence. The defendant was the lessee of the Elandsfontein Hotel, and being pressed for payment, he set up a counter-claim of £500 against the company for short delivery in certain casks. He entered appearance, but no plea was filed, and the defendant was barred. During that period the defendant leased the hotel. As he failed to pay the amount of the judgment, a writ was issued, when it was found he had left Johannesburg.

Mr. Upington submitted that the present case was on all-fours with the case of *Einwald*, and that the Court would not assume jurisdiction by attaching the defendant's person. Both the parties had a domicile in the Transvaal, and there was no proof that the defendant was making the Cape Colony his domicile.

Buchanan, A.C.J.: I think this case is not at all governed by the case of *Einwald*, which must be adhered to, but is not applicable in this case. I think the writ of arrest must be confirmed, and the defendant must either remain in gaol or give security pending further proceedings. The defendant will be released on giving security to the satisfaction of the Registrar in the sum of £100 to abide the judgment of the Court. The summons will have to be set aside and the action instituted forthwith.

PROVISIONAL ROLL.

SCOTT V. KIRBY. { 1906.
{ May 13th.

Mr. Lewis moved for a decree of civil imprisonment on an unsatisfied judgment of the Court for £50, with interest and costs.

The defendant appeared recently before Mr. Justice Maasdorp, who gave him time on a statement that he never

received the summons. He said the first notification he had had of the matter was when he saw it in the paper. He wanted the case re-opened.

Decree granted, execution suspended for one month.

POPPE AND BENNETT V. BROWN.

Mr. Burton appeared on behalf of the assignees, and Mr. Gutsche was for the defendant. Mr. Gutsche moved for the final adjudication of the defendant's estate. Mr. Burton opposed the application, and read the affidavit of the defendant, who repudiated all liability to the petitioners.

Mr. Gutsche pointed out that the defendant had given notice in the "Gazette" of his intention to surrender, and counsel said that that was proof of insolvency.

The provisional order of sequestration was set aside on the ground of the insufficient evidence in the affidavit upon which it was originally granted.

ARDERNE AND CO. V. GIRD.

Mr. Roux moved for provisional sentence on a promissory note for £100, with costs.

Granted.

VAN DER BYL V. MOHADIEN.

Mr. Struben moved for the final adjudication of the defendant's estate as insolvent.

Granted.

LE ROUX V. DE VILLIERS.

Mr. Du Toit moved for provisional sentence for £24 4s. 6d., on a cheque, with costs.

Granted, subject to the production of a certificate of presentation.

LOGAN V. ABRAHAMSON.

Mr. Gutsche was for the plaintiff, and Mr. Alexander for the defendant. Mr. Gutsche moved for the final adjudication of the defendant's estate.

Mr. Alexander put in the affidavit of the defendant, in which he admitted there was due £2,250 on a mortgage bond and other amounts, but denied that he was insolvent. If he were given time he would be able to satisfy the debts, as he was expecting a remittance from his father. If the hotel were sold next month there would be a balance in his favour after the plaintiff was paid. On a fair valuation of his assets, there would be a surplus in his favour of £776.

Mr. Gutsche put in an answering affidavit by the curator, who considered the

value put on the schedule by the defendant as excessive.

Buchanan, A.C.J.: The creditors cannot be compelled to give time, and the provisional order of sequestration will be made final.

CAPE TIMES V. LANGERMAN.

Mr. Douglas Buchanan moved for judgment on a promissory note for £66 17s., with interest and costs.

Granted.

HENNESSY V. DE MARILLAC.

Mr. P. S. T. Jones moved for provisional sentence on a promissory note.

The defendant appeared and asked for postponement for a month, to give him an opportunity to pay the money. He practically owned £9,000 worth of property, and could not put his hand on £200 ready cash.

Granted.

PITTMAN V. HATCHER.

Mr. Douglas Buchanan moved for judgment on a mortgage bond for £600, with interest and costs.

The defendant appeared in court, and said, as his property was pulled down, he could not get a penny to pay the interest with.

The case was ordered to stand over until Monday, to see what amount of interest was due.

VAN DER MERWE V. BESTER.

Mr. Du Toit moved for provisional sentence for £310 on a mortgage bond, with interest and costs, and that the property be declared executable.

Granted.

WRIGHT V. DU TOIT.

Mr. Douglas Buchanan moved for judgment on a mortgage bond for £200, with interest and 16s. premium paid, and that the property specially hypothecated be declared executable.

Granted.

COLONIAL ORPHAN CHAMBER V. LATEGAN.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £4,700, with interest, less £125 paid on account, and £17 11s. 6d. premiums of insurance, and that the property specially hypothecated be declared executable.

Granted.

SAPIERO V. SOLOMON.

Mr. P. S. T. Jones moved for judgment on a mortgage bond.

Buchanan, J., pointed out that there was short service, and the return day was extended until 2nd June.

AFRICAN MUTUAL V. FOGGENPOEL.

Mr. Furton moved for the final adjudication of the defendant's estate as insolvent, and that Mr. Marais be appointed provisional trustee.

Granted.

LIEPSCHITZ V. NOEMDS.

Mr. De Waal (for the plaintiff) moved for the discharge of the order of sequestration against the defendant's estate.

Granted.

SUPREME COURT

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

PROVISIONAL ROLL.

LITHMAN V. HATSCHER. { 1905.
May 15th.

Mr. D. Buchanan moved for provisional sentence on a mortgage bond for £600, with interest, less £125 paid on account.

Judgment as prayed, the hypothecated property being declared executable.

DE JONGH V. KOENIG.

Mr. Roux moved for provisional sentence for £2,359, with interest.

Granted.

ILLIQUID ROLL.

ENDLEY AND ANOTHER V. ESTATE ENDLEY.

Mr. Freer moved for judgment under Rule 329d for £58 0s. 10d., amount of inheritance due to John Endley.

Judgment as prayed.

COLONIAL GOVERNMENT V. BUCKLEY.

Mr. Nightingale moved for judgment under Rule 329d for £59 19s. 9d., for

convict labour supplied, with interest and costs.

Order granted.

VAN RENSBURG V. LIEBENBERG.

Mr. Freer moved for judgment under Rule 329d for return of eight oxen or their value (£64), with interest *a tempore moræ* and costs.

Judgment as prayed, delivery to be made within 14 days, failing which defendant to pay £64.

Order granted.

IMPERIAL TOOL CO. V. GREEF AND WALTER.

Mr. Upington moved for judgment in default of plea upon a declaration claiming a full and true account of the defendants' dealings as agent.

Judgment as prayed.

KREDERBERG AND DUNCAN V. JACOBS.

Mr. Douglas Buchanan moved for judgment for three sums amounting in all to £29 18s. 9d.

Order granted.

GENERAL MOTIONS.

Ex parte STROEBEL. { 1905.
May 15th.

Mr. Gutsche moved for the rule *nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

Ex parte ESTATE WALKER.

Mr. Gutsche moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

Ex parte GREEFF.

Mr. McGregor moved for a rule *nisi* under the Derelict Lands Act to be made absolute. The matter related to a certain erf, No. 34, with the buildings thereon, in the town of Somerset East. Petitioner was the daughter of Cornelius Francois van Rooyen, and claimed as his sole and universal heir.

Mr. Searle, K.C., on behalf of one Isaac Dirk Bower (the deputy messenger of the Magistrate's Court, Somerset East, and cousin of the petitioner) opposed the application. Bower, in an affidavit, denied that the petitioner had ever succeeded to the erf in question, and claimed that his five sisters and himself should benefit to the same extent as the petitioner.

Mr. McGregor read answering affidavits by the petitioner and others.

Buchanan, A.C.J., suggested that the parties should meet and decide on a settlement. *Prima facie*, it seemed to him that the erf should be divided, one-half between each of the parties. It would be a pity to waste the erf in litigation.

Mr. McGregor thought the suggestion a very good one.

Mr. Searle said that the suggestion met with his acquiescence, but he thought the petitioner should pay the costs. The petition, under the Derelict Lands Act, had really fallen away.

Mr. McGregor did not think that the petitioner should bear the costs because the application benefited both sides.

Buchanan, A.C.J., said that the order of the Court would be that the matter stand over *sine die*. He would suggest that the parties should come to terms, and make a joint application to the Court for division of the erf, one half to the petitioner and the other half to Mr. Searle's clients. If that were published, and no opposition made by Mrs. Ferreira, it would settle the matter. It could not possibly be settled now on the affidavits before the Court.

Ex parte DE RICHMOND HANDELS MAATSCHAPPIJ, BEPERKT.

Mr. J. E. R. de Villiers moved for an order confirming the reduction of the company's capital by £1,896, amount of certain shares declared forfeit.

Buchanan, A.C.J., said that under the Companies Act it was necessary that every creditor should be advised of the application; so that the Court could only grant a rule *nisi* calling upon all persons concerned to show cause why the application should not be granted. It was only right that the creditors should have an opportunity of objecting. A rule would be granted, returnable on June 15; to be published in the Richmond newspaper and in the "Government Gazette."

Postea (June 15). Rule made absolute.

BLIGNAULT V. WEPENAR.

This was an application to have a certain amended award of arbitrator to be made a rule of Court. The matter related to water rights at Buffel's Vlei.

The affidavit of the respondent stated that he did not oppose making the award a rule of Court, but desired that a clause relating to water led beyond the boundaries of the farm Buffel's Vlei should be deleted. He contended that the arbitration went beyond the scope of reference in determining the right to lead the

water: that they only had power to arbitrate in regard to water within the boundaries of the farm.

Mr. Burton for applicant; Mr. McGregor (with him Mr. Close) for respondent.

Buchanan, A.C.J., said that the award was in the spirit of the order of Court, but too many words had been struck out of the clause. It would make it clear if the words "on the farm Buffel's Vlei" were re-inserted. Subject to this amendment the award would be made a rule of Court. The costs would be paid as ordered in the previous rule.

VAN NIEKERK V. SANDILANDS.

This was an application made by the trustee in the insolvent estate of Van Niekerk to have a proof of debt amended by expunging it as a preferent claim, and admitting it as a concurrent claim. Sandilands claimed that Van Niekerk had pledged certain stock to him as security for debt on a promissory note; Van Niekerk said that the stock was sent to Sandilands to graze, and was not sent as a pledge. The Magistrate held that the stock was pledged, and admitted the claim as preferent. It was alleged by Sandilands on affidavit that he purchased 50 Afrikander rams and 50 Afrikander ewes, and later on purchased 248 Angoras. Subsequently, Sandilands told Van Niekerk that he could not accept the stock, as it was old. It was arranged that Van Niekerk was to retain the money as a loan, Sandilands retaining the sheep and goats as security. Replying affidavits were read denying the pledging.

Mr. Searle, K.C., appeared for the applicant; Mr. McGregor for the respondent.

Mr. Searle urged the claim set up was an untenable one; if there were a pledge it would have been shown on the contract, but the contract was clear that it was a lease. It was perfectly clear under the contract that the stock was the property of the insolvent, and that there was no pledge. It was, of course, open to the respondent to take action.

Mr. McGregor argued that it was quite possible that the stock might be leased, and might also be retained as a pledge.

Buchanan, A.C.J.: In this case the creditor proved for a preferent claim. The trustee now wanted to strike out the preferent claim, and make it a concurrent claim. The circumstances are not very clear, but the creditor, Sandilands, appears to have authorised the debtor to buy stock. Debtor did so, and Sandilands paid, and the stock has remained in his possession ever since. Shortly afterwards Sandilands objected to the stock as being old, and wanted to return them. He, however, agreed to keep them as

leased property, and the debtor agreed to repay the money. If this is true the equity is all in favour of Sandilands, and if the estate wants to cancel the sale, and have the stock back, they must pay the money back. Under the circumstances there is certainly no reason to reduce this claim from a preferent to a concurrent one, but leave will be given the trustee to take any action he may be advised. The application must be refused, costs to follow any action taken, and, if no action be taken, the trustee to pay costs.

HUNTER V. HEENEN.

Mr. Douglas Buchanan (for the applicant) stated that in this matter, which was heard last Thursday, no order was made as to costs. He applied for costs against the respondent.

Buchanan, J., said that the costs of the application would be costs in liquidation.

Ex parte THE CURATOR BONIS OF MARGARET FRANCIS.

Mr. D. Buchanan moved for leave to sell a chemist's business belonging to Margaret Francis.

Order granted, notice to be given to creditors who have not consented to the application.

Ex parte TERBLANCHE.

Dr. Greer moved for leave to participate in certain partition of property.

An order was granted in terms of the Master's report.

Ex parte ROUX.

Mr. J. E. R. de Villiers moved for an order authorising the Mutual Life Insurance Company to pay petitioner certain money on insurance policies in respect of minor children.

Order granted.

Ex parte FERREIRA.

Mr. De Waal moved for authority to sell and transfer land belonging to minors. Granted.

Ex parte THE EXECUTRIX IN THE ESTATE OF THE LATE J. L. DELPORT.

Mr. Gutsche moved for leave to pass a mortgage bond in order to raise money for the benefit of the heirs. The heirs consented.

Order granted.

Ex parte KIRSCHOFF.

Mr. J. E. R. de Villiers moved for an order authorising the Registrar of Deeds at King William's Town to register certain property in petitioner's name. The petitioner purchased the land out of the estate of which he was executor. The sale was by public auction, and it was stated that the amount paid was fair value.

Order granted.

ELLIOT V. ENGELBRECHT.

Mr. Du Toit moved for the appointment of J. P. Krige as provisional trustee in the respondent's insolvent estate.

Granted, costs of the application to be costs in the estate.

Ex parte MILLS.

Mr. De Waal moved to make absolute a rule nisi authorising the executors in the estate of Coetzer to pay the petitioner a certain inheritance.

Granted.

Ex parte DE VILLIERS.

Mr. Upington moved for leave to the petitioner to expend £1,000 out of the accumulated interest on a sum bequeathed to minors in the estate of which petitioner is executor. The money was required for the expenses of a trip to Europe by the two minor daughters, aged respectively 20 and 18. In his report, the Master referred to a previous application in 1892 by the survivor—the widow—for payment to her of the accumulated interest for the maintenance of the minors, which application was granted. The Master was of opinion that the minors could defer their trip until they become of age. Counsel said the estate was a very valuable one, the residue being £50,000, and it was not proposed to touch the capital. The idea, it seemed, was that these young ladies were about to be married, and wished to see a bit of the world before that happened and they settled down. The trip would be in the nature of an education.

The application was granted.

VAN NIEKERK V. FABER.

Mr. Gardiner moved for an extension of the return day of a citation. The respondent had left the place where he was residing at the time the previous order was granted, and his exact whereabouts were not known, though it was believed he had returned from Germany to this colony.

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Buchanan, A.C.J., said there was no information as to where the respondent formerly carried on business in the Colony, and as to where the debt was incurred. Publication would depend on this information, and the matter would therefore have to stand over.

Ex parte CHANNING.

Mr. Douglas Buchanan applied for leave to sue by edictal citation. The petitioner's affidavit was to the effect that she married Mathew Channing in 1896, and resided at Cape Town. When the war broke out, her husband joined the army, and had not since rejoined her. She was desirous of suing for restitution of conjugal rights or divorce, and asked permission to sue by edictal citation.

Leave granted to sue by edictal citation, one publication in the "Government Gazette" and one in the "Natal Witness," rule returnable June 30, with leave to serve notice of trial and intendit at the same time.

In Re DUSSEAU AND CO., LTD.

Mr. Douglas Buchanan presented the final report of the liquidator. It was pointed out that some shares had been put down to one Hoogendoorn in error. One hundred shares had been put against him, instead of fifty.

Buchanan, A.C.J., said an order would be granted for publication of the report for fourteen days, after which the other matter could come up.

Ex parte RECEIVER GRAND JUNCTION RAILWAY.

Mr. Upington, on behalf of the Receiver, applied for the issue of a rule nisi under the Derelict Lands Act. The piece of land in question was acquired by John Walker and Son for the purpose of the railway. The Receiver now claimed same, and that it should be transferred to them for the benefit of the creditors.

Buchanan, A.C.J., pointed out that the matter had been before the Chief Justice in 1904, when His Lordship then made a note to the effect that there was no information before the Court that Amos, in whose name the property was still registered, was dead, mentally incapable, or had left the Colony.

Mr. Upington said he was not instructed as to that.

Buchanan, A.C.J., said the attorneys should have been aware of it, and ordered the matter to stand over for further information as to Amos.

Ex parte PAXTON.

Mr. Watermeyer moved, on behalf of the trustee under an ante-nuptial contract and the parents, for leave to raise £100 loan on a life policy to pay arrears of school fees for the children, and to provide for their future maintenance.

Application granted, the money to be devoted to the payment of the arrears of the school fees, the cost of the application, and the balance to be applied by the trustee for the future school fees in terms of the Master's report.

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

TRIAL CAUSE.

VAN DER BYL AND CO. V. { 1905.
AFRICA. { May 16th.

Guarantee—Forged signature.

This was an action to recover £65 0s. 10d. from Cornelius Africa, of Worcester, upon a security given by the defendant on behalf of the son.

The declaration set out that when Cornelius Africa retired from business in 1902, his son, James Africa, took on the business, and the plaintiffs declined to supply the latter unless the father would give a guarantee. This the father ultimately did. The son became insolvent, and the plaintiffs then sued for the amount due by the father as security. The defendant's plea was briefly that his signature on the document was a forgery.

Mr. Burton (with him Mr. Struben) was for the plaintiffs; Mr. McGregor (with him Mr. Swift) was for the defendant.

P. van der Byl, of Messrs. Van der Byl and Co., Cape Town, stated that after several proposals had been made by the son, witness wrote on the 8th July to the father, who was security, threatening him with proceedings unless a settlement was forthcoming. In reply, Mr. Lindenberg, the attorney, wrote denying that the letter of the 2nd May was ever received, that the father was security, and pointing out that the son was awaiting trial at Cape Town on a charge of forging his father's name to a number of securities.

Cross-examined by Mr. McGregor: He was not bold in asserting that the signature was that of "C. Africa." Per-

sonally he had no opportunities himself of judging of the signature. The goods in the grocery shop were supplied by witness, and were rightly the property of James. Afterwards witness got the son to get a deed of guarantee signed by the father. In 1902 the son took over the accounts, when Cornelius ceased to come up to Cape Town. Before the deed of guarantee was signed witness's firm gave James credit.

Re-examined by Mr. Burton: Witness discriminated between the genuine signature of "C. Africa" on a cheque and "C. Africa" written by James in two letters.

Adam Cornelius Neethling, who had formerly been in the employ of James Africa, and witness to a document, identified the signature of "C. Africa," which had been written by the defendant. James held his hand while he signed the paper.

Cross-examined by Mr. McGregor: He did not know that Cornelius had been able to write his name for twenty-five years. He thought it very strange that James held his hand on that occasion. Solomon's signature was already on the paper before the defendant signed it.

Re-examined by Mr. Burton: That was the only document he ever signed.

James William Bain, traveller, in the plaintiff firm, said from time to time during the last four or five years he had seen Cornelius Africa at Worcester. In September, 1902, Cornelius said he would be responsible for the debt of his son, but he did not care to sign any documents. A month or five weeks afterwards witness asked for security, and Cornelius said that he had signed, and that it would be all right.

Cross-examined by Mr. McGregor: On his second visit he did not know that the plaintiffs had already signed a document purporting to bear the signature of Cornelius. After he heard that the document was signed he was prepared to take orders from James.

Mr. Burton closed his case.

Cornelius Africa, the defendant, was called, and stated he had lived many years at Worcester, and had been a wagon maker, but gave it up and took a butchery. Later he gave up the butchery owing to ill-health, and advertised that he had done so in the butchery. The son took over the business. When witness had the business he never had any grocery store, but his son had a grocery shop in Napier-street afterwards. Witness remembered Mr. Bain calling, and saying Mr. Van der Byl had sent a message to ask if witness would go surety for his son for grocery. Witness said, "No, Mr. Bain, I have given up all business; my health is too bad, I won't go surety for anything." Witness did not see Mr. Bain afterwards; he only saw Bain once. If Bain said he saw him again with James he did not think it was correct. Witness never told Bain the

second time that he had signed the document. The signature was not his. Witness knew Neethling, but it was not true that he signed before him, or that James held his hand. Witness had no share in the business at that time. Witness only received one letter from Van der Byl, that was after his son was arrested. Witness believed it was asking him for money, and he took the letter to Mr. Lindenberg, who answered it. Before witness dealt with Van der Byl, he dealt with other people, and never had any trouble. Before witness retired he had no manager; James worked for him, and witness clothed and fed him.

Cross-examined: James did not manage the business of witness. Witness used to come up to Cape Town himself. When he gave up coming he gave up his business. Witness could not swear that the signature produced was his; it might be. Witness would swear a hundred times that he never met Mr. Bain a second time, or told him that he had signed any security. The evidence of Neethling as to the signing was entirely false. Witness once signed a bill for his son at the bank for £80, but never signed anything else.

Frederick Lindenberg, attorney, of Worcester, said he had done Cornelius Africa's work for many years, and knew his signature. The signature on the guarantee document was not that of defendant; that he was certain of. Witness wrote on behalf of defendant on July 11 to Messrs. Van der Byl repudiating all liability. Defendant could only write his name, as far as witness knew.

Cross-examined: Witness based his opinion of the signatures being false upon the general build of the word, and particularly the largeness of the letter "c" in Africa.

Re-examined: Neethling, a previous witness, told him that four signed the document, and also said that Cornelius could not.

James Africa, a convict at Tokai, undergoing twelve months' imprisonment with hard labour for forgery, stated that he was the son of the defendant. After 1902 witness took on the butchery business. Mr. Bain saw him about a security from his father. On the second occasion Mr. Bain brought a suretyship, on which he required his father's signature. Witness signed the document without his father's authority. The document was signed in the butcher's shop. He intercepted the letter from the plaintiffs to his father. He wrote the letter to the plaintiffs without his father's authority.

Cross-examined by Mr. Burton: The document he signed in his father's name he took to Mr. Bain. Before his father gave up his business, witness opened the letters, but previously he read them to his father. Neethling's evidence was absolutely false. In one year he had forged his father's name three times.

He had practised the signature carefully.

Japha Solomon, who signed the document as a witness, stated that when he signed there were no other names on the paper. Witness was told that he was signing for sheep that James would get from the farm. He never saw Cornelius sign the paper.

Mr. McGregor closed his case.

Counsel having been heard in argument on the facts,

Buchanan, A.C.J.: Unfortunately, Mr. Van der Byl is not familiarly acquainted with the signature of Cornelius Africa. Although I am satisfied there is a great deal of force in Mr. Lindenberg's statement, I would be sorry to decide this question upon the opinion of a witness as to the authenticity of the signature. On the question of the genuineness of the document there is a serious conflict of evidence. I am not satisfied that Cornelius made any admission to Mr. Bain that he signed the contract. I come to the conclusion, on the evidence, that James had an object in trying to place a spurious document before the plaintiffs, and he obtained the signatures under false pretences. I do not think that the plaintiffs have proved that it is a genuine contract signed by Cornelius Africa. I am quite satisfied it is a forgery on the part of James Africa, and judgment will be given for the defendant, with costs; the defendant declared a necessary witness.

[Plaintiff's Attorneys: Van der Byl and De Villiers; Defendant's Attorneys: Van Zyl and Buissinné.]

SECOND DIVISION.

[Before the Hon. Mr. Justice M AASDORP.]

TRIAL CAUSE.

ALLAN AND SHAW V. BEN-^j 1905.
NETT. (May 18th.)

This was an action brought by the plaintiffs, who are a limited company, registered in England, and carrying on business in the Cape Colony, against the defendant, a builder, of Wynberg, to recover £263, balance of account for material supplied.

The declaration set out that during January, 1904, and February, 1905, the defendant bought certain building material from the plaintiff's shop at Wynberg, and paid certain instalments, amounting to £54. From time to time particulars were rendered, and on February 15 a complete statement was rendered, showing a balance of £263, for which the action was brought. The

plea set out that the defendant had been overcharged on certain items, and some of the goods charged had never been delivered. It was also pleaded that a verbal arrangement had been entered into by which the defendant was to pay by instalments from time to time. He was willing to pay £251 by instalments, as had been arranged. The replication admitted the arrangement as to instalments, but that was confined to another building which had been completed, and it was understood, if the instalments were not paid at the specified times, the whole amount would fall due.

The defendant, in reply to His Lordship, said it was never agreed that on failure to pay the instalment the whole amount could be called up.

Mr. Close was for the plaintiffs and the defendant in person.

H. J. Ross, manager of the plaintiff company, stated that at the end of each month the defendant was furnished with a detailed account. In October last the defendant called to make an arrangement about getting further credit, and on the first of that month he owed the firm £39 6s. 3d. There was no arrangement whatever previous to that. In October, Allan agreed to give the defendant credit to the amount of £250, and witness heard Allan come to an agreement with the defendant that the latter was to pay off £100 on the completion of the building, for which he required the material, and to pay £10 a month thereafter. The defendant did not pay the £100 or the £10 a month, as arranged upon.

Cross-examined by defendant: Witness could not show where the defendant used the 9-feet columns, which he said had been supplied to the defendant. As far as his recollection went, the four columns were not returned. The defendant could not have used the columns on his buildings. Everything was charged to the Wynberg firm at cost price landed in Cape Town, but the head office put on 10 per cent. to cover handling, etc. Witness would not say that Wynberg had to make up any loss sustained in Cape Town. Witness was positive that the defendant agreed to pay £10 a month, but he was not present when the arrangement was made that the whole amount became due on the failure to pay instalments. It was true that after the conversation with Mr. Allan the defendant said he would be able to pay the £100 if a bond went through. Witness would not care to express an opinion as to whether the case would never have come into the Court if the matter had been left in his hands.

Robert Allan, managing director of Allan and Shaw, Ltd., stated that in October last the defendant was referred to him with a view to extended credit.

Witness agreed to give him £250 credit to enable him to build two villas. The arrangement was that as soon as the houses were completed he would pay £100 down and £10 a month after the new year, when he expected the houses would have been completed. When witness asked for the £100 the defendant used insulting language, and defied witness to take action. It was made clear to the defendant that if he failed to pay the instalments of £10 a month, the whole amount would become due.

Cross-examined by the defendant: Witness did not suggest that the £10 should be paid every month on a subsequent occasion. The £10 a month was to be paid through Thos. Hazel, of Cape Town.

Defendant: Are you a business man?

Witness: I hope so.

Why didn't you reduce that to black and white?—I can't say.

You are not a business man; you never were one.—That's your opinion; we don't require black and white from some of our customers.

The defendant went into the box, and stated that it was true that he promised a £100 if a bond went through, which, however, did not take place. There was no agreement about the amount falling due, if witness failed to pay the instalments. The 8 ft. columns were returned for some 9 ft. ones.

[Maasdorp, J.: Why don't you pay the £100?]

Defendant: I had not got it. I have been always willing to come to an agreement.

Mr. Close said Mr. Allan was still willing to accept the £100, and £10 a month.

Maasdorp, J.: The plaintiff sues the defendant upon an account for goods sold and delivered. This account is partly disputed by the defendant, who denies that he received certain articles mentioned in the account. These articles are four columns, said to be supplied by the plaintiff to the defendant, to be used in the building of his houses. It appears quite clear that these columns were sent on the order of Mr. Bennett to the buildings which he was busy erecting. He discovered that the columns were unsuitable, and I am satisfied, upon the documentary evidence, that the columns were not used by Mr. Bennett, and Mr. Ross is not prepared to swear that these columns did not come back. Under the circumstances the account must be altered by striking out the items dealing with the columns. The defendant also objects to a couple of other items as over charges made at Wynberg, but that he ought to have considered that when he had his dealings with the firm, and I think these items must be allowed to stand. With reference to the rest of the account the defendant admits that he owes the money,

but he says that a special arrangement was made by which the parties agreed that £100 should be paid upon his being successful in certain speculations, and that the rest was to be paid by instalments, without reference to amount or time when these instalments should fall due. The plaintiff says there was a definite arrangement that £100 was to be paid on the completion of the building, in respect of which the goods were supplied, and thereafter there should be a monthly payment of £10, and in the event of his failing to pay either the £100 or these instalments, that the whole amount should fall due. On the part of the plaintiffs, here we have a clear, definite, business-like agreement, which the Court can put into force, whereas the defendant's agreement is of such a vague character, and its conditions are so uncertain, that it is not really a contract which could be regarded as binding on the parties. There must, in my opinion, be a period when the creditor could enforce payment, and I do not believe that the matter should be left over to the discretion of the debtor. On the whole it has been proved to my satisfaction that there was a definite agreement made in the terms of the statement put before the Court by Mr. Allan. The buildings were completed in January, and Mr. Bennett failed to pay, and the plaintiff was entitled to claim the whole of the indebtedness. I can only now give judgment in favour of the plaintiff for the amount of his claim, and leave it to the parties to make such other arrangements as it seems, upon the offer now made by the plaintiff, they might be well able to. Judgment will be for the plaintiff, less £7 10s. for the costs, with costs. The amount of the judgment will be £254 4s. 7d.

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

GENERAL MOTIONS.

ESTATE DAVIDS V. DAVIDS. { 1905.
May 18th.

This was an application upon notice of motion calling upon the respondent, Jacobus Davids, to show cause why an

order of personal attachment should not be issued against him for contempt of Court in neglecting to sign the necessary declaration to enable the applicant to obtain a certified copy of a certain deed of transfer of property situate in Jordaan-street, Cape Town, the original having been lost or mislaid.

The affidavit of Mr. W. A. Currey, the executor dative, stated that the certified copy of the deed was required to enable him to close and administer the affairs of the estate. The respondent was married in community to his wife, who had died intestate. The property was registered in the respondent's name. The heirs in the estate claimed that the property should be put up by public auction, so that they might take their shares. Counsel also read affidavits by two of the heirs, daughters of the late Mrs. Davids, by a previous marriage.

The answering affidavit of the respondent denied that he had refused to sign the declaration or to obey the order of the Court. He was quite willing, he said, to make a declaration of facts within his knowledge, but he declined to make a declaration of facts beyond his knowledge, as he had been asked to do, and he also declined to say that the said deed was lost by him. He denied that he was assuming, as had been alleged by the executor, a defiant attitude, and said he was willing to assist the petitioner in the administration of the estate. He objected, however, to a forced sale in the present circumstances, but was willing to sign for the sale of the property at a reasonable figure, seeing that he was interested as to one half. He did not object to signing a power of attorney, but up to the present no sale had been effected. He had been away at Caledon, hence some delay had taken place.

Mr. P. S. T. Jones was for the applicant (the executor dative); Mr. Alexander was for the respondent.

Buchanan, A.C.J., said that there was no contempt on the part of the respondent, and the application would be refused with costs.

POLICANSKY BROS. V. HERMANN AND CANARD.

Trade mark—Colourable imitation—Interdict.

This was an application for an interdict restraining the respondents from using a label or cover for cigarettes called "Sultan's Specials," the same being an infringement of the trade-mark registered by the applicants.

The affidavit of Philip Policansky stated that the label "Sultan's Specials" was a colourable imitation of the registered trade-

mark used by the applicant firm called "Sultan's Favourites." The deponent said that the respondents had taken up this attitude because of an unsuccessful application formerly brought by them against the present applicants for an alleged infringement of trade-mark.

Mr. Burton for applicant; Mr. Gutsche for respondent.

[Buchanan, A.C.J. (to Mr. Burton): You have not a sole right to the use of the word "Sultan"?]

No, my lord; we say that the whole get-up is a colourable imitation of our trade-mark, and calculated to deceive the public. Counsel went on to point out that his clients formerly obtained an interdict against a third party (*Wolf and Miller v. Smit*) (11 C.T.R. 535) for infringement of their trade-mark by a label called "Sultan's Beauties," and he submitted that if there was an infringement in that case, there was much more of an infringement in the matter now in question. He also read an affidavit by Alexander Gromer, who said that he had called at a shop in Caledon-street for the purpose of purchasing "Sultan's Favourites," and had, owing to the get-up of the cover, been deceived into buying "Sultan's Specials."

The answering affidavit of Raphael Hermann, one of the respondents, said he denied that the trade-mark used by his firm was an infringement of the applicants' trade-mark. As to the former case in regard to "Sultan's Beauties," he pointed out that the respondents in that matter were not registered proprietors of the mark. He claimed that his firm, being the registered proprietors of the trade-mark, were entitled to use the label now disputed.

Counsel were heard in argument.

Mr. Burton submitted that there was such an identity between the two marks as to deceive the public.

Mr. Gutsche contended that the labels were by no means similar, and that there was a greater divergence of labels in the present instance than in the former case heard in March last.

Buchanan, A. C. J.: Both the applicant and respondent have registered trademarks in which they use the word "Sultan," but this application is based solely on the allegation that the label used for the cigarettes of the respondents is a colourable imitation of the label used by the applicants. The applicants had been before the Court on several occasions. In one case in 1901 an interdict was granted against the use by certain respondents of a label imitating the one in question in this case. In that case the only difference between the labels was that the word "Beauties" was used instead of "Favourites." The applicants had "Sultan's Favourites," the respondents

had "Sultan's Beauties." In several respects the labels were identical. It was then held that the one was a colourable imitation of the other, and an interdict was granted. In the present case the two labels seem to me to be by no means similar, and not at all likely to deceive an intending purchaser. In the first place the colour is different, and, as his lordship, the Chief Justice, remarked in the case before him recently, there is no monopoly of colour. Then the words, "Sultan's Favourites" in the applicants' labels are printed differently from the words "Sultan's Speciale" in the respondents' labels. Then there are other respects in which the labels are dissimilar. I think it would be going very far indeed to say that the one label is a colourable imitation of the other, and likely to deceive even the most ordinary purchaser. Using my own common sense in the matter, I cannot see any colourable imitation, and I think the application must be refused, with costs. I am strengthened in this position when I look at the case which came before his lordship the Chief Justice in August last, *Rosebank Match Co. v. Jonkopings Vulcans* (14 C.T.R. 616), because although there was greater similarity between the two labels in that case, his lordship refused to make an order.

STEVENSON V. CAPE TOWN { 1905.
LICENSING COURT. { May 19th.
{ July 14th.

Liquor licence—Magistrate's discretion—Withholding of certificate.

S. had applied for a new liquor licence in respect of certain premises, and the licence was granted. The Magistrate withheld his certificate on the ground that some of the signatures to the petition were forgeries.

Held, that as after the forged names were struck off, there was still a majority in favour of the licence, the Magistrate was bound to grant his certificate.

This was an application upon notice of motion addressed to the Resident Magistrate of Cape Town, calling upon him to show cause why he should not forthwith issue and deliver to the applicants the certificate required to enable them to take out a licence to sell intoxicating liquors on the premises called Annandale Hall and Kimberley House, situate at Gardens, Cape Town.

Mr. Molteno was for the applicant; Mr. Nightingale appeared for the Attorney-General.

The affidavit of Harry Stevenson, the applicant, set out the proceedings which had led up to the present state of things. He had been granted a licence in the ordinary course, but the Magistrate refused to deliver to him the necessary certificate.

The answering affidavit of Mr. J. T. Wyde, R.M. of Cape Town, said that the memorial deposited by the applicant bore 1,067 signatures. Forty had been discovered up to that time to have been forgeries, and the total number of voters whose names appeared more than once in the memorial was 74, thus reducing the number of signatures to 953, which number did not represent a majority in the district as required by the Act. Under the circumstances he deemed it his duty not to issue a certificate.

The replying affidavit of the applicant said that the number of *bona fide* signatures on the memorial was 1,067.

Mr. Molteno (for applicant): When once the Licensing Court has decided to grant a licence the Magistrate has no option as to furnishing the necessary certificate. He is a mere conduit pipe for the granting of the licence. This is neither an appeal nor an application for review, but simply an application for an order to compel the Magistrate to perform a statutory duty. The persons who signed twice were registered twice in respect of different properties. We have the decision of the Licensing Court, and the Magistrate is bound to act upon it.

Mr. Nightingale (for the Attorney-General) pointed out that a man was to be tried at the next Criminal Sessions on a charge of having forged some of the signatures to the petition.

Buchanan, A.C.J.: The application had better stand over till the first provisional day after the Criminal Sessions.

Postea (July 14).

[Before the Hon. Mr. Justice MAASDORP.]

The applicant's affidavit stated that at the meeting of the Licensing Court on the 1st March last, presided over by the respondent, he made application for a retail licence to sell intoxicating liquors at his premises, known as Annandale Hall and Kimberley House, which application was granted. On the 1st April he applied to the clerk to the Resident Magistrate for a certificate signed by the Resident Magistrate, as required by the Director of Stamps before issuing licences, and was informed by him that the certi-

ficate had been made out, but that, by orders from the Attorney-General, he was not to issue the same. Subsequently correspondence ensued between deponent's attorneys and the Attorney-General's Department.

The answering affidavit of the respondent stated that the total number of voters on the Council's roll for District No. 4, where the premises were situated, was 1,999. The number of signatures, passed as correct by the Resident Magistrate's Court official, on the said memorial was 1,067. Of these 1,067 signatures, 40 were discovered to have been forgeries up to the present, and the number of voters whose names appeared more than once in the memorial amounted to 74, thereby reducing the number of signatures to 953, which number did not represent a majority of voters in the district, as required by the Act. Deponent communicated these facts to the Attorney-General, and advised that, under the circumstances, a licence should not be issued, except by order of the Supreme Court. Counsel also read an affidavit by Claude Miles, a head constable of the urban police, giving the results of the investigation up to that stage. Counsel added that, since the application was first mentioned to the Court, an agent named Samuels, who had been collecting signatures, had been prosecuted for forgery in respect of eight signatures, and had been found guilty and sentenced. No proceedings had been taken against the other canvassers, who were no longer in the Colony. Counsel had 35 affidavits of persons who said their signatures had been forged.

The replying affidavit of the applicant said that the memorial originally contained about 1,500 signatures, but those who were not voters and those whose names appeared on the memorial twice had been deducted, leaving a total of 1,067 *bona fide* signatures. The affidavit of Mr. Buyskes, a canvasser employed by the applicant, said that the list of *bona fide* signatures disclosed a majority of 69 in favour of the licence. The officials acting for the Government had omitted to strike off the voters' list those who had been placed on the list twice, or who were dead, or who had left Cape Town before the list was issued. After deducting the number of those who were absent from Cape Town, or who were dead, or who had been placed twice on the list, the total number of voters left would be 1,929; consequently the majority, as required by the Act, would be 965. There were originally 1,516 names on the memorial. Taking away the non-voters who had signed the memorial (378) and persons who had signed more than once (131), there remained 1,007 signatures. Of these, 39 were alleged to be forgeries, thus leaving 968 genuine signatures. In a fur-

ther affidavit, Mr. Buyskes said that he had made inquiries in order to ascertain the number of deceased persons on the Divisional Council voters' list for 1904 (District No. 4). All the persons named in the schedule (b) annexed were dead, with the exception of five (including one of the judges of the Colony). Amongst the deceased persons aforesaid, seven signed the memorial during their lifetime. Taking Head Constable Miles's figures of 1,067, and deducting 74 signatures for duplicates and 38 for forgeries, they had left 955. According to his (Buyskes) investigations, after deducting non-voters, forgeries, and duplicate names, there remained 1,026 signatures. The number of names on the voters' list for 1904 was actually 1,989, the names appearing twice were 60, and the names of deceased voters were 27, leaving a total of 1,912. Adding to these the voters who signed the memorial prior to their death, the total would be 1,919, so that the majority, as required by the Act, would be 960. There was therefore a majority of 66 *bona fide* signatures. Deponent further stated that, as regarded the alleged forgeries, affidavits had been sworn by three persons who were not on the voters' roll, and by one who had not signed the memorial. The number of signatures, therefore, should be increased by four in favour of the applicant.

Mr. Burton, for the applicant, said that the Act said that when a licence was granted by the Licensing Court, the Magistrate must give a certificate. The Magistrate was bound as a necessary consequence to give a certificate, and could not go behind that decision of the Court. Applicant claimed to have a majority, even on respondent's showing it was a very near thing. If the Court thought the matter should be gone into, he would suggest that a competent and impartial person should go through the memorial in the presence of the parties, and find out how many genuine, proper signatures there were on the memorial, and whether they constituted a majority.

Mr. Evans, for the Attorney-General, contended that this was in effect an application to this Court for a licence. The Act required that there must be a memorial signed by a majority of the voters before a licence should be granted, and he submitted that it was now for the applicant to clearly prove to the Court that the memorial did in fact contain a majority. If the Government discovered that there were circumstances not in the knowledge of the Licensing Court, which constituted a contravention of the law, he contended it was their duty to step in and prevent a breach of the law. It had been proved that after deducting the forged and duplicated names, the

requisite majority had not been obtained. He suggested that the most equitable course would be to refer the whole matter back to the Licensing Court to go into again.

Mr. Burton, in reply, urged that the Supreme Court was being asked by the respondent to go behind the decision of the Licensing Court. The want of a majority of voters as signatories to the memorial had not been proved by the other side. There must be a scrutiny. The Court was now asked to do the very work which the Magistrate under the Act ought to have done. The position seemed to him (counsel) to be preposterous.

Maaasdorp, J.: It appears that the Licensing Court held its sitting, and determined all the questions submitted to it, and came to the conclusion that the applicant was entitled to his licence. The Magistrate, however, refused to grant a certificate upon grounds which will have to be decided under section 13 of the Act 25 of 1891. It is there provided that if an application is for a new licence it shall not be lawful for the Licensing Court to grant such licence unless there be lodged with the Magistrate of the district, at least four days before the meeting of the Licensing Court to consider the application, a memorial signed by a majority of the voters registered for the election of members of the Divisional Council within the Divisional Council district, the municipality, or the ward or district of the municipality, approving of the issue of the said licence. The ground taken by the Magistrate in this matter is that there has been no such majority of the voters as is required by this section. It appears that at the time when the application was made the Magistrate had to ascertain whether such a majority existed, and he came to the conclusion, after scrutinising the memorials and the list of voters, that a majority of voters had appended their signatures to the memorials. He informed the Licensing Court of that, and upon that ground the Licensing Court granted their certificate that the licence should be issued. It is contended now that, subsequently to the Licensing Court coming to that decision it has been discovered that a majority of voters did not sign the memorials. It is said that, amongst the signatures, there were 38 forgeries, and that to that extent the names on the memorials should be reduced. I am of opinion clearly that that must be done. It has been clearly proved that the number of names on the memorials must be reduced by 38. Counsel for the applicant in this matter has admitted that the applicant cannot take advantage of forged signatures. On the other hand, I am of opinion that these forged signatures must be struck off the list. There is no proof that the applicant him-

self was responsible for the forgeries having been committed, and the forgeries should not operate to his prejudice. It is quite clear that, under the Act, memorials may be got up without the intervention of the applicant for a licence. But, after striking off the thirty-eight names, it would appear that there is still upon the memorials a majority of voters in favour of the issuing of the licence. The Magistrate, however, contends that he has now discovered that 74 of those names appear twice, and, as a matter of course, the names must be reduced by that number. Now, the question arises whether that reduction reduces the majority to a minority. In my opinion, if it were quite clear upon the evidence before this Court, that the supposed majority has now been reduced to a minority, the Court would not help the applicant, because the section provides that it shall not be lawful for the Licensing Court to grant a licence unless there is the approval of the majority, and if this Court had now evidence that there is no such approval, the Court would not compel, with full knowledge of that circumstance, the Court below or any officer of that Court to commit an illegality. But the question arises now, has it been proved that the majority has been reduced to a minority? I take it that, at the time when the application was considered, the whole of the evidence was gone into; all the facts upon which the decision had to be come to were determined, and, amongst other things, it was determined by the Court below that memorials were in order. In so far as the memorials are not in order in respect of the forgeries, so far the memorials must be set right. But when the question arises, whether in reducing the names by 74, which appear twice on the memorials, the majority is reduced to a minority, certain matters have now to be taken into consideration, which the Magistrate has not taken into consideration. It is not now attempted to set aside the judgment, the question is not now before the Court, whether the judgment was correctly arrived at upon the evidence that was before it, but the judgment stands, and the judgment must be considered to be given on good and sufficient grounds, and the presumption is in favour of that judgment, until there is most absolutely clear proof that that judgment is wrong. Now, I have come to the conclusion that there are certain circumstances which the Magistrate did not take into consideration, which affects his opinion that the majority had been reduced to a minority. He takes the number of voters at 1,999, because that number appears on the roll and he is clearly proved to be wrong, because undoubtedly a number of these voters have died since the list was made out. Consequently, that basis upon which he went is erroneous. With re-

spect to some of the names, if not all of them, which have been mentioned, it would appear that the names of some voters appear more than once upon the roll. Here again, the list of total voters must be reduced, and I am not satisfied, if this list be properly reduced in the manner suggested in Mr. Buyskes' affidavit, that there will now be a minority of voters, instead of a majority in favour of the issue of the licence, even though the 38 forgeries and the 74 duplicate voters have been removed. Under these circumstances, I think the judgment ought to stand, because there is no clear evidence upon which to refuse to allow it to stand. The Court is asked to enforce it by granting an order upon the Magistrate to give effect to it by issuing his certificate. It appears to me, upon my reading of this Act, that the issue of a certificate is contemplated. Who exactly is to sign that, and what the practice is with reference to making out the list, which is sent to the Magistrate, and making out certificates, is not very clear, but I think that the Court will meet the requirements of the case by deciding that the applicant is entitled to his licence, and that he is entitled to receive the necessary documents from the Magistrate. I do not think, after that, there will be any difficulty in obtaining what the applicant requires. The Court will declare that he is entitled to the certificate required.

[Applicant's Attorneys: Sauer and Standen. Respondent's: Reid and Nephew.]

HEYDENRYCH V. THE TRUSTEES OF THE ESTATE OF MACKIE, YOUNG AND CO. AND ANOTHER. { 1905.
May 19th.
" 25th.

Insolvency—Preferent and concurrent creditors—Rights of cessionary of a general covering bond.

In 1901, C. & Co. agreed to support M. & Co., on the latter firm passing a general covering bond in their favour. C. & Co. supplied goods to M. & Co. from time to time, for which the latter gave acceptances. Subsequently C. & Co. discounted some of these with the Standard Bank, and on December 12th, 1902, ceded to the Bank the said covering bond as security for the acceptances discounted. In 1904, when the estate of M. & Co. was sequestrated, all their current acceptances in the hands of the Bank were of date later

than December 12th, 1902. The Bank claimed that debts due on these acceptances were preferent, and the Master having admitted the claim, the trustee filed a liquidation and distribution account accordingly. The petitioner now applied for this to be amended by treating the said debts as concurrent.

Held, that as the Bank held the bond as security for all the paper of M. & Co. discounted by C. & Co., whether before or after the cession, the application must be refused.

This was an application calling upon the respondents to show cause why the account and plan of distribution in the insolvent estate of Mackie, Young and Co., should not be amended.

The circumstances, as disclosed by the affidavits, were that the trustee of the insolvent estate admitted as a preferent claim, a claim by the Standard Bank under a bond for £5,000. In 1902, the firm of Mackie, Young and Co. entered into an agreement with Messrs. Cresswell, Sons and Co., who agreed to give them financial assistance in consideration of receiving a bond for £5,000, to cover advances made by them on behalf of Mackie, Young and Co., for the purchase of goods ordered by the last-named firm. Messrs. Cresswell ceded the bond to the Standard Bank in 1892, and subsequently the applicant was given covering bonds, against which property was specially hypothecated. Another covering bond was issued to Cresswell and Co. for £3,000 and this was ceded to the bank in 1903. Most of the advances on the covering bonds to the bank were made subsequent to the cession. The question to be decided was whether the bank's claim was preferent or concurrent, and applicant claimed that it should be regarded as concurrent.

Mr. Burton was for the applicant; Mr. Searle, K.C., was for the respondents, Mr. H. Hands, trustee in the insolvent estate and the Standard Bank of South Africa.

Mr. Burton contended that the bank could only claim for the amount of the advances prior to the cession. The cessionary acquired the rights of the mortgagor, and upon the cession there was a cessation of the obligation to advance further moneys. He submitted that the bank was only entitled to preference to the extent of advances made prior to the date of cession.

Mr. Searle argued that if the cessionary at any time while the bond was

in force made advances in respect of obligations owing by the original mortgagor, then the cessionary could prove preferently. It was broadly laid down in the authorities that the cessionary held the same rights as the cedent. This was the ordinary banking practice, and he contended the Court must have a clear, definite authority before declaring such a practice illegal.

Cur. Adv. Vult.

Postea (May 25th).

Buchanan, A.C.J.: The second named respondents, the Standard Bank, claimed as preferent creditors on the insolvent estate of Mackie, Young and Co., in respect of certain acceptances secured by a notarial general bond duly registered on the 23rd April, 1901. This claim was admitted by the Master, and the first named respondent, the trustee of the estate, has now filed his liquidation distribution account, in which he has awarded the bank preference on the proceeds of the property not subject to any special hypothecation. The applicant, who holds several bonds registered subsequently to the respondents' bond, has applied to have the distribution account amended so as to award to him under the general clause in his bonds the preference which the trustee has awarded to the bank. To understand the relative position of the parties it is necessary to consider the facts disclosed on the affidavits. From these it appears that early in the year 1901, Messrs. Cresswell, Sons and Co., a London firm, agreed with Messrs. Mackie, Young and Co., who carried on business in Cape Town, to open a supporting account upon Mackie, Young and Co., passing in their favour the general bond in question, covering present and future transactions. The validity of this bond is not questioned. Under this security Cresswell and Co. supplied goods from time to time, for the price of which Mackie, Young and Co. gave acceptances. Later on, Cresswell and Co. discounted some of these drafts with the Standard Bank ceding to them the covering bond in question. The date of cession was the 12th December, 1902, and is in terms absolute. But it is clear from the affidavits and the subsequent dealings of the parties that the bond was held by the bank as security for the paper discounted, and that Cresswell and Co. were entitled to the return of the bond when their liability to the bank on the acceptances discounted were discharged. This especially appears from the fact that subsequently when negotiations took place between Cresswell and Co. and Gardiner and Co. to take over Mackie, Young and Co.'s account, Cresswell and Co. directed the bank to hold the bond at disposal of Gardiner and Co. on their discharging Mackie, Young and Co.'s liabilities on their drafts in favour of Cresswell and Co. These

negotiations fell through, and the bond was retained by the bank. When Mackie, Young and Co.'s estate was sequestrated in 1904, their acceptances then current were all of date subsequent to the 12th December, 1902, the date of the cession to the bank. These acceptances were at the time under discount with the bank, who had recurrence thereon against Cresswell and Co. Holding these acceptances, as well as the bond, the bank proved them on the estate, claiming the preference now in question. The applicant does not object to the proof of the bank, his case being that it should rank as a concurrent and not a preferent claim. Applicant's counsel freely admitted that had Cresswell and Co. never ceded the bond, but had retained possession of it, and had themselves proved for the outstanding acceptances, they would have been entitled to the preference, but he contended that in the hands of the bank the bond only secured preference for such bills as were in the bank at the date of cession. This contention, if I understand counsel's argument correctly, was founded on the proposition that the bank, not being an original party to the bond, could not tack on the debt due to Cresswell and Co. at the time of the cession, and then transferred to the bank a debt subsequently incurred to the bank itself. The doctrine of tacking of claims is certainly not recognised by our law, and the applicant's contention might have had some force if the bank had claimed a preference for debts incurred by the insolvents directly to the bank subsequently to the cession. But there were no transactions between Mackie, Young and Co. and the Bank. On the cession of the bond to the bank, Cresswell and Co. did not close their account with Mackie, Young and Co., but continued the course of business agreed upon when the bond was passed. These very transactions were what the bond was given to secure, and they are represented by the acceptances in question, and it is common cause that had Cresswell and Co. retained the bond in their possession they could have claimed a preference for them. In the case of *London and South African Bank v. Trustees of Gates* (5 Searle, 246), it was argued by counsel for the successful party that where promissory notes in the hands of third persons were secured by a registered bond, the holders of the bond could be compelled to prove for such liabilities, and to hold the amount recovered as trustee for the creditor holding the notes. It does not appear from the report whether or not the Court adopted this view, but it is not necessary to go so far in this case, as the bank holds both the acceptances and the bond which was given with the object of securing them. For the financing of their business, Cresswell and Co. discounted with the bank the acceptances they received from

Mackie, Young and Co., and handed the bond to the bank just as they might have handed over any other securities they might have had in their possession. I fail to see how the fact that some of these acceptances were discounted by Cresswell and Co. at the time of the cession, and others were discounted subsequently, could relieve Mackie, Young and Co. from their obligations under the bond. The cession of the bond to the bank did not give them a discharge of their debts. As the bond covered the subsequent transactions, and was valid as against Mackie, Young and Co., I see no ground for holding that their insolvent estate can be placed in a better position than they themselves were in. The very object of the bond was to secure a preference in the event of insolvency. The registration of the bond was notice to the applicant that he was dealing with persons who had secured their supporters in business for past debts as well as for future advances, which security would give the supporters a preference should insolvency intervene; and with this notice before him the applicant became a creditor, and now insolvency has intervened. Under these circumstances, in my opinion this application must be refused, with costs.

[Attorneys for applicant: Van der Byl. For Mackie Young: Reid and Nephew. For the Standard Bank: Fairbridge, Arderne and Lawton.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

ROSEN V. EARLS AND } 1905.
SCHMITZ. } May. 19th.

Mr. Gardiner moved, as a matter of urgency, for an order for the delivery and restoration of certain furniture and goods set out in a schedule attached to a hire purchase agreement. From the affidavit of Mr. Andrew Carmichael, a bookkeeper in Mr. Rosen's employ, it appeared that certain furniture was supplied to Earls under a hire purchase agreement when he was proprietor of the Mount Pleasant Hotel, Reform-street. The instalments had been paid as they had become due except as to the rent for April, £5, which had not been paid. Deponent had ascertained on the 10th instant that the respondent Earls had left the hotel and handed over possession of the furniture to Schmitz. Earls had disposed of the furniture to Schmitz in violation of the agreement. An offer had been made by the applicants to allow the furniture to be transferred to Schmits in consideration of his paying in cash the balance owing of £32 7s. 2d. From

the correspondence it transpired that he respondent Earls said that he had not handed over possession of the furniture to Schmitz and he denied that the goods had really passed out of his custody. Deponent (Carmichael) said that he had applied for leave to inspect the goods, but this had been refused by Schmitz. The total value of the goods, added counsel, was £46 9s. 2d. The respondent Schmitz, who appeared in person, produced a document showing that he had purchased all the movables from Earls. He objected to the applicant coming to his premises for the purpose of removing them.

Maasdorp, J., said that the Court would give the respondent an opportunity of appearing before the Court again, if he had a case, though he did not see that he had got a case. The parties, however, might come to a settlement before a further order of Court was made and in the meantime an interdict would be granted restraining Schmitz from parting with the property, pending a further order of the Court and directing Schmitz to allow the applicant to inspect the property, question of costs to stand over.

Ex parte D'ATH.

Mr. Gardiner moved for leave to mortgage certain property in order to pay off the debts of the estate. The petitioner was co-executor with Mr. Steytler in the estate of his late wife, who had formerly been married to Charles Elliott, with whom she drew up a mutual will, the terms of which were that the survivor should inherit the property, with the exception of the provision of £1,000 for the children, and that the property, including certain property at Diep River, should not be sold until the youngest child attained the age of 21. The petitioner and his wife made a mutual will, making the children heirs to all the property, subject to a life interest in favour of the survivor. There was a considerable amount of landed property, but the rents were not sufficient to pay the debts and expenses, and to provide for the children. The original application had been to sell certain property, and it had been ordered to stand over for a report from Mr. Steytler, who now expressed his opposition to selling any property owing to the depressed state of the market, and recommended that the property at Wynberg and Muizenberg, which was valued at £9,575, should be mortgaged to the extent of £1,250. Counsel said that he thought Mr. Steytler must have included the property at Mowbray, otherwise the valuation of the other two properties had been wrongly entered.

Maasdorp, J., granted an order in terms of Mr. Steytler's recommendation, the order to be amended to include the Mowbray property, if Mr. Steytler intended it.

GRASSICK V. B.S.A. ASPHALT CO.

Practice—Default of plea—Setting aside of judgment.

Although it is not necessary to give notice of a set down for judgment to a defendant who has been barred, it is competent for the Court to set aside the judgment upon the defendant giving good reasons for his default and showing that he has a prima facie ground of defence.

This was an application upon notice of motion calling on the respondent to show cause why a certain writ of attachment should not be set aside or the sale postponed in accordance with a judgment given in the Supreme Court on the 27th April, 1905, at the suit of the plaintiff, by reason of the defendants' default of plea, and why the defendants should not be allowed to reopen their case and defend their action. The affidavit of Harry Davis, secretary of the B.S.A. Company, set out that the defendants contracted with the City Corporation for tar pavement at the Early Morning Market. The plaintiff engaged to do certain piece work to the satisfaction of the City Engineer, who, however, condemned the work, and the plaintiff was ordered to cease work. The work had to be redone by the company. By reason of the delay in doing the work the company did not know the exact amount of their counter claim until the 18th April. Defendants were barred on the 19th April, and owing to the intervening four holidays and the pressure at the Supreme Court the matter did not come on until 26th April, and the following morning, without notice, judgment was taken out against them by default. The company was never served with a notice of set down. The company had good grounds of defence, and had a *bona fide* counter claim. The applicants were willing to pay the amount of the judgment into Court, and to pay any wasted costs if allowed to reopen their case. The amount of the judgment was £160 and the counter claim amounted to £213.

Mr. Jones put in an answering affidavit, which set out that the plaintiff was working for the defendants, and that the engineer had nothing to do with the work beyond the condition that it was to be carried out accord-

ing to his measurements. He denied that he was requested to cease work, but, on the other hand, he refused to carry out the work unless he had money to pay his labourers. The plaintiff did not believe the company had got a *bona fide* claim; they were merely trying to gain time, and he had reason to believe further that they intended going into liquidation.

Mr. Upington put in a replying affidavit from the secretary, in which he denied *in toto* the allegations of the plaintiff.

Mr. Upington for the applicants (defendants in the action). Mr. P. S. T. Jones for the respondent.

Counsel having been heard in argument,

Maasdorp, J.: It seems to me that the plaintiff in this case complied with the conditions of the Rules of Court before he obtained judgment, and consequently he obtained his judgment in due course. The defendant was barred from pleading, and, in my opinion, after he was so barred there was no necessity under the rule of the plaintiff giving the defendant notice that the case was to be set down for judgment. But I think that judgment, having been obtained, it is within the discretion of the Court to set it aside upon the defendant satisfying the Court that there was some good reason for his default, and that he has a *prima facie* cause of defence, although it does not quite clearly appear that all the necessary steps were vigilantly taken by the defendant in these proceedings. I think some good explanation has been given, which accounts for his default in this matter, and the Court would therefore consider further whether he has given *prima facie* grounds for a defence. It seems to me that the dispute is a *bona fide* dispute, and it did not arise after the action brought by the plaintiff. The defendants were dissatisfied at the work performed by the plaintiff, and did not consider themselves liable for the full amount of his claim. Under all the circumstances the Court will set aside the judgment, and allow the defendant to purge his default and to plead upon the plaintiff being fully secured in the amount of his judgment in case he shall be hereafter successful. The defendant to pay into Court the amount of this judgment, and to pay the costs which have been incurred in consequence of their default. The judgment will be set aside, the defendant allowed to purge his default, and to pay into Court £162 3s. 6d. to abide the judgment of the Court, and to pay costs incurred by his default, and costs of this motion.

[Applicant's Attorney: P. Hughes.
Respondent's: A. J. McCallum.]

DUNLOP V. UNION CLAN LINE.

Sir H. Juta, K.C., for the defendants, moved for the appointment of a commission to take the evidence of defendants' witnesses in New York. Mr. Burton, for the plaintiff, consented on condition that the commission be a joint one. Sir H. Juta suggested, as commissioner, the British Consul at New York.

Order appointing a commission granted, the British Consul at New York to act as commissioner.

In re THE ESTATE STEER.

Mr. Gutsche applied for an amendment of a recent order by the insertion of the word "unsecured." The order allowed certain property to be mortgaged for the sum of £800, in order to pay the liabilities, and counsel now moved for the alteration to make it read "unsecured liabilities."

Granted.

Ex parte THE LIQUIDATORS, BUFFALO SUPPLY AND COLD STORAGE CO.

Mr. Burton moved as a matter of urgency for the removal of one of the official liquidators of the company, Christopher Robertson, who had absconded with some of the funds of the company. Robertson had since written saying that he had taken the money as remuneration for his services. The other liquidators could do nothing without Robertson's signature.

A rule *nisi* was granted, calling on Robertson to show cause why he should not be removed from the office of liquidator, returnable June 8, to be served personally, if possible, and in case of default, one publication in the "Gazette," and one in a *Ploemfontein* paper, authority in the meanwhile given to the two liquidators to act in the liquidation. The usual order of inspection of the report made, publication in a paper in Cape Town and East London.

Postea (June 8th).

Mr. Burton moved on behalf of the official liquidators of the Buffalo Supply and Cold Storage Company (Messrs. H. M. Fleming and J. Power), for the removal of one of their co-liquidators, Christopher Robertson, from his office. Counsel said that he had already presented a report of the liquidators to the Court, and that report was now lying for inspection. Paragraph 15 said that Robertson, about the middle of April, left East London, and in consequence of certain information, Mr. Fleming (who drew up the report) went to East London, and, as a result of inquiries, had found that Robertson had absconded, and had misappropriated certain of the company's funds. Part of that money

had been received during voluntary liquidation, and part afterwards. The total amount so misappropriated, as far as had been ascertained, would amount to less than £150. A letter had since been received from Robertson, written from Bloemfontein, saying that the funds so taken by him had been applied towards payment of remuneration, due to him in connection with the liquidation. He went on to say that he was without means, or he should have entered an appearance to reply to some of the statements in the report which he thought unreasonable and unnecessarily harsh. Counsel asked for the removal of Robertson from office, and a direction that he should receive no remuneration for his services. He also asked on behalf of the liquidators for an order by the Court, as to a claim for £150 by Mr. Lawrence Wray for rent to rank as preferent.

Order granted for the removal of Robertson from office, and Mr. Wray's claim to rank as preferent.

His Lordship said that the matter of Robertson's remuneration could be dealt with when the question of remuneration to all the liquidators came before the Court.

ESTATE DAVIDSON V. AURET.

This matter came before the Chief Justice in January last, and a judgment, although not of a final nature, was given. His Lordship referred the matter back to the Resident Magistrate for further information on certain points (15 C.T.R. 21). The original application was to have a certain proof of debt filed by the respondent expunged. Davidson had borrowed £300 from the respondent, and an agreement on which the money was borrowed was to the effect that Auret was to have the right to inspect all the books, and that he was entitled to a half share of the profits yearly. At the end of the first year there was a profit of £200 or £300, Auret applied for his half share of the profits, but Davidson was not in a position to satisfy this demand, and the respondent obtained judgment against Davidson in the Court for £300 and half the profits, and Davidson, being unable to satisfy the judgment, surrendered his estate. Auret filed his claim, and the Resident Magistrate allowed it. When the matter came before the Chief Justice, he referred it back to the Resident Magistrate, with leave to both parties to produce further evidence for information on the following points: (1) Production of all correspondence that may have passed between Auret and Davidson relative to the tailoring business carried on by the latter; (2) any relevant oral evidence that may be tendered on either side upon the questions at issue with liberty to the opposing party to

cross-examine the witnesses; (3) production of the statement submitted by Davidson in March, 1904, and showing an alleged profit of £283 11s. 6d.; (4) an account prepared by some competent person, and sworn to by him showing (a) the capital, if any, paid into the business by Davidson; (b) the actual amount and dates of advances made by Auret; (c) the sums, if any, obtained from the business by Auret, and the sums drawn by Davidson as salary as his share of the profits and for his private purposes; (d) the profits and losses made and incurred between the date of the agreement and the date of sequestration; (e) the value of the assets of the business and the value of assets not belonging to the business at the date of sequestration; (f) the amount of the liabilities of the business and the amount of the other liabilities of Davidson at the date of sequestration, and (g) generally the balance of either profit or loss of the business at the date of sequestration. Counsel said that there was no reply to the question as to the sums drawn by Davidson, as his salary, as his share of the profits and for his private purposes, but with that exception there was evidence on the other matters.

Mr. Giddy, K.C., was for the plaintiff, the trustee in the estate; and Mr. Searle, K.C., was for the defendant.

Counsel having been heard in argument,

Maasdorp, J., said it might be necessary for him to ask for further information hereafter, meanwhile he would look into the papers.

SUPREME COURT

[Before the Acting Chief Justice, (the Hon. Sir JOHN BUCHANAN), and the Hon. Mr. Justice MAASDORP.]

VAN ZYL V. WARNER. { 1905.
May 22nd.

New trial—Insufficient damages.

Where a case involving only questions of fact has been tried before a jury which, in the opinion of the judge who presided, has not acted perversely or unreasonably, the Court will not order a new trial, on the ground that the verdict was against the weight of evidence,

and that insufficient damages were awarded.

This was an application upon notice of motion for a new trial of an action heard last term before Mr. Justice Maasdorp and a jury. The applicant, Christian Hendrik van Zyl, of Sea Point, sued the respondent, Robert Charles Warner, also of Sea Point, for £1,000 damages, by reason of the defendant having wilfully, wrongfully, and unlawfully set fire to a plantation on the applicant's land at Botany Bay, and destroyed a large number of trees and hedges. The defendant made a tender of £250, with costs to date of tender. The jury found for the applicant for £250 damages, the amount of the tender, and judgment was entered accordingly, defendant to pay costs to date of tender and plaintiff to pay subsequent costs.

Mr. Van Zyl now moved the Court for a new trial, on the ground that the damages awarded by the jury were too small, and that the verdict was against the weight of evidence, and also for the Court to exercise its discretion in regard to giving final judgement on the evidence already recorded. Counsel intimated that it was not proposed to press the latter part of the application.

The application was brought under section 36 of Act No. 23 of 1891, subsections 3 and 9, which were respectively, "that the damages are excessive or too small," and "that the verdict is against the weight of evidence."

The affidavit of the applicant stated that the damages awarded were too small.

The replying affidavit of the respondent stated that he considered the amount of damages awarded was fair and reasonable, and that he objected to a new trial, by which he would be put to further expense.

Mr. Searle, K.C. (with him Mr. Gardiner) was for the applicant; Mr. Upington (with him Mr. F. S. T. Jones) was for the respondent.

Mr. Gardiner then proceeded to read the record of the evidence called for the plaintiff.

Mr. Jones read the record of evidence called for the defence.

Mr. Searle referred to the case of *Hunter v. Tramway Company* (10 Cape Times Law Reports, and 17 Supreme Court Reports, 80). He submitted that it was clear, as regarded the present matter, that the preponderance of evidence was strongly in favour of the plaintiff, in view of the character of the witnesses and their local knowledge. Neither Mr. Matthews nor Mr. Pillans, who were called for the defence, really met the case at all. Mr. Matthews's evidence might very properly be swept away, because his tender was not based

on the correct estimate of what it would cost to reinstate the trees. Mr. Pillans, in his estimate, only took into account maintenance for twelve months, and he also left out the charge for labour. Both the estimates failed to go to the issue, which was, what it would have cost to put Mr. Van Zyl in possession again of his plantation. It was perverse and unreasonable if the jury found the damages on the estimates given by Mr. Matthews and Mr. Pillans, inasmuch as they had not provided for the full set of circumstances for which the plaintiff was entitled in law to damages. Again, on the question of the deterioration of the ground, counsel submitted that, so far as the defence was concerned, the only evidence which was directly of value in the matter at all, was that given by Mr. Behr, in answer to the Court, when he said that, with the trees on the plantation, he would value the ground at £265. That was the only evidence which they had to support the verdict. It was evident that his estimate could not be accepted, because, on his own admission, he had taken the lots at a less extent than he should have done, by deducting space for a roadway. He would not say that the respondent's action was malicious, but it was a wanton case of destruction, and liberal compensation should have been given. One never knew what influenced a jury—but it was clear, in this case, that the weight of evidence was strongly in favour of the plaintiff. Counsel submitted that the Court should now hold that the verdict was against weight of evidence, and direct a new trial.

Mr. Upington quoted authorities on damages, and submitted that it could not be said in this case that the jury did not take all of the elements of damages into their consideration. The authorities went to show how reluctant the Court was to grant a new trial on the ground that the damages were inadequate.

Buchanan, A.C.J.: The applicant was plaintiff in an action for damages suffered in consequence of a fire which the defendant had originated, and by which fire plaintiff had a plantation of trees destroyed. The plaintiff himself admits that he was satisfied with defendant's explanation that the fire was not done maliciously, and he accepted defendant's explanation that it was done for the purpose of saving defendant's own property. A bush fire was sweeping over the mountain in the direction of the plaintiff's property, and the defendant set fire to the grass in plaintiff's property in order to save his own. It was a wrongful act on the part of the defendant, and the defendant very properly admitted his liability for the injury done. The only question was what was the amount of the injury the plaintiff suffered. The plaintiff claimed £1,000,

and the defendant tendered £250. The question went before the jury, and there is no objection taken to anything set before the jury or the direction of the Court. The only objection is that the amount of damages was too small, and against the weight of evidence. Now, there is evidence to show that Mr. Van Zyl was put to considerable expense in planting these trees, but he planted them in a place where trees do not readily grow, and a good deal of the expenditure was unremunerative. The jury had before them direct evidence that the trees could be replaced for less than £200. It was essentially a jury question to determine what amount should be awarded for damages. The circumstances on which a new trial is granted are fairly stated in the case of *Hunter against the Cape Town Tramway Co.* (10 C.T.R. 141), and there it is laid down when the question is one of fact, and there is evidence to support, the verdict ought to stand. Then, again, the Court will consider the opinion of the learned judge who heard the case. He was in a fair position to judge, and he was of opinion there was no perverseness or unreasonableness on the part of the jury, and, on the contrary, it was a fair verdict. We have a question left entirely to the jury. We have the evidence before the jury, and, in the opinion of his lordship, the jury acted in an honest way. Under the circumstances it is difficult for the Court to find any sound ground to grant the application for a new trial. On the contrary, it was a jury case, and there was no law involved in it. The jury had been chosen by the plaintiff, and they gave their verdict honestly on the evidence. The Court ought not to go out of its way to upset this verdict. One may sympathise with Mr. Van Zyl, on losing a property he had an affection for. While sympathising with him, I cannot hold that the verdict is an improper one, and I think that the application ought to be refused, with costs.

Maasdorp, J., concurred.

[Applicant's Attorneys: Van Zyl and Buissinné. Respondent's: Syfret, God-lonton and Low.]

GENERAL MOTIONS.

ESTATE ULYATE V. SAVAGE { 1905.
AND SONS. May 22nd.
" 25th.

This was an application on notice of motion, brought by the trustee in the estate to have certain preference of debt expunged or amended. The applicants formerly carried on business at East London, and it appeared that two bonds had been entered into with the respondents, first when the firm was a

partnership, and again when the firm had been transferred into a limited company.

Mr. Searle, K.C., was for the applicant, and Sir H. Juta, K.C., was for the respondent.

Mr. Searle submitted that the evidence showed that it was never intended that there should be two bonds in existence. It was fully understood between the parties that the second bond should take the place of the first. The old bond could not, he urged, be now revived.

Postea (May 25th).

Counsel were further heard in argument.

Buchanan, A.J.C.: The firm of Savage and Sons carried on business at Port Elizabeth and in London, and one of their customers was Ulyate, who carried on business at East London. As is a common practice in this country, Ulyate, in 1896, gave a general bond to the firm of Savage and Sons to cover present and future advances by his supporters. In 1898 Savage and Sons' business in London was formed into a limited liability company, and the limited liability company took over, as one of the assets of Savage and Sons, the debt of Ulyate. An agreement was then entered into that Ulyate should pass a new bond to the limited liability company formed in London, and that the old bond passed by him to Savage and Sons should be cancelled. The carrying out of this agreement was entrusted to the attorney of the company, Mr. Chabaud, of Port Elizabeth. As there were many transactions of the same nature, and Mr. Chabaud could not attend to them personally, the conduct of this business was handed over to his chief clerk, Mr. Van der Horst, who was an attorney and notary public. The limited liability co. were cognisant, and consented to this arrangement, but looked to Mr. Chabaud to have this work done in a proper manner. In compliance with this agreement Ulyate passed a new bond to the limited liability company on the 22nd December, 1898. This new bond was registered in the Registry of Deeds in Cape Town, but the attorney evidently overlooked the fact that under the Act No. 3 of 1865 registration was also required in the Deeds Registry of King William's Town, East London having formed a portion of the former province of British Kaffraria. When Ulyate became insolvent in 1904, the limited liability company claimed under the new bond of the 22nd December, 1898, to have a preference for the amount of the debt due to them by Ulyate. The debt was allowed as preferent, but on an appeal to the Eastern Districts Court, that Court decided that in consequence of the failure to register at King William's Town the preferent claim must be ex-

punged, but the limited liability company were allowed to rank as a concurrent creditor. The decision of the Eastern Districts Court is not questioned, and still stands, and this Court cannot now go behind that decision. Thereupon the company withdrew the claim, which they had proved, and sought to secure their preference under bond, which Ulyate had given to Savage, and which by the agreement, was to be cancelled on the passing of the new bond. That bond, as I have already stated, had been cancelled in the Deeds Registry of Cape Town, but it had not been cancelled in the Deeds Registry of King William's Town, and when we look at the facts on the insolvency of Ulyate we find that the English company themselves totally ignored any claim under the old bond, and stood by their own bond which had been passed in 1896. It was only when this new bond was declared not to give them a preference that they sought to have a preference under the old bond. The question is, therefore, whether the old bond is still of force, and can be relied on by the limited liability co. It is alleged that the assets of Savage and Sons were ceded to the limited liability company, and that this was one of the assets which went to the company. But when we come to look at the bond itself it appears that the old bond was not ceded to the new company at all. The new bond was passed on the 22nd December, 1896, and I find upon the old bond not a cession to the company, but a cancellation by Savage and Sons on the 14th January, 1899. It is evident that Savage and Sons considered all along that the old bond had been superseded, and that there had been an acquittance thereon. The question the Court has to decide is whether the new bond was accepted in place of the old one. I think undoubtedly it was. The documents themselves show that it was; the conduct of the English company in proving on the new bond shows that they considered it was; and I think that now it is too late for them to attempt to revert to a liability on a document which had been put out of existence, and to rely on a document which had been declared to be cancelled. On that simple ground I think that the English company are not entitled to revert to this old extinguished agreement, and thereunder claim a preference. The Court are of opinion that the old liability was not of force and effect as against Ulyate. The application must, therefore, be granted, declaring that the respondents had no preference under the bond of 1896.

Maasdorp, J., concurred.

[Applicant's Attorneys: Fairbridge, Arderne and Lawton. Respondents: Van Zyl and Buissimé.]

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COATES V. SEARLE.

Sir H. Juta, K.C., moved upon notice calling upon the plaintiff in the action to show cause why an order should not be granted restraining him from proceeding with his suit until he shall have paid the costs of an application heard on the 1st May, and the costs of this application.

Order granted.

[Before the Hon. Mr. Justice MAASDORP.]

GRAND JUNCTION RAILWAYS { 1905,
V. WALKER. { May 22nd.

This was a double application, arising out of an application that was made some time ago on behalf of John Walker for leave to have his evidence taken on commission in an action in which the receivers of the Grand Junction Railways, who are suing John Walker and Sons and John Walker individually for transfer of certain landed properties, which were acquired for the purpose of the railways, and which, under a certain agreement, they contracted to hand over to the Grand Junction Railways. The Court had previously ordered that the case should be set down for trial on the 13th May, and that in the meantime the present applicant should take the opportunity of having Mr. John Walker medically examined, and decide whether or not they would oppose the application for leave to take his evidence on commission. Mr. Walker applied to have his evidence taken on commission on two grounds: the first being his state of health, and that he had an action pending in the English Court in which he is defendant, and Arnold Frank Hills plaintiff. Hills was willing to suspend those proceedings to enable John Walker to come out here to give his evidence. The application was on notice of motion, calling on the respondent to show cause why an order should not be granted to further postpone the hearing of the action, and the application of John Walker for leave to give his evidence on commission.

Mr. Upington for the applicants; Mr. Russell for the respondents.

Mr. Russell said he consented to the postponement of the hearing of the action.

Mr. Upington said he moved for the postponement of the hearing of the action, and of the application to take Mr. Walker's evidence on commission. Counsel put in affidavits which set out that Walker put such conditions in the way that it was impossible to obtain a proper medical report. Dr. Gay had said that Mr. Walker was suffering from certain senile affections, that he had suffered from apoplectic seizures, and that it would be dangerous to his health if he

undertook the journey to the Cape. It was necessary to have Walker examined by a surgeon, but he would not have the physician and surgeon examine him at the same time, and insisted on seeing the first doctor's certificate before he submitted himself to the second examination. Mr. Upington read letters from Dr. Ferrier and Sir Victor Horsley to the effect that it was essential that the examination should be made conjointly.

Mr. Russell read medical affidavits, one stating that the examination could well be made on separate occasions, and another to the effect that some years ago Mr. Walker suffered from a sharp attack of cerebral congestion, and as there was always a danger of recurrence, he was warned to avoid excitement and worry, and live quietly. Counsel did not object to the postponement of the trial, but he opposed the postponement of the application to take Walker's evidence on commission.

Maasdorp, J.: In this case there is an application for postponement of the trial, and that being consented to, the case is postponed *sine die*, as the trial depends upon the result of the other application that is before the Court. Then there is a motion on behalf of Walker for a commission to take his evidence in London. It appears that the matter has already been before the Court, and the Court ordered that the decision be postponed until the plaintiff had an opportunity of obtaining an affidavit by a medical man as to the state of health of the defendant. Then the plaintiffs made some attempt to get the necessary medical certificate, and in order to do so, it was necessary that the defendant should consent to submit to such examination. Upon being approached, certain difficulties were raised by him, and in the result, as the correspondence now stands, it appears that the parties came to terms on most points, leaving only one outstanding. When the plaintiff requested a physician to examine Mr. Walker, he expressed it as his opinion that it would be necessary to have the assistance of a surgeon, and the surgeon concurred with the physician that the only satisfactory examination could be by the two of them jointly. Mr. Walker consented to all the proposals of the attorneys in London, but he refused to submit himself to a joint examination by the surgeon and physician. Now, I cannot possibly conceive what reasonable objection Mr. Walker can have to such examination, and we have it positively stated by two eminent medical men that any but a joint examination would be unsatisfactory. I can only hold that Mr. Walker ought to allow himself to be jointly examined by these men. No order will be made on the application for a commission to take Mr. Walker's evidence, but leave is given to the applicant to move again

when he shall have consented to submit to a joint examination in consultation by two medical men. Any future application to be made not later than the 1st August, the question of costs to stand over.

Ex parte MEYER.

Mr. Burton moved for an order authorising the Registrar of Deeds to amend certain deed of transfer and mortgage bond, by substituting the petitioner's full name, Sabrant Renard Meyer, instead of Sabrant Meyer.

Granted.

VAN DRIEL V. WENTER AND NIEBERG.

Mr. Douglas Buchanan was for the applicant, and Mr. Watermeyer was for the respondent. The application was for leave to sue the defendants *in forma pauperis* over a certain contract.

Maasdorp, J., said he would like to have further information as to certain items, and ordered the case to stand over.

SUPREME COURT

[Before the Acting Chief Justice (the Hon. Sir JOHN BUCHANAN) and the Hon. Mr. JUSTICE MAASDORP.]

REVIEW.

REX V. HANS PEKEUR. { 1905.
{ May 23rd.

Magistrate's jurisdiction—Lashes
—Act 43 of 1885.

Maasdorp, J., said that the case of Rex v. Hans Pekeur had come before him from the Court of the Resident Magistrate of Montague. The accused was charged with assault with intent to do grievous bodily harm. This case had been remitted to the Magistrate under the Act 43 of 1885. The accused was found guilty, and sentenced to six months' imprisonment with hard labour and 24 lashes. It appeared that under the Act 43 of 1885 the accused could only be sentenced to lashes in case of a previous conviction for some offence within the last three years. No previous conviction had been proved in this case, and consequently the sentence must be quashed by striking out the words "and 24 lashes."

CRIMINAL APPEALS.

REX V. DUMBELLA.

This was an appeal from a conviction of the Assistant Resident Magistrate of the Cape at Uitvlugt, who had sentenced the accused to a fine of £50, with the alternative of three months' hard labour, for a breach of the liquor laws. The charge against the accused was that she had contravened section 75 of the Act 28 of 1883, in that, on or about the 26th February, at or near Uitvlugt, the accused, Matilda Dumbella, did wrongfully and unlawfully, and without a licence and contrary to the provisions of the said Act, sell, deal in, or dispose of intoxicating liquors, or sell, offer, or expose for sale to certain persons mentioned in the summons a quantity of intoxicating liquor, to wit, Kafir beer, Cape beer, and Cape brandy, otherwise with a contravention of section 7 of Act 28 of 1883, in that she did wrongfully make, assist in, or cause to be made a quantity of intoxicating liquor, to wit, one tin containing Kafir beer, without having obtained the permission of the owner or lessee of the premises.

The Magistrate, in his reasons for judgment, said that he did not believe the evidence of the witnesses called for the defence, and he was quite satisfied that the accused was the owner of the liquor in question.

Mr. Burton was for the appellant; Mr. Nightingale was for the Crown.

Mr. Burton: The first point raised is an alleged offence under section 75 of Act 28 of 1883, viz.: the selling intoxicating liquor without a licence. This Act raises a presumption in favour of the Crown. In the case of *Queen v. Fullerton* (4 H.C. 246), the conviction was quashed on appeal, although a considerable quantity of liquor was found in the house. In the case of *Queen v. Du Plessis* (9 Juta 83), the evidence was much stronger. Here the woman admits the ownership of the beer and Kafir beer, but she denies having dealt in it. There is no evidence to connect her with dealing in brandy and Cape beer. A witness claimed the Cape beer as his own property. The natives living in the house procured the Kafir beer. No sale has been proved. The men who really sold the beer were acquitted, and the accused who was innocent was convicted. As to being in possession of Kafir beer, she admits that it was hers.

[Buchanan, A.C.J.: She must show that she had permission to make Kafir beer.]

No, she is accused of making Kafir beer without a licence. See *Queen v. Kirkman* (4 E.D.C. 309), especially the judgment of Shippard, J. There must be at least *prima facie* evidence that the accused had no licence.

[Buchanan, A.C.J.: She certainly had no licence to sell Kafir beer, nor had she permission to make it.]

Section 8 of Act 28 of 1883 only gives permission to a landowner or lessee to search for Kafir beer.

Mr. Nightingale (for the Crown), was not called upon.

Buchanan, A.C.J., said that, taking the whole of the circumstances into consideration, the Magistrate was justified in finding that the liquor was actually consumed by the men on the premises, and supplied by a woman who had no licence. The appeal would be dismissed and the conviction confirmed.

Mr. Justice Maasdorp concurred.

REX V. RADASI.

This was an appeal from a conviction of the A.R.M. of the Cape at Uitvlugt. The case was in several respects similar to the previous one. The accused was charged with contraventions of section 75 of the Act 28, 1883, or, otherwise, with a contravention of section 7 of the Act 28 of 1883, the allegations being that he had sold, in the first instance, a bottle of Cape beer to a native, and, in the second instance, Kafir beer, Cape beer, and Cape brandy to certain natives, and, alternatively, that he had in his possession two bottles of Kafir beer. The accused was convicted on all counts, and sentenced to pay a fine of £50, or three months' imprisonment, with hard labour.

The Magistrate, in his reasons for judgment, said he did not believe the evidence with regard to the sub-letting of the premises, and he was satisfied the liquor was found on the premises.

Mr. Burton was for the appellant, Arthur Radasi, of McKenzie's Farm; Mr. Nightingale was for the Crown.

Mr. Burton contended that the Magistrate's decision with regard to the sub-letting was not supported by the evidence. Was it probable that this man would lease a whole row of rooms without having any sub-tenants? The constable, who was well-known to the accused, stated that he was not sent to trap the accused, but that he went to the room of his own accord. The evidence of the policeman was extremely improbable, and it was entirely unsupported. There was not a tittle of evidence to show that anybody else was the owner of the place. The evidence went to show that the accused was the owner, and there was no evidence that he did not get permission to have the Kafir beer, and the Magistrate was wrong in refusing the application of the appellant's attorney for a discharge on that count.

Buchanan, A.C.J., said there was an alternative count, and before dealing with the matter he would refer it back

to the Magistrate to ask him if he found the accused guilty on all three counts, and if so to apportion the punishment.

Postea (May 29th).

Buchanan, A.C.J., said that when this case was argued last week, the Court was of opinion that there was sufficient evidence to justify the Magistrate's decision, but an irregularity appeared on the face of the proceedings, in that the Magistrate had convicted the accused on two counts, and on an alternative count to the second, and the Court sent the matter back to the Magistrate to apportion the fine on the three convictions. The Magistrate now apportioned 10s. to the alternative count, and to this extent the sentence would be reduced, and the conviction on the count quashed. Otherwise, the decision of the Magistrate would be confirmed.

REX V. WEDDELL.

This was an appeal from a conviction of the R.M. of Colesberg, by which the appellant, Robert Weddell, junior, was ordered to pay a fine of £20, or one month's imprisonment, to be cumulative on two counts for a breach of his licensing conditions at Naauwpoort.

The charge was that the accused, who was manager of the British African Hotel, in breach of conditions 1 and 2 of his licence, sold a bottle of brandy to an unregistered Basuto (who had no permit) between the hours of 6 p.m. and 10 a.m. The appellant's attorney applied for a dismissal of the case on the ground that there was no evidence to show Robert Weddell was licensed to sell liquor, and that as the licence read "before 10 a.m. and 6 p.m.," there was total prohibition, and there could be no breach of the conditions. The application was refused.

Mr. Gardiner was for the appellant, and Mr. Nightingale was for the Crown.

Mr. Gardiner said he relied in his appeal on the ground that Robert Weddell was absent in Johannesburg, and was no party to the offence.

Buchanan, A.C.J.: The accused in this case was charged with contravening the conditions of his licence in that liquor was sold by his barman to an aboriginal native at a time when such sale was not allowed by the conditions, and also without the permit required. There are two defences set up. The first one is that the person charged was only managing the business, and that the licensee was absent at the time when the sale took place. It is true the defendant was absent, but he admitted he was the manager for his father, and the 11th section of Act 44 of 1885, makes the person managing the business of any licence holder liable to the same duties and obligations and

penalties as such holder. The mere fact of his being out of the hotel at the time, if he had stood in the position of the licensee does not exculpate him from the consequence of the act of the barman, whom he placed in charge. The 12th section of Act 28 of 1898, enacts that any liquor in the possession of a licensed dealer sold by any member of his family or person in his service or employ shall for the purposes of the Liquor Acts of 1883 and 1898 be conclusively deemed to have been sold, delivered and dealt in, or supplied with the knowledge and permission of the holder of the licence. It is the duty of the manager, to keep a man in charge who will not contravene the conditions of the licence, and the wrongful act of the barman was committed within the scope of his (the barman's) employment. It is no defence, though it might affect the amount of the penalty, that the act was committed against the wish of the manager, and that the manager did his best to avoid a contravention. The next point has reference to the conditions of the licence. There were two conditions which were charged as having been contravened, but both offences were in respect of the same act, and it is a principle in law that one act like this should not be split up and multiplied into separate offences. I think, therefore, there should be only one conviction on this charge. The Magistrate convicted the accused of two offences, and imposed a cumulative penalty. I think one of the convictions should be struck out, and the sentence reduced to one fine of £20, or one month's imprisonment. The sentence will, therefore, be corrected, but otherwise the conviction will be confirmed, and the appeal will be dismissed.

Maasdorp, J., concurred.

SUPREME COURT

[Before the Acting Chief Justice (the Hon. Sir JOHN BUCHANAN) and the Hon. Mr. Justice MAASDORP.]

JACOBS AND CO. V. MILLER & CHAT. 1905.
{ May 25th.

This was an application on notice of motion calling on the respondents to show cause why they should not be committed for contempt of Court for not complying with an order of Court. The affidavit of Francis Guthrie, attorney, of

Caledon, and sole trustee in the estate of Jacobs and Co., set out that he obtained judgment against the respondents for £771 3s. 9d., and a further order was obtained to attach the book debts of the firm. The respondents handed in one book, which was apparently "faked." Miller stated to the deponent that there were outstanding debts in the books to the amount of £180, and the book showed nothing like that. His refusal to deliver up the books would injure the creditors. The respondents had purchased Jacobs's business, and an action for the amount of the purchase price went by default.

The affidavit of Solomon Miller stated he admitted judgment was obtained against his firm, and an order granted to attach the books. He endeavoured to carry out the order of Court, and was willing to hand over the books to the trustee. The only book was the one handed in, and it was made up from little pocket-books kept in the Yiddish language by Jacobs.

The replying affidavit of Mr. Guthrie drew attention to the fact that only one of the respondents made an affidavit. The affidavit of one De Wet, stated that he had seen three books—ledger, cash, and a rough daybook.

Mr. Upington was for the applicant, and Mr. Alexander was for the respondents.

Buchanan, A.C.J.: to make the previous order perfectly clear, and in order to prevent any further illegality, an order will be issued that the respondents deliver up to the applicant all books connected with their business, the order to be served personally on both respondents, as this was a question of contempt of Court.

Ex parte THE RECEIVERS OF THE GRAND JUNCTION RAILWAYS.

Mr. Upington asked leave to mention this matter, which had been ordered to stand over for further information as to one Amos, in whose name certain property which had been purchased by John Walker and Son for the Grand Junction Railways was still registered. Amos, counsel said, was still living in the Colony. Counsel moved for transfer under the Derelict Lands Act.

A rule *nisi* was granted under the Derelict Lands Act, the rule to be served on Amos and the late partners of the firm of John Walker, the partners in the Colony to be served personally, and those out of the Colony to be served by registered letter, one publication in the "Gazette" and in the "Cape Times," returnable 3rd August.

Postea (August 3rd).

Mr. Upington said that this was the return day of the rule *nisi* under the

Derelict Lands Act. One of the respondents (Amos) did not appear, and counsel asked that the rule, so far as he was concerned, be made absolute. As to the other respondents, John Walker and partners of John Walker and Sons, he asked that the matter stand over pending the decision of other questions by an action.

Mr. Russell (for the respondents, John Walker and John Walker and Sons) consented.

Rule absolute as against Amos, and ordered to stand over as against other respondents.

His Lordship intimated that, with reference to the application for a commission *de bene esse* to take the evidence of John Walker in England, he had seen his brother Hopley, who agreed with him that, on the certificate filed by the two English doctors, the application for a commission should not be granted. The application would be refused, with costs, and the Court would direct that the parties should go to trial within the first week of next term, which would allow sufficient time for Mr. John Walker to come out from England.

SUPREME COURT

[Before the Acting Chief Justice (the Hon. Sir JOHN BUCHANAN) and the Hon. Mr. Justice MAASDORP.]

REX V. JELLIMEN. { 1905.
May 26th.

Magistrate's finding on facts overruled.

This was an appeal from a judgment of the Resident Magistrate of Maclear.

The appellant, Wm. Edward Jellimen, of the Royal Hotel, Maclear, had been convicted in the Court below of contravening section 30 of Proclamation 104, of 1903, in that he did, himself, or by or through, or by the hand of his servant, or barman, one Collins, at or near the Royal Hotel, wrongfully and unlawfully sell, give, or supply, or deliver to a native (a Basuto), a bottle of brandy, the said native not having obtained a permit signed by a Magistrate. The accused had been sentenced to pay a fine of £50, or in default six months imprisonment.

Mr. Close was for the appellant; Mr. Pyemont was for the Crown.

Mr. Close said that the grounds of appeal were: (1) That there was not

sufficient proof that the barman Collins did sell the liquor, and (2) that the barman had been instructed by his master not to sell liquor to natives. Appellant had originally been licensed under Proclamation 250 of 1900. Under that Proclamation the hotel was carried on for some time. The last time the licence was renewed it was issued on a form under the old Proclamation, whereas, as a matter of fact, that Proclamation had been repealed, and the new Proclamation of 1903 had been substituted. The difference between the two was that there was a specific penalty under the Proclamation mentioned on the licence handed to the licensee, but there was not a word as to forfeiture, while under the later Proclamation forfeiture was provided for. That was the particular Proclamation under which the appellant was convicted. The Magistrate apparently recognised the very serious consequences and had suspended his judgment. He (counsel) might mention, as indicative of the very serious results to the appellant, that the value of his stock was £2,000.

[Buchanan, A.C.J.: As the law stands at present the Magistrate has got a discretion?]

Mr. Close: No, he has got no discretion. The case is rather an impasse, because appellant has got his licence under a Proclamation that does not exist. Of course, he is bound by the conditions on his licence.

[Buchanan, A.C.J.: Carried to the legitimate issue, then, he has got no licence to sell at all?]

Mr. Close said he thought the position would be that appellant was entitled to act under the authority given him. Proceeding, counsel said that his client did not deny that the brandy was sold, but he said that it was sold in the bar to a white man, and that the white man sold the liquor to the native at the side door. Counsel submitted that Bester's evidence was contradicted in regard to his position; he contradicted himself as to where the native was. Kennedy, an important witness for the Crown, gave a totally different version from Bester, as to the time the native arrived at the hotel. With all the contradictions of Bester by credible witnesses, the Magistrate, having such drastic powers, should have given the appellant the benefit of the doubt. It was clear by section 12, of Act 28, of 1898, that the holder of a licence could not defend himself by saying that he gave instructions to his servant not to sell, but that law only applied to the Colony.

Mr. Pyemont said he would not argue that there were contradictions on both sides, but unless there was something startlingly wrong, he did not think that the decision of the Magistrate should be upset, and he contended that the probabilities were in favour of the prosecution.

Buchanan, A.C.J.: The licence of the

hotel was held under a Proclamation issued in 1900. At the time the licence was issued, that Proclamation had been repealed and replaced by a Proclamation of 1903. The terms of the two Proclamations, as far as they affect the offence, do not differ to any material extent, but the punishment under the two Proclamations differs, and if this conviction is sustained, it will be an interesting subject for discussion whether or not defendant is liable to the penalties under the Proclamation under which the licence was granted, or to the penalties under the Proclamation existing at the time the offence was committed. The appeal is made by the appellant on the grounds: firstly, that the conviction is against the weight of evidence in the case; and, secondly, that the person who committed the offence was the barman, who, if he did sell liquor to a native, did it against the orders of the hotelkeeper. The circumstances of the case are such that it will be sufficient to deal only with the weight of evidence. The learned counsel for the Crown admitted there is a contradiction in the evidence, but put it to us that we should take the evidence and weigh it, and say to which side it leans. Well, if I were sitting as a juror, I should have no hesitation in saying that the great weight of evidence is in favour of the appellant; but, as the question depends upon the finding of the Magistrate on the fact, it is necessary to go more carefully into the evidence, than to give a general impression as to which side the evidence supports. It has frequently been laid down that, where witnesses are called and facts have to be determined, the person who tries the case sees the witnesses and their bearing in Court, is the person better able to judge as to the credibility of the evidence given before him. But it must also be remembered that in a criminal charge the onus is on the Crown to prove its case, while in a civil action it is very often a question as to on which side falls the balance of testimony. The charge is that the appellant's barman sold liquor to a native when not entitled to do so under the licence. The native is one Koloko. The only witness called to show that liquor was sold is a man Bester, and his evidence is positively contradicted by a number of witnesses, and one has to look closely at Bester's evidence and antecedents before we can say whether his evidence should be acted upon alone. He says he went into the bar of the hotel, and when he entered the barman Collins was actually serving the native at a side window. Corporal Kennedy, of the C.M.R., called to support Bester, directly contradicts him in this respect. Kennedy, on the contrary, says that when Bester entered the bar, Koloko was then proceeding to the side window.

Bester's evidence is contradictory in itself. He first said on entering the bar he went to the end of the counter but could not see the side window, but when pressed, it is clear he went from the door opening on the side directly to the bar, and it would be impossible for him to see where the native was supposed to be standing. Bester did not go at the instigation of the police to trap. He went there simply, he says, for a drink. He says he did not buy a bottle of brandy, but witness after witness—and they seem credible witnesses—say he did buy a bottle of brandy, and came out of the hotel with the bottle and the man Feirara, to whom the Magistrate alludes, says he saw him go out of the bar with the bottle. The Magistrate queries his evidence, because he says witness was not certain as to the time, but witness says it was while the sale was going on, and it was clear from other evidence that it took place between 10.30 and 1 o'clock. Therefore it was likely that Feirara did see Bester coming out of the hotel with the bottle of brandy at the same time that the other witness deposes to. As to Bester's character, it appears he was a man who associated with natives, and who on previous occasions had bought liquor for them, knowing they were not entitled to buy themselves. The native Koloko says it was Bester, and not the barman, who gave him the liquor, and he gave it outside the hotel. Koloko also says that he had received liquor from Bester on a previous occasion. Bester denies buying brandy, but Collins, the barman, says he sold him a bottle of brandy. Kolopolo's son says he saw Bester come out, and saw him give the brandy to Kolopolo, and Jellimen, the hotelkeeper himself, says he gave instructions to the barman never to give liquor to natives, and that he saw Bester and the native walk over to the hotel. Looking at this evidence, I think the Magistrate should have carefully scrutinised Bester's evidence, and should not on his evidence alone have convicted the accused, unless there was corroboration. Six or seven witnesses positively contradicted Bester, and the evidence of these witnesses should have received more weight than they did. The Magistrate simply says a number of witnesses were called for the defence, but he says he could not accept their evidence, as they were all addicted to the use of brandy, and it was to their interest to keep the hotelkeeper there. If that was the reason for not accepting their evidence, the same objection would also apply to Bester. Reluctant as I am at any time to interfere with the finding of a magistrate on facts, yet, as there is only the uncorroborated evidence of one man, who had previously contravened the law, and who, when the native was ar-

rested, had a strong interest in trying to shield himself; and he is contradicted by the police (who are Crown witnesses) as well as by so many witnesses for the defence, I think the Magistrate would have acted with better discretion if he had acquitted the accused. In our opinion, on the evidence, the appeal must be allowed, and the conviction quashed.

Maasdorp, J., concurred.

SUPREME COURT

[Before the Acting Chief Justice (the Hon. Sir JOHN BUCHANAN) and the Hon. Mr. Justice MAASDORP.]

CRIMINAL APPEALS.

REX V. ADAMS AND OTHERS. { 1905.
May 29th.

Mission station—Grazing rights.

This was an appeal from a decision of the Assistant Resident Magistrate of Malmesbury, who convicted Adams and 22 others of the crime of contravening section 30 of Act 15 of 1892 (the Pounds Act), and sentenced each of them to pay a fine of £1, or ten days' imprisonment, with hard labour. The allegation was that on the 2nd March last they unlawfully seized and rescued 130 head of cattle from one Nathan Lederman, the said cattle having been lawfully seized by Lederman and others for the purpose of impounding. The appeal was made on the grounds that the accused were justified in retaking the cattle, that the cattle were not lawfully seized by Lederman, that the Magistrate had no jurisdiction, inasmuch as title of land was *bona fide* in dispute; that, under any circumstances, the accused had a twelve months' agreement, and had not received notice to quit, and that the conviction was not supported by the evidence. It appeared from the evidence that the cattle were seized by Lederman and others from land on the Moravian Mission Society property, in the division of Malmesbury. It was alleged that the appellants belonged to a disaffected party in the mission station. They had used the ground for grazing for a number of years, and up to two years ago were said to have paid a small sum per year for the right. Upon an intimation that the missionaries intended to lease the land some two years ago, the

people had paid no money in respect of grazing. It was alleged that at a meeting held at that time, one of the society missionaries agreed to give the people the grazing rights free of charge. The land was afterwards leased by the Moravian Society to Lederman, who took possession. The Magistrate held that the complainant was in lawful and *bona fide* possession of the ground. The superintendent had the power to grant a lease, and the lease being otherwise in order, the complainant was entitled to remain in possession until ousted by order of a higher court. He further ruled that the permission given to appellants to graze in 1903 was revocable.

Mr. Burton appeared for the appellants; Mr. Van Zyl for the complainant in the Court below.

Buchanan, A.C.J.: The land on which the cattle were seized belonged to the superintendent of the Moravian Mission. It had been bought for £240 from the Government. The superintendent let the land to one Lederman. It is clear that this land was not upon the same footing as the land granted the Moravian Mission Society which by terms of the grant the appellants had no grazing rights over. The defendants had been allowed to graze their stock on the land now leased upon paying a small annual rental to the superintendent; but they received due notice that they were no longer to graze their cattle there, and that the land had been leased. One of the defendants said they intended to bring an action in the Supreme Court to have their rights declared. Knowing they had no rights, and that they had been instructed not to go on the ground, they went and obstructed the person who was in lawful possession who was impounding cattle trespassing on the land, and rescued the cattle with a considerable amount of violence. The penalty imposed by the Magistrate was substantial, but not vindictive. The Magistrate was justified in convicting the defendants.

The appeal must be dismissed.
Maasdorp, J., concurred.

REX V. BAVOOKA AND OTHERS.

Theft—Technical exception.

Where certain prisoners were accused of stealing napsery from R., the exception was taken that the goods were not the property of R., but of a firm in which he was only a partner.

Held on appeal, that the exception was purely technical, and

that as the goods were in the lawful possession of R., the appeal must be dismissed.

This was an appeal from a decision of the R.M. of East London, in which the appellants were found guilty of theft, the first accused being sentenced to three months' imprisonment with hard labour, and the remaining three to six months' imprisonment with hard labour. The alleged thefts were committed during 1902, 1903, and the first nine months of 1904. The evidence showed that the accused were Indian laundrymen, carrying on business at East London. The proprietor of the National Hotel became suspicious, and on a search warrant he found a considerable quantity of the hotel linen in the boxes of the accused. The case was remitted, and an application to adduce further evidence on behalf of the Crown was allowed. The defence set out by Harry Bavooka was that he had sold the laundry to one Morrow, who had disappeared, and that the linen found in the house was retained by the other accused, as Morrow had not paid them. The Magistrate held there was guilty knowledge on the part of the other accused, who denied to the detectives that there was any National linen in the house. Taking the last three accused, counsel submitted that they probably took the clothes as a sort of lien for the wages due to them by Morrow. The indictment set out that the linen was the property of Michael Reece, but on Reece's admission, he was only a partner in the hotel at the time. The three last accused, counsel submitted, could only be charged with receiving, and in the case of Bavooka, he took the technical objection that the property was wrongly laid.

Mr. Gardiner was for the appellants, and Mr. Pyemont appeared for the Crown.

Buchanan, A.C.J.: The first accused was entrusted with the washing of the hotel linen, which was delivered to him from time to time. He did not return all the linen. After a time he gave over his business to one Morrow, who, however, shortly after gave back the business and left the premises. The accused, Bavooka, continued to wash for the hotel after Morrow left. Morrow has gone, and is not now to be found. Mr. Reece, knowing he lost a large quantity of linen, obtained a search warrant, and in the house of Bavooka, where the prisoners all lived, he discovered a quantity of linen in each of their rooms. These people could give the Magistrate no reasonable account of their possession, and were convicted of theft. On appeal a technical exception is taken on the ground that the charge lays the stolen property as being that of Mr. Reece, whereas, as a fact, the hotel belonged to a partnership in

which Mr. Rooce was only one of the partners. This is purely a technical objection, and I think it is covered by the words in his lawful possession.. The Magistrate has sentenced the first-named prisoner to three months' imprisonment. As the record stands, it seems to me that the first-named person is the much more guilty of the four, and although the conviction will be confirmed before finally dealing with the case, the Magistrate will be asked to explain why the other three prisoners received a heavier sentence than the first accused. It may be that it is a clerical error for six weeks.

Maasdorp, J., concurred.

[The Magistrate subsequently reported that the sentence passed on the three accused was six weeks' (and not six months') imprisonment. The record was amended accordingly, and so amended was confirmed.]

were suing an insurance company under a fire policy affecting the insolvent, upon part of his stock which had been damaged and destroyed by fire. Owing to the position taken by the insolvent and Peycke and Co., on account of to the latter refraining from proving their preferent claim against the insolvent estate, it was impossible for petitioner to ascertain what assets of Seagull, Peycke and Co. actually held, and whether they had any legal right to the same. He prayed that the Court may grant an order authorising the Acting Resident Magistrate of Port Elizabeth to take the evidence on commission of the persons set out in the schedule, including insolvent and his wife, the managers and accountants of the Standard Bank, Bank of Africa, African Banking Corporation, National Bank, partners of Peycke and Co., bookkeepers and clerks of Peycke and Co., and three ex-employees of insolvent.

Order granted as prayed.

REX V. JAFFE.

Culpable insolvency — "Proper books."

There is no positive legal standard as to what are "proper books." But the books kept must show all transactions of the business, its assets and liabilities: or at least give data from which these can be ascertained.

This was an appeal from a judgment of the Resident Magistrate of Calvania, who had convicted the appellant, Harris Jaffe, hawker, Rietfontein, of culpable insolvency, under section 71 of the Insolvency Ordinance, and sentenced him to six weeks' imprisonment with hard labour.

From the record it appeared that the appellant was originally charged at a preparatory examination on two counts — first, with fraudulent insolvency in contracting a certain debt of £191 11s. with Mendelssohn and Co., of Cape Town, when he had reason to believe he was not solvent; and secondly, with not having kept proper books. The case was eventually remitted to the Magistrate to be dealt with in regard to the second count. The appeal was based upon the grounds that the books and accounts kept by the accused were as sufficient and comprehensive as might reasonably be expected or required from one exercising his particular trade or calling, and that no evidence

SUPREME COURT

[Before the Acting Chief Justice (the Hon. Sir JOHN BUCHANAN) and the Hon. Mr. Justice MAASDORP.]

Er parte SIMONS, { 1905.
May 30th.

Mr. Gardiner moved, as a matter of urgency, on behalf of Mr. John Deane Simons, in his capacity of sole trustee in the insolvent estate of Max Seagull, trading as Seagull and Co., at Port Elizabeth, for the appointment of a commissioner to take certain evidence.

Petitioner said that in the examination of the insolvent before the Resident Magistrate of Port Elizabeth, at the second and third meetings of creditors, the insolvent, when asked to account for the disappearance of practically all his assets, alleged that they had been pledged by Peycke and Co., of Port Elizabeth. On the insolvent being questioned, he was unable to give a satisfactory explanation of his dealings and transactions with the said firm of Peycke and Co. Peycke and Co. had filed a concurrent claim of £1,486 5s. 4d., but they had as yet filed no preferent claim. They had admitted that they had a considerable quantity of the assets of the insolvent, but alleged that they held the same under a legal pledge, and declined to hand over such assets. Petitioner was further informed that Peycke and Co.

was adduced to prove that they were insufficient.

Mr. Burton was for the appellant; Mr. Nightingale was for the respondent. Counsel having been heard in argument on the facts,

Buchanan, A.C.J.: There is no standard fixed by the Insolvent Ordinance what particular books must be kept by a particular person, but regard must be had to the dealings and transactions of the insolvent, and what was his particular trade or calling. The books required from a merchant or banker would be different from what would be required from a person like a hawker. The Magistrate convicted insolvent for not keeping proper books, but did so on the inference drawn by himself from the books produced. These books are before us, and we can draw our own inference. Now, having regard to the fact that the insolvent was a hawker, and, having regard to the fact that the books produced show all his transactions—there is no complaint that they did not show any transaction—and having regard to the fact that accused banked his cash and produced a bank-book, and that he forwarded his invoices and books and stock lists, the fact that the accused did not keep a formal cash-book was not enough to justify a conviction. Having regard to the particular trade or calling of the insolvent, I think the Magistrate would have been better advised if he had not convicted the insolvent. I think it is a fair case in which the appeal might be allowed.

The conviction will be quashed.

Maasdorp, J., concurred.

REX V. TSOTSOBE.

Act 23 of 1897, Secs. 80 and 81.

Under Sec. 80 of Act 23 of 1897, any police officer or other person authorized by the local authority or the Minister may enter at all reasonable times upon any lands or premises for the purpose of making any inspection or doing anything required by the Act, and any person obstructing such officer in the execution of his duty is liable to the penalties specified in Sec. 81.

This was an appeal from a judgment of the A.R.M. of Port Elizabeth.

Appellant had been charged in the Court below with having on the 12th April last wrongfully and unlawfully refused entrance to one John Sprang, a sergeant of the C.M.R., stationed in

the district of Port Elizabeth, and being a person duly authorised thereto and acting in the course of his duty. The charge was laid under the Public Health Act, No. 23 of 1897, and proclamations duly published in the "Gazette" from time to time. Accused pleaded not guilty, but was convicted and fined £6 or five weeks' imprisonment, with hard labour.

From the record it appeared that accused occupied a dwelling at the Hills Location, Korsten, and that the Acting Resident Magistrate of Port Elizabeth had been appointed by the Colonial Secretary to direct the removal of all persons in that area to a place which he might point out. Sergeant Sprang, in default of the woman's compliance with an order to vacate the premises, went there under the instructions of the Acting R.M. for the purpose of evicting her, but the accused stood outside the house, the door was locked, and she declined to give the officer the key or in any way to enable him to carry out the directions of the Acting R.M.

Mr. Gardiner for appellant; Mr. Nightingale for the Crown.

Mr. Gardiner said the defendant was accused in terms of the section with wilfully refusing entrance to a duly authorised officer. In order to see whether she wilfully refused entrance it must be seen what Sprang's duty was. Sprang was only instructed to go in and take her things out if she did not go out herself. Sprang, counsel contended, had no authority to demand any further entrance from the appellant. Then again there was no proof that the appellant had the key of the hut, and, if she did refuse entrance, she was acting under compulsion by her husband, who, after all, was the occupier of the place. In conclusion, counsel submitted that Sprang was not a duly authorised officer in terms of the Act.

Mr. Nightingale was not called upon.

Buchanan, A.C.J., said: The accused was charged under the 80th section of the Public Health Amendment Act with refusing entrance to the premises in question to a sergeant of police. The section refers to "aforesaid officers or duly authorised persons in the performance of their duty." The "officers aforesaid" are officers of police, or constable, or other person duly authorised. The principal objection raised in this case is that the woman was ordered to leave, and refused admission to the house to a person who was not duly authorised. The person who attempted to carry out the directions of the minister was the sergeant of police, and not only was he acting under the directions of the minister, but he had specific and special instructions from the Magistrate to eject this woman from the location. The appellant had been previously ordered to remove from the location, but as a favour had been allowed to

remain on until the 13th of the month, and not quitting then, the Magistrate insisted on his previous decision being carried out. It was a matter of urgency with plague in the district, and I think the sergeant not only being a sergeant of police, but also having special instructions, was a duly authorised person. The next point is that the accused wilfully refused entrance. She was told she had to leave this hut, and go away to another location, and she refused. She looked the door, and sat outside, and that is not in compliance with the order to quit the location. She does not deny she had the key. She was the only person on the premises, and I think it is clear she contravened the section of the Ordinance, and wilfully refused the admittance to a police sergeant in the discharge of his duty. On these grounds the appeal will be dismissed, and the conviction confirmed.

Maasdorp, J., concurred.

CIVIL APPEAL.

SCULLARD V. PRICE.

This was an appeal from a decision of the R.M. of Elliot, in an action instituted by the plaintiff to recover £50 6s. 2d. for work and labour done at the defendant's request. The defendant acknowledged his indebtedness to the plaintiff in the sum of £6 15s. 8d., which amount he tendered to the plaintiff. The defendant prayed for judgment for the amount of the tender, with costs against the plaintiff. Judgment was given in reconvention for the sum of £34 9s. 2d., and in convention for the sum of £54 17s. 11d., each party to pay his own costs.

Mr. Gardiner was for the appellant, and there was no appearance on the other side.

Mr. Gardiner submitted that the Magistrate had wrongly refused to allow two items in the claim in reconvention for £13 1s. 3d. and 11s. 9d., for re-boring sleepers, which the plaintiff had failed to do according to the contract, and if he had allowed these items it would have brought the amount to that tendered by the defendant.

Buchanan, A.C.J., said that the Magistrate, in going through the accounts, appeared to have gone a little astray. The effect of an examination of the accounts was to show that the tender made by the defendant was sufficient, and the appeal would therefore be allowed, with costs, and judgment entered in the Court below for the plaintiff for the amount of the tender, the plaintiff to pay the costs.

SUPREME COURT

[Before the Acting Chief Justice (the Hon. Sir JOHN BUCHANAN) and the Hon. Mr. Justice MAASDORP.]

CIVIL APPEALS.

SMUTS V. POOLE. { 19X5.
May 31st.

Payment of costs by telegraphic money order.

Payment of costs by telegraphic money order is a good and sufficient payment.

This was an appeal against a decision of the Resident Magistrate of Wynberg, in a case in which the appellant, who was plaintiff, sued the respondent (defendant) for the sum of £1 for goods sold and delivered. The defendant's agent, Mr. Walker, excepted on the ground that the costs in a previous hearing had not been paid. A telegram was put in during the trial, which read as follows: "Silberbauer to Walker: Smuts v. Poole, cash, 14s. costs, herewith." The telegram was not answered, Mr. Walker stating that he was waiting on the money, and that the telegram was not sufficiently explicit. The exception was sustained, with costs, the Magistrate not considering payment by telegram a sufficient tender. In his reason, he added he did not consider it incumbent on the defendant's attorney to attend the Post Office for the money. Counsel said it appeared that the previous case went off on non-appearance of the plaintiff. On Nov. 17 the plaintiff's attorney sent the telegram, which was put in. The plaintiff's attorney, in order to save the preparation of a bill of costs, sent the telegraphic money order for the sum of 14s.

Mr. Burton was for the appellant, and Mr. Upington was for the respondent.

Mr. Upington said a telegram was sent to pay the costs of the previous hearing, but no order was included.

[Buchanan, A.C.J.: It is attached to the telegram.]

Mr. Upington said he did not know that, but he would submit that the creditor was not bound to go to the Post Office in order to obtain the money, and that the payment must be made directly in cash. The tender must be made in cash unless the party consented to accept the cheque. Supposing Mr. Walker had gone down to the Post Office to obtain this money, he would have wasted his time, and presumably he would have been entitled to charge his client for that.

Buchanan, A.C.J.: The plaintiff sued the defendant in the Magistrate's Court on a debt of £1 for goods. On the return of the summons, the plaintiff was represented by his agent, but the plaintiff himself not being present, his agent applied for a postponement, and he tendered the costs of the day. The defendant's agent objected to this, and the Magistrate, exercising his discretion, refused the postponement, and dismissed the summons, with costs. No doubt, under the rules of the Court, these costs must be tendered before the case can be re-heard. A summons was taken out, and on the return day of the summons the defendant's agent again objected that he did not receive the costs, but, as a matter of fact, when he made that objection he had received a telegram, in which was included a postal money order for 14s., the amount of the costs of the previous case. He does not object to the telegram or the amount, but he says it is not a proper tender. He had, however, never demanded his costs, and he had kept the telegraphic order for the amount due. Under these circumstances, the Magistrate should have heard the case, instead of dismissing it. Though the Magistrate erred in judgment, the agent was to blame in having taken the objection, and his client must take the consequences. The objection will be overruled, the case remitted to the Magistrate for hearing, and the appeal allowed, with costs.

Maasdorp, J., concurred.

HART V. FORMAN.

School—Notice of withdrawal of pupil.

Notice of withdrawal of a pupil given to the secretary of a public school is sufficient notice to the head master. Where, however, the school authorities stipulate for a quarter's notice, such notice must be given at the beginning of a school quarter.

This was an appeal from a decision of the Resident Magistrate of Cathcart, in a case in which the appellant was summoned by the respondent for £10, which was alleged to be due in lieu of a quarter's notice to the plaintiff (Forman) on the occasion of the defendant's minor daughter leaving a boarding school, of which the plaintiff was the principal. Judgment was given in favour of the plaintiff, and against that decision the defendant appealed. From the evidence it appeared that the defend-

ant agreed to give a quarter's notice if he should have occasion to take his daughter from the school, and it was contended on his behalf that the notice he sent to the secretary of the school on the 24th October was sufficient, although the plaintiff denied any knowledge of it. The plaintiff contended that a quarter's notice meant the school term, and not any three months' which might be selected by the defendant. The Magistrate, in his reasons, said that the plaintiff sued the defendant for £10 for board charges, due in lieu of a quarter's notice. The defendant contends that in giving notice to the secretary it was sufficient as regards the school, and the boarding departments, but he admits that he never treated with the secretary in regard to the boarding department. The Court was of opinion that a school term was implied, as shown on the school calendar, and that notice should have been given before the opening of the school for the new term.

Mr. Burton for appellant; Mr. Gardiner for respondent.

Counsel, having been heard in argument on the facts,

Mr. Burton, in reply, submitted that the whole thing was a pure technicality, and a mere legal quibble. This technicality was disposed of by the secretary of the school, who said he agreed that there should be three months' notice from one date to another. He submitted that the plaintiff really had no case.

Buchanan, A.C.J.: The plaintiff is the principal of the Cathcart Public School, and besides being principal of the school, he, assisted by his wife, kept a boarding establishment for boys and girls. The defendant sent his girl to this boarding establishment in 1902, and kept her there until the end of the school term in December, 1904. The contract between the parties, beyond what was stated in the letters, is shown by the prospectus of the school, which is published in every issue of the local newspaper, and which it is admitted was seen by the defendant. Indeed it is not in dispute that this prospectus was the basis of the contract between the parties. On the 24th October, 1904, defendant gave notice to the secretary of the school that he would remove his daughter from the school at the end of that term. This notice came to the principal's knowledge at the meeting of the Board in November, 1904. The girl was removed at the end of the term in December, and was not sent back to the school afterwards. The plaintiff now sues defendant for not having complied with the contract in giving one quarter's notice before removing his daughter. The Magistrate held that notice to the secretary of the committee of the school was not notice to Mr. Forman, the principal, and he has also held that the notice was not given in sufficient time. On the first point, looking at the advertisement, which simply stated that

Mr. Forman was principal and that Mr. Bentley was secretary, it is a fair inference to be drawn by the public that communications should be made to the secretary, and consequently that notice given to the secretary would be sufficient. In his evidence, it is true the secretary says that, as far as the boarding establishment is concerned, he does not think that notice should be given to him, but notice should be given to him in regard to school fees. I do not see on what principle the secretary can divide this prospectus into two parts in this way. I do not think that the Magistrate was sound in his reasons when he says that this notice given to the secretary was insufficient. But the question remains whether this notice was given in time? Now, one would say that "a quarter's notice required" would mean a quarter of the year, so that, under ordinary circumstances, notice should be given on the 1st January, 1st April, 1st October, and so on, but, looking at the advertisement, another interpretation is given to the word "quarter." The quarter there-in referred to evidently means the school quarter, and the question is, has notice been given at the beginning of the school quarter for the removal of the girl in that quarter? Notice was not given until some time after the quarter commenced, though, as it turned out, it was given just three months before the pupils had to re-assemble in January for that quarter. I think that the Magistrate erred in saying that notice to Bentley was not sufficient, but that he was right in holding that a quarter's notice in terms of the contract between the parties was not given, and on that ground the defendant is liable for the quarter's fees. On that ground, the appeal must be dismissed, with costs.

Maasdorp, J., concurred.

PRIEST V. STEGMAN AND OTHERS. { 1905.
May 31st.
June 19th.
" 26th.

Beneficia S. C. Velleijani et Authentica si qua mulier—Promissory note—Endorsement by women—Act 19 of 1893.

P., a married woman, had signed a promissory note made by her husband on the back "as surety and co-principal debtor," without expressly renouncing her benefits under the S. C. Velleijna et Authentica si qua mulier. When sued on the note in an R.M. Court,

she pleaded these benefits and further urged that the note was not presented to her and noted at the due date.

Held on appeal, that by Sec. 20 of Act 19 of 1893, it is not necessary that a woman, who accepts or endorses a note or a bill, should renounce the said benefits, in order to be held liable.

Held further, that a surety who binds herself in solidum and as co principal debtor, incurs the same responsibilities as the maker of the note (dis. Maasdorp, J.), and that presentation is not necessary, in order to render such surety liable.

This was an appeal from a judgment of the Resident Magistrate of Graaff-Reinet, in an action brought by the respondents upon a certain promissory note, which the appellant had endorsed on the back as surety and co-principal debtor.

From the record it appeared that the appellant was sued in the Court below for £33 4s., due upon a certain promissory note dated the 4th April, 1904. The appellant was the wife of the maker of the note, T. P. Priest, and at the hearing of the action an exception was taken that she was married out of community, and that she had not renounced the exceptions of excussion and division. The Magistrate gave judgment for the plaintiffs for the amount claimed.

Mr. Upington for the appellant; Mr. Sutton for the respondents.

Mr. Upington, in argument, said that he was unable to find any case in the reports which was on all fours with the present case. He submitted that where a woman signed as surety and co-principal debtor the creditor had notice that she was signing, not for her own benefit, but for the benefit of the maker of the note. He contended that a person who signed a promissory note as Mrs. Priest had done, although liable for the amount of the note, was not really the maker of the note in the sense required by the Act. His submission was that the position of a surety who signed as such, and as co-principal debtor was really the most onerous form of suretyship. If this were not so, why put in "surety" at all: why not sign only as co-principal debtor? The phrase would be meaningless, if it had the effect of making a person the joint maker of the note.

The case of *McAlister* (Kotze's Rep., 6 Natal, 10) is much stronger than the present case.

[Buchanan, J.: A woman need not renounce benefits if she gets value.]

Oak v. Lumsden (3 Juta, 144) hardly goes as far as that. The case of a woman who has received money for her own use is distinguishable from that of one who has signed as co-principal debtor. The important thing is the knowledge of the creditor, as was pointed out by De Villiers, C.J., in Hope's case.

[Maasdorp, J.: If a person signs a note in the place where the maker should sign, will he not be held liable?]

No; see *Klopper v. Van Straaten* (11 Juta, 94). A person who writes his name on the back of a note is not necessarily a maker. He may be liable in *solidum* on the note, but he is not the maker. Take the case of a man who signs as security for a lease. He is responsible, but he is not the lessee. So, *a pari*, a man who endorses a note is liable if he receives consideration, but he is not a joint maker. Here the creditor has notice *ex facie* of the document that the surety is signing merely as a surety. See *Oak v. Lumsden* (3 Juta, 144) and *Smuts and Co. v. Coetsee* (Buch., 1876, p. 55). In this case the defendant did not discuss the defence raised. It has been held in the High Court that a female is entitled to the benefit of the S.C. Vellijani; see the judgment of Barry, J.P., in *Estate Klueagen v. Adress* (7 E.D.C., 171). There the woman was the actual maker of the note. That is a very different case from the present. See also *Whitnall v. Goldschmidt* (3 E.D.C., 314). A woman cannot sign a note as surety. In English law she would be stopped from denying her signature. The knowledge of the creditor as to the relation between the principal and surety is all important. This case raises an interesting point of law as to what was the liability of a woman married out of community of property, who endorsed a promissory note for the benefit of her husband as surety and co-principal debtor. He (counsel) was not able to produce any direct authority upon the point; as far as he knew, the point had not been decided in our courts. Dr. Nathan, in his work on the Common Law of South Africa (vol. 2, p. 897) made the statement that in such a case the woman would be liable, but the cases that he cited in support of that view—*Collison, Sons and Co. v. Guildenhuis* (5 Searle, 62) and *Guildenhuis v. Swart and Others* (5 Searle, 162)—were not to his (Mr. Upington's) mind, any authority in favour of the view of the learned author. One had, under the circumstances, to go back to the provisions of the Bills of Exchange Act, and the main principles which had been

enunciated in the cases that he should venture to quote. Proceeding, counsel first addressed the Court on the question of what was the nature of the endorsement on this promissory note. He submitted that the correct way of looking at this matter was not to look upon Mrs. Priest as endorser. The maker of the note should be gone against. An endorser was entitled to claim the benefits of an endorser, and those benefits had certainly not been allowed to the present appellant. If it was contended that this woman was to be regarded as an endorser, then the defence could be raised that the note had not been presented on the due date which was a very good defence, and it would be giving her an even wider interpretation of co-debtor.

Maasdorp, J., said it had been decided in the Supreme Court that a person signing as a surety did not require notice.

Mr. Upington said his main contention really was that the defendant in this case intended to contract, and did only contract the liability of a surety, and nothing more than the liability of a surety. The appellant was not getting the consideration of a principal. If that view was not held by the Court, then at the least she must be looked upon as an endorser with the privileges of an endorser, and when the note was not presented on due date in that line of defence she must succeed, and she could not in any way be looked upon as a joint maker of the note, inasmuch as she contracted all her liability without her name appearing on the face of the note.

Mr. Sutton for the respondent.

The appellant cannot now take advantage of the *Senatus consultum Vellijani* and *authentica si qua mulier*. She loses her privilege by reason of section 20 of Act 19 of 1893, which is intended to apply to all cases where women become sureties to promissory notes or bills of exchange. The appellant, if not actually a joint maker of the note sued upon, signed as co-principal debtor and surety, and so is in the position of a maker. She is not entitled to notice of dishonour or presentment for payment. *Michaelis v. Mosina* (5 E.D.C., 129). She is not entitled to the ordinary benefits of a surety, e.g., the benefits of excussion and division. *Collison, Sons and Co. v. Guildenhuis* (5 S., 62); *Guildenhuis v. Swart and Others* (5 S., 165); *Willems v. Widow Schendler* (2 M., 24); *Kennedy, N.O. v. Haarhoff* (2 H.C., 215).

If not a joint maker, she has indorsed the note within the meaning of section 20 of Act 19 of 1893. See section 54 of Act 19 of 1893, Chalmers' Bills of Exchange, v. 6 and p. 188 and 189; *Evan Cape Bills of Exchange*, p. 30; *Klopper v. Van Straaten* (11 J., 97), *Coetsee v. Tiran* (1 F., 43). Such an indorser is

not entitled to notice of dishonour or presentment for payment, *Michaelis v. Mosina* (5 E.D.C., 129). A surety is not entitled to notice of dishonour on presentments for payment. *Hyal v. Lyons* (1 H.C., 238)).

Mr. Upington said he had nothing further to add, but referred the Court to a case decided in the late Orange Free State, and reported in 14, "Cape Law Journal," page 296.

Cur. Adv. Vult.

Postea (June 26):

Buchanan, A.C.J.: The defendant was sued in the Magistrate's Court upon a promissory note signed by her husband, Thomas Priest, in favour of the plaintiffs, Messrs. Stegman, Eeselen and Roos. On the back of the note appears the following: "As surety in *solidum* and co-principal debtor.—A. S. Priest." This endorsement is that of the defendant, who pleaded non-liability thereunder on the grounds, first, that she had not renounced the benefit of the exceptions *senatus consultum Vellijani* and *de authentica si qua mulier*, and, secondly, that if she was to be regarded in the light of an endorser, she had been discharged from liability owing to the fact that the note was not duly presented and noted for non-payment at the due date. The suit was for provisional sentence on the note, consequently no evidence was led, but it seems to have been assumed that the payee were aware that defendant had signed only as surety for her husband. The Magistrate overruled the defence and gave judgment for plaintiffs as prayed, with costs. Against this decision the defendant now appeals. As to the first plea filed, it is true that there had been numerous cases in our courts in which it has been held that women who had entered into contracts by which they had bound themselves as sureties for their husbands were not liable thereon where they had not expressly or impliedly renounced these *beneficia*. But the Bills of Exchange Act, No. 19, 1893, has modified the law on this matter, at any rate as regards bills and promissory notes. Section 20 of that Statute enacts as follows: "Capacity to incur liability as a party to a bill is co-extensive with capacity to contract, provided that to the validity of a bill accepted or endorsed by a woman, the renunciation of the benefits *senatus consulti Vellijani* and *authentica si qua mulier* shall not be requisite." Independently of this enactment by our law, women, whether married or single, had the capacity to bind themselves by contract, provided they complied with the proper legal forms. Several cases are given in the reports, in which judgments have been given against married women upon negotiable instruments. In other cases the exceptions relied upon here have been sustained as affording a good defence, but the fact that it

has been held that such a defence must be specifically raised supports the view that they have the capacity to contract. The considered judgment of De Villiers, C.J., in *Oak v. Lumsden* (3 Juta, 144), indicates certain circumstances in which, even before the Act, women were not entitled to rely upon these exceptions. And now this 20th section removes the necessity of women going through the form of specifically renouncing the benefits of their exceptions when they are parties to a bill or promissory note. But it has been argued with some ingenuity that in this case the defendant is neither the maker nor a simple endorser, and, therefore, she should not be taken to be "a party to the bill" under the 20th section. I fail, however, to see the force of this contention. The defendant has endorsed the promissory note itself, and not bound herself by any collateral agreement. Her liability, if it exists at all, arises upon the note and upon nothing else. I cannot see how she can deny being a "party" to the note—the extent of her liability as a special endorser is quite a different question. And, moreover, this objection is met by the 54th section of the Act, which says: "Where a person signs a bill otherwise than as drawer or acceptor, he or she thereby incurs the liabilities of an endorser to a holder in due course." The Magistrate was, therefore, right in deciding this point in favour of plaintiffs. The only defence remaining to be considered is the one founded on the fact that notice of dishonour was not given to the defendant on the due date of the note. Here, also, I think the judgment in the Magistrate's Court was correct. To ascertain the extent of the defendant's liability, we must look at the contract entered into by her. Had she simply signed her name, and endorsed the bill in blank without more, there might be some ground upon which to rest her claim for a discharge from liability. But it is not necessary to decide that question, as the defendant has specially endorsed on the note that she bound herself as surety in *solidum* and co-principal debtor. Similar words have received judicial interpretation in several cases, where they have been decided to mean that the person binding himself in this way assumes the same responsibilities as are incurred by the maker of the note. As want of presentation on the due date does not operate as a discharge of the maker, it would follow that it does not discharge the co-principal debtor from liability. The cases cited in argument on this point were not heard in this Court, but I am under the impression that they are in accord with decisions of the Supreme Court. At any rate, we have not been referred to any judgment to the contrary effect, and I see no sound reason for dissenting from them. In my

opinion, therefore, the Magistrate's judgment should be upheld, and the appeal dismissed, with costs.

Maasdorp, J.: I wish to make my opinion quite clear upon one point in this case, and it is this: I do not regard the defendant, who had endorsed the note in the form in which she has endorsed it, as the maker of the note, though she may in some respects stand in the position of a maker, and incur responsibilities similar to those of a maker. It appears that under section 20 the benefit of these exceptions need not be renounced by a woman where she signs as a maker or where she endorses a note. I regard her, under section 54, as standing exactly in the same position as the endorser. Section 54 is to the following effect: "Where a person signs a bill otherwise than as drawer or acceptor, he or she incurs the liability of an endorser to a holder in due course." This note has been endorsed by the defendant, and she has incurred all the responsibilities of endorser, but it is also quite clear that the endorser may endorse upon a note a modified endorsement—a qualified endorsement. I am, therefore, of opinion that, if her qualified endorsement had been that of a surety only, the question would still be open whether she could then take advantage of these benefits. I do not say she can, but I would like to reserve my opinion upon that point. In this case, however, after restricting her responsibilities by describing herself as surety, she then extends them by describing herself as "co-principal debtor," and it is upon those words that I hold she is liable to the full extent as an endorser. As to the question of whether she had had notice of dishonour, it has been held that where an endorsement is made by an endorser, with the full liabilities of co-principal debtor, in that case she stands in the position of the maker, and is not entitled to notice. Under these circumstances, I concur in the judgment, but I reserve my opinion upon the point as to what would have been the result if she had only endorsed as surety.

Hopley, J.: I concur in the judgment, for the reasons stated by His Lordship the Acting Chief Justice.

[Appellant's Attorneys: Reid and Nephew; Respondent's: Dold and Van Breda.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

ADMISSIONS. { 1905.
 { June 2nd.

Mr. Douglas Buchanan moved for the admission of Templar Buissinne as an attorney and notary.

Application granted and oaths administered.

Mr. Burton moved for the admission of Johannes Hendrik de Klerk as an attorney and notary.

Application granted and oaths administered.

Mr. Swift moved for the admission of Herbert N. Attwell as a conveyancer.

Application granted and oaths administered.

Mr. Close mentioned the application of F. S. Webber for admission as an attorney of this Court, applicant having been already admitted to practise in the Transvaal. Counsel read an affidavit setting forth Mr. Webber's explanation of his non-appearance.

Application granted; oaths to be taken before the Registrar of the High Court at Bloemfontein.

PROVISIONAL ROLL.

LONDON AND LANCASHIRE ASSURANCE CO. V. McNAUGHTON.

Mr. P. S. T. Jones moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

HEINAMAN V. HEINAMAN.

Mr. M. Bisset moved for a provisional order of sequestration to be made final.

Order granted.

Mr. Bisset applied for the appointment of Mr. W. A. Currey as provisional trustee of the estate, the principal assets of which, it was stated, were an hotel at Robertson.

Application granted, Mr. Currey to have power to carry on the hotel and collect monthly rents as they fall due.

MANGOLD V. KEUN AND ANOTHER.

Mr. Upington moved for provisional sentence upon a promissory note for £76 4s. 7d., less £54 6s. 1d., upon a bill of exchange which was also sued upon, with interest.

Order granted.

SMITH V. LEVIN.

Mr. Swift moved for provisional sentence on an acknowledgment of debt for £30, with interest and costs.
Order granted.

ESTATE VAN DER MERWE V. HERNE-MANN

Mr. McGregor moved for provisional sentence upon a mortgage bond, the bond having become due by reason of non-payment of interest; Counsel also applied for the property specially hypothecated to be declared executable.

Counsel said that the defendant had filed an affidavit to the effect that there were no arrears of interest due. The plaintiff had filed a replying affidavit stating that £17 odd was due by way of interest.

Order granted.

SEDGWICK V. SLABBER.

Mr. Struben moved for provisional sentence on a mortgage bond for £800, due by reason of the non-payment of interest, and for property specially hypothecated to be declared executable, and costs of suit.

Order granted.

HAYBITTEL V. VAN DER WESTHUIZEN.

Mr. Bailey moved for provisional sentence on a mortgage bond for £730, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

SAPIERO V. SOLOMON.

Mr. P. S. T. Jones moved for provisional sentence on a mortgage bond for £300, less £50 paid on account, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable, and costs of suit.

Order granted.

ESTATE REARLE V. VAN DER WEST-HUIZEN.

Mr. Bailly moved for provisional sentence on a mortgage bond for £500, due by reason of the non-payment of the interest, and for the property specially hypothecated to be declared executable.

Order granted.

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CHORITZ V SHOOLMAN.

Mr. Alexander moved for the final adjudication of the defendant's estate.
Order granted.

OHLSSON'S BREWERIES V. BRADSHAW.

Mr. Struben moved for provisional sentence on a judgment of the Witwatersrand High Court. A writ of arrest had been issued in the case in order to found jurisdiction the defendant having been resident at Camp's Bay for a time but being domiciled in the Transvaal. The plaintiffs had obtained judgment against the defendant for a sum of about £500, in the Witwatersrand High Court.

Order granted.

MARAIS V. VILLET.

Dr. Greer moved for provisional sentence on mortgage bond for £2,400, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

CAUVIN V. BONCKER.

Mr. Douglas Buchanan moved for judgment on a mortgage bond for £1,800, with interest, less £55 paid on account, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

COSTELLO BROS. V. OWBRIDGE.

Mr. Watermeyer moved for provisional sentence on a promissory note for £103, with interest and costs.

Order granted.

AERDERNE V. VAN WEENAN.

Mr. P. S. T. Jones moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

IREK V. CHRIEDON.

Mr. M. Bisset moved for provisional sentence on a mortgage bond for £530, the bond having become due by reason of the non-payment of interest; counsel

also applied for the property specially hypothecated to be declared executable. Order granted.

MALMESBURY BOARD OF EXECUTORS V. VAN SCHALKWYK.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £325, with interest, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable. Order granted.

MALMESBURY BOARD OF EXECUTORS V. VAN NIEKERK.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £750, with interest, the defendant being jointly and severally liable with his brother Lodewyk van Niekerk. Plaintiffs tendered cession of right of action against L. van Niekerk.

Mr. Gardiner read an affidavit by Nicolaas F. van Niekerk, from which it appeared that the defendant had obtained an order in the Supreme Court for a division of the farm which he and his brother had held in undivided shares, and against which the bond was standing. Subsequently, however, his brother surrendered his estate, and deponent was informed that no steps could be taken until after the third meeting of creditors. He urged that judgment on the present application should be deferred until after the liquidation of his brother's estate. Counsel submitted that the plaintiff ought to wait for his interest until the 15th July, 1906, and that the plaintiffs were not now entitled to a decree of forfeiture. The defendant had tendered his half-share of interest due. The plaintiffs had proved against his brother's insolvent estate, and they ought to wait until they saw what they got from the insolvent estate. All they could do at present was to come against the defendant for his half-share.

Provisional sentence granted, the defendant's share of the property declared executable.

ESTATE GOODSON V. LUCKE.

Mr. Sutton moved for provisional sentence on a mortgage bond for £1,000, with interest and costs, and that the property hypothecated be declared executable.

Maaasdorp, J., said a petition had been sent in by the defendant, and he would ask counsel to read it and mention the matter again.

Later in the day, His Lordship granted judgment as prayed.

KUPER AND GILLIS V. RAUBENHEIMER.

Mr. De Waal moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

SCHUTZ AND CO. V. PFUHL.

Mr. Gardiner moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

BUTCLIFFE V. HIRCHFELD.

Mr. De Waal moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment for £44, for jewellery sold to the defendant.

Order granted.

ESTATE WORDEN V. MILLER.

Mr. Gutsche moved for provisional sentence on a mortgage bond for £1,100, with interest, less £28 10s. paid on account, and that the property specially hypothecated be declared executable.

Order granted.

SILBERBAUER, WAHL AND FULLER V. SULLIVAN.

Mr. Gardiner moved for provisional sentence on a promissory note for £26 5s., and judgment for £39 2s. 4d. for professional services rendered, with interest and costs.

Order granted.

HUTT V. BRENNING.

Mr. P. S. T. Jones moved for provisional sentence on a mortgage bond for £250, with interest and costs, less £7 10s. paid on account, and that the property specially hypothecated be declared executable.

Order granted.

STROYAN V. BOTHA.

Mr. Van Zyl moved for provisional sentence on a mortgage bond for £700, with interest and costs, and that the property mortgaged be declared executable.

Order granted.

SMITH V. BOTHA.

Mr. Van Zyl moved for provisional sentence on a mortgage bond for £1,250, with interest and costs, and that

the property specially hypothecated be declared executable.
Order granted.

S.A. BREWERIES V. SCHMOLLE.

Mr. Douglas Buchanan moved for the sequestration of the defendant's estate as insolvent.

Order granted.

ESTATE MASKEW V. MORGAN.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £1,550, with interest and costs, and that the property specially hypothecated be declared executable.

Order granted.

LEEB V. VAN HEERDEN.

Mr. De Waal moved for provisional sentence for £60, an amount of interest on a mortgage bond, and costs.

Order granted.

PURCELL V. MCKEY.

Mr. De Waal moved for provisional sentence for £1,250, on a mortgage bond, with interest, less £31 2s. 5d. paid on account, and for £11 14s., paid on premiums, and that the property specially hypothecated be declared executable.

Order granted.

SUTHERLAND V. OWBRIDGE.

Mr. Van Zyl moved for provisional sentence for £100, on a judgment of the Court, and that certain property on which the applicant had not yet obtained transfer be declared executable.

[Maasdorp, J.: There is no property to declare executable. It is clear he has not got transfer. You can take your judgment without any order as to the property at present. You can mention the matter again if you can show any precedent for such a course.]

At a subsequent stage, Mr. Van Zyl quoted from Van Zyl (page 250) to show that a special order was required to execute against the rights. This was the only property the plaintiff could proceed against, as it was the only property left.

The Court declared the defendant's right on the property executable.

HUMAN V. ROUX.

Dr. Greer moved for provisional sentence on a certain acknowledgement of

debt for £47 5s., less £6 7s. paid on account, with interest and costs.

Order granted.

CAPRON AND CO., LTD. V. G. AND H. ROWE.

Mr. Close was for the plaintiff, and Mr. Gardiner for the defendant, Henry Rowe Rowe.

Mr. Close moved for provisional sentence on a bill of exchange for £255 14s., drawn by the plaintiff on George Rowe Rowe, endorsed by Henry Rowe Rowe. The other defendant had filed an affidavit, and the plaintiff wished to reply, and he asked that the matter should stand over.

Provisional sentence granted against George Rowe Rowe, and as against Henry Rowe Rowe the matter ordered to stand over until the end of June.

SMUTS V. LOUW.

Mr. Van Zyl moved for provisional sentence for £3,900, less £1,040, and £200 paid on account, with interest and costs.

Order granted.

GRAAFF AND ARDEBNE V. HALWERISKY AND OTHERS.

Mr. Van Zyl moved to have provisional order of sequestration against the defendants' estate made final.

Order granted.

WILSON V. A.M.E. CHURCH.

Mr. P. S. T. Jones moved to have the provisional order of sequestration against the defendants made final.

Order granted.

WORDON AND PEGRAM V. GINSBERG.

Mr. Long moved to have the provisional order of sequestration against the defendants made final.

Order granted.

DE BEER AND OTHERS V. SCHWARTZ.

Mr. Gardiner moved for the discharge of the provisional order of sequestration and also for the discharge of an interdict, with costs of this application and previous motion.

Order granted.

ESTATE OF REED V. JONES.

Mr. Baily moved for a provisional sentence on an acknowledgement of debt for £270.

Order granted.

CAPRON AND CO. V. BOWE.

Mr. Du Toit moved for provisional sentence on a promissory note for £109 16s. on two bills of exchange for £68 7s and £25 7s. 10d., and for judgment under Rule 329 (d) for £95 0s. 5d.

Order granted.

KOLBE V. KOLBE.

Mr. Roux moved for judgment on a Magistrate's Court summons for £6 17s., with interest and costs, and to have certain properties declared executable.

Defendant said he had made an arrangement to pay 2s. 6d. a week, and had paid for two weeks.

Mr. Roux said he would make enquiries of applicant's attorney.

EATON TRUST FUND V. WEIGMAN.

Mr. Gutsche moved for provisional sentence for £600, less £21 paid on account, on a mortgage bond and for certain specially hypothecated property to be declared executable.

Order granted.

ILLIQUID ROLL.

HULTON V. ROBERTSON. { 1905.
 { June 2nd.

Mr. P. S. T. Jones moved under Rule 329 (d) for judgment for £30, money lent.

Order granted.

CAPE TIMES, LIMITED V. PLATEWELL BUILDERS' AND SUPPLY CO.

Mr. Bisset moved, under rule 329 (d), for judgment for £72 7s. 6d., advertising charges.

Order granted.

SCOTT V. SMITH AND WILLIAMS.

Mr. Bisset moved for judgment, under rule 329 (d), for £162.

Order granted.

JOHNSON AND CO. V. BURRILL.

Mr. Lewis moved for judgment, under rule 329 (d), for £124 8s.

Order granted.

CHIAPPINI BROS. V. HARRIS.

Mr. Bayly moved for judgment for £228 17s., the purchase price of certain shares.

Order granted.

SCHOEMAN V. LATEGAN.

Mr. De Waal moved for judgment for £140, the purchase price of certain horses.

Order granted.

WOODSTOCK MUNICIPAL COUNCIL V. DE MARILLAC.

Mr. Gutsche moved, under Rule 329 (d), for judgment for £40 8s. 4d., Municipal rates.

Order granted.

REHABILITATIONS.

Upon the application of Mr. Sutton, Lazarus Rosenstein and Bernard Rosenstein were rehabilitated, as was Petrus Jacobus Bosman.

GENERAL MOTIONS.

BYRNE V. BYRNE. { 1905.
 { June 2nd.

Mr. Gardiner applied, on behalf of the wife, for a decree of divorce to be made absolute, for forfeiture of benefits by the husband, and for the custody of the minor children.

Decree granted as prayed, with costs.

MAIDMENT V. KENDRICK.

Applicant appeared in person, and Mr. Douglas Buchanan for the respondent.

This was an application by Henry Maidment for release from civil imprisonment, he having been attached for failing to keep up his instalments.

Applicant stated that he had absolutely no money, but, if he was allowed out, he could make £5 per week at a quarry in which he was interested.

Mr. Buchanan read affidavits to the effect that applicant had received various sums of money and could have paid.

Applicant denied this statement, and stated that his share of the profits in the quarry were being kept from him by his partner, and he wanted to get out, so as to obtain the money. If he was allowed out he would pay £4 per month.

Maasdorp, J., said he had come to the conclusion that the applicant had no property, but had a valuable contract, which he could not work while in prison. Therefore, the Court would order that the applicant be released and the order further suspended while the applicant paid £4 per month.

Ex parte EKERMAN

Mr. Gutsche applied for a rule nisi under the Derelict Lands Act to be made absolute.

Application granted.

Ex parte VAN SITTERT.

Mr. Swift appeared, to ask for the amendment of a certain transfer and bond, and for registration of a certain contract. Petitioner had been in the habit of using only her first name Lucy, and omitting the second, Florence, and inadvertently signed a transfer with her first name only. She had now contracted a marriage, and required an ante-nuptial contract to be registered, but the Registrar refused to do so, owing to the difference in the names. An order was accordingly prayed for the Registrar to register and alter the document.

Order granted.

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

CIVIL APPEALS.

RADEMEYER V. STONE. { 1905.
 { June 5th.

This was an appeal from a judgment of the Resident Magistrate of Uniondale, in an action brought by the present respondent to recover commission upon a certain bill of exchange. The Magistrate had given judgment for the plaintiff in the action, with costs.

From the record, it appeared that the appellant signed a bill on the 15th November, 1904, promising to pay to the respondent, on the 15th February, 1905, the sum of £212 15s. 9d., for value received, and failing payment on due date to pay 5 per cent. commission and 10 per cent. interest, in addition to the afore-mentioned sum. The money was not paid on the due date, and the plaintiff thereupon took proceedings on the 20th February in the Resident Magistrate's Court to recover the capital amount, together with 5 per cent. interest and

costs. An exception was taken at the hearing by the defendant's attorney that the bill had not been presented by a notary public as required, this having been due to the fact that the only notary in the town was absent for the day, and that the bill was thereupon presented by a householder. The exception was upheld, and the Magistrate found for the defendant, with costs. Subsequently the defendant paid the bill, with interest. On the 27th March the plaintiff brought a suit for £10 12s. 9d., being 5 per cent. commission for collection of the bill. At the hearing the defendant excepted on two grounds: (1) that the costs in the previous action had not been paid by the plaintiff, and that he was thus debarred from taking a further action; (2) that the summons did not disclose any cause of action, because it did not say that the plaintiff had incurred any expenses in collecting the bill. Plaintiff, in reply, said that he had been ready and willing to pay the costs, and he tendered the same. The Magistrate gave judgment for the amount claimed, with costs.

Mr. Burton was for the appellant, Gert Rademeyer; Mr. McGregor was for the respondent, J. T. Stone.

Mr. Burton said that the appeal was against the judgment of the Resident Magistrate upon the commission claimed by the respondent. He submitted that commission clearly must be taken to mean what commission meant in such cases, viz., commission for collecting the amount, and inasmuch as no person was instructed to collect and there was no collection, the plaintiff incurred no risk, and was consequently not entitled to charge commission. Counsel cited the cases of *Steytler v. Smuts* (1 Menzies, 40), *Jones v. Rhynould* (3 Menzies 463), and *Falkner v. Behr* (6 Juta 410), and submitted that it was reasonable to infer from all these cases that commission was for collection, and that it could not be recovered unless the risk were incurred. In this present case, he submitted, no risk was incurred.

Mr. McGregor contended that, the defendant having failed to pay the bill on the due date, he was liable to pay this commission. This was a specific form of *damnum*, and the parties had agreed to it as a sort of compensation in default of meeting the bill on the due date. It was a sort of compensation for the risk that was run and any extra trouble and labour involved when the defendant failed to meet his obligations. If the Court thought it necessary to regard the commission as being for collection, then he submitted that there was collection by the plaintiff himself and his agent.

Mr. Burton having been heard in reply,

Buchanan, A.C.J., in giving judgment, said that he thought a risk was incurred by Stone, and the Magistrate had grounds for finding the facts which he had done in this case. The appeal would be dismissed, with costs.

HARRIS V. LENTIN.

Stolen property—*Bona fide* holder for value.

The appellant had agreed to let H. have certain rings for half an hour, in order that he might find a purchaser for them. H. sold them to L., appropriated the proceeds and absconded.

Held on appeal, that as H. must be held to have stolen the rings, and as by our law the appellant was not bound to prosecute the thief to conviction before he could recover his property, judgment must be given for the appellant for the return of the rings or payment of £20, their value.

This was an appeal from a judgment of the Resident Magistrate of Cape Town in an action brought by the appellant for delivery of two diamond rings or their value, £20. The Magistrate had given absolution from the instance.

Mr. Gardiner said that the plaintiff sued the defendant in the Court below for the restoration of two diamond rings, or their value £20. The rings were obtained from the plaintiff by one Louis Hermann, late of Plein-street, who had agreed to take the rings on approval, to be returned within a half-hour if not accepted, the purchase price being £31. The rings were afterwards sold by Hermann to the defendant for £19 10s.

The Magistrate, in his reasons for judgment, said he was of opinion that the plaintiff lost possession of the rings by handing them to Hermann, with permission to sell them to an un-named customer, upon which he (Hermann) did actually sell to the defendant on the same date. The plaintiff had failed to pursue the said Hermann to conviction. The defendant appeared to have purchased the rings *bona fide*.

Mr. Gardiner, for the appellant; Dr. Greer, for the respondent.

Mr. Gardiner submitted that the principal was Hermann himself.

Buchanan, A.C.J., asked why the man Hermann had not been prosecuted?

Mr. Gardiner said it was alleged that Hermann had left the country. Continuing, he submitted that after the half hour

had elapsed the transaction became a sale, and that on the authority of *Daniels v. Cooper* (1 E.D. Courts, 174), plaintiff was entitled to follow the rings into the hands of a third party.

Buchanan, A.C.J., said that, according to English law, a man who did not pursue the thief to a conviction was not entitled to recover his property?

Mr. Gardiner: I don't think that has been held in our law.

Dr. Greer submitted that the onus lay upon the plaintiff to prove that a theft had been committed of these rings, and that this had not been proved in the present case. There had been carelessness on the part of the plaintiff in entrusting the rings to the possession of an unreliable person, and if anybody was to suffer it should be the plaintiff.

Buchanan, A.C.J.: The appellant in this case was a jeweller, and had certain rings in his possession. These rings are now in the possession of the defendant, Lentin. The rings were handed by the appellant to one Hermann, and he sold them to the defendant. The first question to decide is whether the appellant, Harris, has ever lost his property in the rings. Looking at what took place, I am bound to say that the appellant Harris has never lost his property in the rings. He said that he handed them over to Hermann, who said that he had a customer for them, and he was allowed to take them away for half an hour on approbation. I do not understand from the Magistrate's reasons whether he looked upon Hermann as a thief, and, therefore, held that as Harris had failed to pursue Hermann to conviction he could not recover these articles. Whatever the English law may be on the point, I do not think that principle is applicable to our law. In this case it seems impossible to prosecute the thief to conviction, because Hermann swore an affidavit on the next day and entrusted the case to the police, and the police were able to recover the property, but were unable to find the man. I think that Harris, therefore, is entitled to look upon Hermann as having stolen this property from him. The only question, but a more difficult one, still remaining to be decided is whether, under the circumstances of this case, Harris should be held to be barred by his conduct from recovering the property from a third person who holds it *bona fide* for value. It is true that Harris gives the rings to Hermann for half an hour, but that is the only thing against Harris. It is true that he enabled Hermann, by handing possession of the rings to him for half an hour, to go and commit a fraud upon a third person, but I do not think that is sufficient to bar Harris from recovering his property, which has been practically stolen from him. I think that the Magistrate would have been wiser if, on the facts before him, he had held that

Harris was not barred from recovering his property when found in the possession of a third party. Of course, it is understood that I am deciding this case on the supposition that the third person acted *bona fide*. I think that defendant acted with a certain amount of negligence in buying the rings under such circumstances. The appeal will be allowed with costs, and judgment directed to be entered in the Court below for the plaintiff for return of the rings or payment of their value, £20.

[Appellant's Attorney: E. J. Sydney;
Respondent's: C. Brady.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

GENERAL MOTIONS.

Ex parte McNAUGHTON. { 1905.
 { June 5th.

Mr. P. S. T. Jones moved, as a matter of urgency, for the appointment of a provisional trustee in the insolvent estate of James McNaughton, to look after rents accruing on certain property. Counsel suggested the appointment of Mr. H. Gibson.

Application granted; Mr. H. Gibson appointed as provisional trustee.

Ex parte MICHELS.

Mr. Sutton moved to make absolute a rule *nisi* calling on the defendant to show cause why the petitioner should not be allowed to sue *in forma pauperis*.

Rule made absolute, Mr. Sutton to act as counsel and Messrs Findlay and Tait as attorneys.

Ex parte TERBLANCE AND OTHERS.

Mr. Bailey moved to have an award of the arbitrators made a rule of Court. The respondents consented.

Order as prayed.

Ex parte GRAND JUNCTION RAILWAYS.

Mr. Upington was for the Receivers and Dr. Rainsford appeared for the London and Westminster Bank.

Mr. Upington said the Receivers, in presenting their second report, now asked for authority to pay a dividend of 5s. in the £ on undisputed claims. The

London and Westminster Bank now came in and said they appeared among the disputed claims, and they wished to be removed to the undisputed list, but there was a further difficulty, as John Walker had lodged an objection to all the debenture claims.

Dr. Rainsford read certain correspondence between the attorneys and the receivers, and submitted that the application of the bank was a very reasonable one. The receivers could not incur any liability, as the London and Westminster Bank were well able to pay any claim should John Walker succeed in his action.

Hopley, J., ordered that the Receivers be authorised to pay out 5d. in the £ on all undisputed claims, including the claim of the London and Westminster Bank, on condition that the said Bank gave a satisfactory indemnity in case of any objection to their claim proving successful. No order as to costs.

WOLFF AND OTHERS V. ESTATE VINK.

Sir H. Juta, K.C., was for the applicants, and Mr. Van Zyl was for the respondents. Sir H. Juta said the late Mr. Vink executed a will, by which he appointed his children as heirs, and he left the usufruct to these children, with a *fidei commissum* in favour of the grandchildren. Last term, on the petition of certain of the grandchildren of the testator, the Court ordered their shares to be paid out on their mother waiving her usufruct. Now, in this application, the lady holding the usufruct was insolvent, but the trustees were willing that she should surrender her right, because an arrangement had been made by which the children would pay all the creditors and release the estate from sequestration.

Mr. Van Zyl, who appeared for the executors, said they did not actually oppose the application, but they wished an order of Court to pay out the money.

Order granted in terms of the petition; no order as to costs.

Ex parte ESTATE LUKE.

Mr. Bailey moved for an order authorising the Registrar of Deeds to issue a certified copy of certain mortgage bond which had been, in the opinion of the executors, stolen from the office of the Eastern Province Guarantee Association at Graham's Town.

A rule *nisi* was granted calling on all persons to show cause why a certified copy should not be issued, one publication forthwith in both Graham's Town papers, the "Eastern Province Herald," and the "Gazette," rule returnable 13th July.

Ex parte NEWDIGATE.

Mr. Gardiner applied for an order authorising the Registrar of Deeds to issue certified copy of a certain bond that had been destroyed.

Decree *nisi* granted, returnable July 13.

Postea (July 13). Rule made absolute.

Ex parte POTGIETER.

Mr. P. S. T. Jones moved for an order cancelling an agreement of lease between the petitioner and one Louis Rosenthal, to whom certain property had been leased at Aliwal North. Rosenthal stayed on the property about six months, and then left for Johannesburg, where his address was unknown. The lease was for a period of ten years.

[Hopley, J.: How can a lease be cancelled on motion?]

Mr. Jones submitted that a sale had been cancelled on motion, and cited the petition of *Henry Stevens* (6 C.T.R. 150), and suggested the issue of a rule *nisi*.

Hopley, J.: I think it would be fair to give the petitioner a chance of having the matter settled on motion. If the respondent can show that he is desirous of continuing the lease, then the Court can order that the matter should be settled by action. It will be in accordance with precedent to grant a rule *nisi*, calling on Rosenthal to show cause why the lease should not be cancelled as prayed; the rule to be returnable on the 1st August, personal service on Rosenthal if possible, failing which, publication in the "Northern Post" and in the "Star," Johannesburg; personal service on Michael Jacobs, who might be the means of bringing this matter to Rosenthal's notice.

Postea (August 1): Rule made absolute.

In re COLONIAL ASSURANCE CO., LTD.

Mr. P. S. T. Jones said he was instructed to apply for the confirmation of the final report of the liquidators, but it had not lain for inspection on the occasion of the presentation of the first report.

It was ordered that the papers lie for inspection in the Master's office for a fortnight, and publication to be made in "Cape Times."

MAKGOSA V. FLAG MINI.

Mr. Alexander moved for an order of contempt of Court against the respondent, for refusing to comply with an order of Court to deliver up the applicant's child. When the respondent was served with the order, he informed the Deputy-Sheriff that he would not

comply with it, until eight head of cattle, which were given as dowry, were returned to him. He alleged he was married to the applicant according to native customs, which the applicant denied.

Order granted, with costs.

Ex parte GROENEWALD.

Mr. J. E. R. de Villiers (for Mr. Swift) moved for leave to pass transfer of certain property at Aliwal North to the petitioner, who was one of the executors in the estate. Sworn appraisers testified to the satisfactory price paid for the land.

Order granted authorising the executors to pass transfer to the petitioner.

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

TRIAL CAUSE.

PICTON V. PERRINS. { 1905.
June 6th.

Mr. Roux was for the plaintiff, and Mr. Alexander for the defendant.

This was an action brought by Stephen Picton, a grocer, of Kenilworth, to recover from Henry Perrins, in his individual capacity, and as sole proprietor of "The Peninsular Periodical and Press Company," £22 18s. 6d., balance for groceries supplied, and £78 18s. 6d. on an accommodation note.

The declaration set out that during the years 1899 to 1904, inclusive, the plaintiff sold, and the defendant bought, groceries on a running account, and on July 4, when he owed plaintiff the sum of £78 18s. 6d., defendant made in favour of, and delivered to, plaintiff a promissory note for the said sum, payable on October 4, 1904, with interest at the rate of 8 per cent. per annum. On the due date of the note the defendant failed to redeem it by paying the said sum and interest, and on October 11, 1904, he induced the plaintiff, for his accommodation, to sign and deliver to him a promissory note for £78 18s. 6d., payable on January 11, 1905, made in his favour. Defendant promised to disburse the said note with his bank, pay the proceeds thereof, the sum of £78

18s. 6d. to the plaintiff in settlement of his grocery account, and redeem the said accommodation note for £78 18s. 6d. at its maturity. The defendant duly discounted the said accommodation note with his bank, receiving the full sum of £78 18s. 6d. thereof. He thereupon drew a cheque for £50 and paid that sum to the plaintiff in part settlement of his grocery account. He induced plaintiff to deliver to him the promissory note made by him in plaintiff's favour on July 4, 1904, on the promise that he would pay the balance forthwith, as he had sold his house. Defendant failed to pay the balance of the promissory note for the grocery account, viz., £28 18s. 6d., notwithstanding frequent demands therefor. On January 11 defendant failed and neglected to redeem the second promissory note made for his accommodation on October 11, 1904, and plaintiff was compelled to redeem it at maturity, and to pay the defendant's bank the sum of £78 18s. 6d. Plaintiff thus became the holder of the promissory note.

The defendant in his plea denied that he owed the plaintiff on July 4, 1904, £78 18s. 6d., or any money. Defendant admitted he gave plaintiff a note, but the note was given for plaintiff's accommodation. On October 11 defendant discounted the plaintiff's note, and disposed of the proceeds as follows: £50 to the plaintiff, £10 set-off for commission due to the defendant in respect of certain shares, £15 paid to plaintiff, £23 18s. 6d. discounting charges. Defendant, in his rejoinder, set out that he had paid £1 4s. 4d. for groceries.

Evidence having been called, and counsel heard in argument,

Maasdorp, J., in allowing certain claims put in by the defendant, gave judgment for the plaintiff for £92 3s. 6d. with costs.

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

TRIAL CAUSES.

LEHMAN V. LEHMAN. { 1905.
June 7th.

This was an action brought by Adonis Johannes Lehman, of Wynberg, a coloured man, against his wife for restitution of conjugal rights, failing which a decree of divorce, on the ground of

her malicious desertion. Mr. Van Zyl was for the plaintiff; defendant was in default.

Wm. Thomas Birch, clerk in charge of the marriage register at the Colonial Office, gave evidence as to the registration of the marriage.

Adonis Johannes Lehman said that a few years after the marriage his wife left him, and went to live in Cape Town. He had tried to get her to return home, but it was of no avail. They had had six children, of whom three survived, all being in the custody of his wife.

Decree of restitution granted, defendant to return to the plaintiff on or before the 22nd June, failing which, to show cause on the 6th July why a decree of divorce should not be granted as prayed.

Postea (July 6): The rule was made absolute.

GOTZE V. BERGL.

This was an action brought by Karl Gotze, of East London, against Alexander Bergl, late of Cape Town, to recover certain sums upon a promissory note. Mr. McGregor (with him Mr. J. E. R. de Villiers) was for the plaintiff; there was no appearance for the defendant.

From the pleadings, it appeared that a letter had been received from the attorneys of record to defendants, Messrs. Fairbridge, Arderne and Lawton, to the effect that they had withdrawn from the case. The defendant was now in England. The matter arose out of the purchase of shares in the Federal Supply and Cold Storage Company by one John Wedderburn, who was in July, 1903, in the company's employ at East London. Gotze was at that time the company's local manager. In May, 1904, plaintiff obtained provisional sentence against defendant on a promissory note for £900. In September he claimed provisional sentence on two sums of £150 and £100, and the Court then directed that he should go into the principal case. In July, 1903, Wedderburn made a promissory note for £1,150 in favour of A. Bergl; that note was signed by Bergl and endorsed by Gotze. The note fell due on the 4th October, 1903, but in the meantime, on the 24th September, there had been a renewal of the note similarly signed and endorsed for £1,000. Plaintiff, on the 24th September, paid £150 on behalf of Wedderburn and Bergl. The £1,000 note fell due on the 4th January, 1904, but again it was not met, and plaintiff then paid £100, whereupon a renewal was granted for £900. The original note was made to enable Wedderburn to get a discount, and with the proceeds of that discount to

purchase shares in the company. Those shares were put in the Standard Bank as collateral security, but just before the last note of £900 had to be met, the shares were sold, and realised £594, the result being that plaintiff paid the balance owing of £306 5s. 3d. on the 5th April, 1904. The defendant's plea admitted his having signed the promissory notes, but said that he did so at the request of plaintiff and Wedderburn, and for their accommodation. He received no consideration for signing the notes. Plaintiff and Wedderburn jointly and severally agreed at the time of the said endorsement to pay the note when due, and to hold him harmless against action. He prayed, therefore, that plaintiff's claim should be dismissed.

Karl Gotze (the plaintiff) said that in 1903 he was in the employ of the Federal Company at East London. John Wedderburn was one of the officials of the company. As to the note for £1,150, Bergl first signed and witness afterwards signed. The note was signed solely for Wedderburn's accommodation. Mr. Wedderburn wanted to buy shares in the Federal. When the note matured, witness paid £150; Mr. Bergl said he was unable to pay, and he asked witness to pay the money for him. The bank would have pressed if witness had not paid the money. As to the second note of £1,000, witness paid £100 when the note became due, because Bergl was unable to manage. They all signed the renewal note of £900. This renewal note was paid by Wedderburn or Bergl. Witness paid £306 5s. 3d. Part had been paid off by the sale of the shares, and witness had to meet the balance. There was nothing said about witness indemnifying the defendant against an action. Some of the money given on the notes was for witness's accommodation. He told Mr. Wedderburn from the beginning that he could not help him with any money.

Maasdorp, J., said that witness helped Wedderburn with his name.

Witness said that Bergl signed as the first endorser. In further evidence, witness said that Wedderburn did not ask him to take up the shares. Witness told Wedderburn to get somebody else to endorse the bill as a protection, and then he would endorse the bill. Wedderburn then got Bergl to endorse the bill. When witness signed, Bergl's name was already on the bill.

Mr. De Villiers then read the evidence taken on commission.

Thomas Fraser, formerly branch manager of the Standard Bank, East London (whose evidence had been taken in Natal) stated that he pressed plaintiff for payment because he was more accessible than Bergl, the latter being in Cape Town.

The evidence of the defendant (taken in London) was to the effect that he

was at East London in July, 1903, when he was approached by Wedderburn, who said that he had been unfortunate in the purchase of 1,000 Federal shares. He represented that Gotze was his greatest friend, and had means, but that Gotze had not sufficient ready money. Witness agreed to lend his name to the transaction. Witness afterwards saw Gotze, and said to him that it was only in the event of him (Gotze) being unable to pay that he (Bergl) was to be called upon to pay. Gotze and Wedderburn both assented. In signing the document, he got no consideration from either Wedderburn or Gotze. When the original note became due, he had no application to pay the £150.

Maasdorp, J., said the question was whether both were accommodating parties, and suggested to Mr. McGregor to direct his evidence towards that point.

Karl Gotze (recalled) stated he saw Mr. Bergl after he signed the note for £1,150. Witness asked the defendant if he would get into trouble for signing the note, and the defendant assured him that everything would be all right. In October, the defendant said he could not pay £150. The bill was renewed after witness had paid defendant the £100.

By the Court: Witness told Wedderburn that he would not endorse the bill until he got someone else. Bergl signed the note to help Wedderburn.

John Wedderburn said that in the first instance he approached Gotze and asked him to assist him by loan or bill to take up the shares. Gotze said he had not got the cash. Subsequently witness went to him again, and Gotze said he was prepared to assist by his name on a bill, providing he was freed from all liability. Afterwards witness said Bergl and the latter agreed to sign the bill. Witness and Bergl went to the bank together, and the matter was fixed up. He did not tell Bergl that he would only have to pay if Gotze could not. Finally, after further transactions, the bank insisted that the shares should be sold. This was done, and the proceeds were paid in against the bill.

This concluded the evidence.

Mr. McGregor contended that part of the money should be regarded as having been paid at the request and on behalf of Bergl. He suggested that Gotze's name should be struck off the notes, allowing Bergl's name alone to remain, so enabling the plaintiff to sue Bergl for the amounts advanced. He submitted that in any case judgment should be for the plaintiff for half the money, with costs.

Maasdorp, J., said the difficulty was that the defendant was in default, because his attorneys had withdrawn at the last moment. They left the defendant in the case, and he was not here now. The defendant might wish to appear, and the court could not in his absence

dispose of the case on a different ground to that stated in the declaration. Both parties had failed in the position they had taken up, and the question was whether the case should now be dismissed, or whether plaintiff should have an opportunity of amending his declaration by putting in a count embracing a claim on the ground of suretyship. The declaration could not be amended in the absence of the defendant.

Mr. McGregor urged that it was not an ordinary case of suretyship, and that the court could deal with it as a matter of equity.

Maasdorp, J., said he would order the matter to stand over *sine die*, in order that the plaintiff might ascertain what position Bergl took up—whether he had ceased to defend, or whether he wished to defend. If Bergl did nothing more, then the plaintiff could approach the court for judgment, and the court would give such judgment as it thought proper.

CAPE ORCHARD CO. V.	{	1905.
COLONIAL GOVERNMENT.		June 7th.
		" 8th.
		" 9th.
		" 16th.

Negligence—Railway regulations
—Contract—Delivery.

The plaintiff company sued the defendants for damages to certain machinery resulting, it was alleged, from the negligence of the servants of the Railway department. By clause 145 of the Railway regulations, it is provided that "all damages to defect, or deficiency in a consignment must be pointed out in writing at the time of delivery, and that no claim will be admitted unless made within three days after delivery." These conditions were embodied in a consignment note signed by the plaintiffs' agent. The truck containing the goods was left by the department at a siding where none of their servants were in attendance, and plaintiffs were notified that the goods were lying there at their disposal. When they were removed by the plaintiffs, it was observed that the case containing them was broken, and the machinery was afterwards found to have been injured: no claim, however,

was made on the department till nearly four months after delivery had been taken. The Court found, as a fact, that the machinery had been damaged while in the custody of the department.

Held, however, that clause 145 was fair and reasonable, and as the plaintiffs had entrusted their goods to be carried, subject to its provisions, they were not entitled to damages.

The plaintiffs also claimed damages in respect of certain cases of grapes entrusted to the defendants for carriage to Cape Town and export to Europe. The grapes were not forwarded by the usual fruit train but by a later train, and arrived too late to be accepted for carriage by the steamship company.

Held, that as the department had not contracted to carry the fruit by any special train, and as they took them to Cape Town in time for despatch by the steamer, which had refused to receive them in consequence of regulations not known to the department, judgment must be given for the defendants on this claim also.

This was an action brought against the Commissioner of Public Works, as representing the Colonial Government, for recovery of the amount of damage caused to certain machinery while being carried by rail, and for the value of certain grapes, the sale of which was prevented owing to the delay in delivery by the Railway Department. The declaration alleged that in June, 1903, the defendant undertook to safely carry and deliver certain machinery to Orchard Siding on behalf of the plaintiffs. The case containing the machinery was conveyed by rail from Cape Town to Orchard Siding, but was delivered broken and damaged. It was useless to the plaintiffs, who had to get new machinery in lieu of it. They claimed £20 in the Magistrate's Court, but agreed, at defendant's request, to incorporate the claim in their action. In regard to the claim concerning the grapes, the plaintiffs alleged that in March, 1906, the defendant undertook to carry 110 cases of grapes from Tweefontein, Slatem, to Cape Town Docks, and to deliver them within a reasonable time for export to London. Defendant

received the goods, but did not dispatch them by the customary train for such traffic, and by reason of the delay the Union Castle Company, under a regulation providing that perishable goods must be stored in the cold store of the Harbour Board for 48 hours before the departure of the steamer, refused to ship them by the mail boat that week, with the result that the grapes could not be sold, as was intended, in London. Plaintiffs claimed the value of the grapes (£33).

Defendant, in his plea, stated that in the consignment note for the machinery, signed by the plaintiffs' duly authorised agent, it was agreed that the machinery should be received, conveyed, and dealt with in accordance with the terms and regulations published in the official tariff-book, clause 143 of which provided that traffic for stations such as Orchard Siding, where no one was on duty, should be left there at the sole risk of the owner. The goods were safely carried by the Railway Department, and duly delivered at the Siding on the 4th June, 1903, to, and were there off-loaded from the truck by, the plaintiffs' agent at the sole risk of the plaintiffs. It was provided by clause 145 of the regulations that all damage to, defect, or deficiency in a consignment were to be pointed out in writing at the time of its delivery, and that the Railway Department would not entertain any claim when this had not been done, and, further, that no claim for any damage, defect, or deficiency would be allowed unless made within three days after the delivery of the goods to the consignee. No damage to or defect in the consignment referred to was pointed out at the time of its delivery, and no claim in respect thereof was made before the 3rd October, 1903. Defendant did not admit that the goods were useless to the plaintiffs, and that he had been compelled to purchase goods in lieu thereof, and denied that he requested the plaintiff to incorporate the claim for £20 in his further action. Defendant admits that he undertook to carry for the plaintiff the other goods referred to, and said that it was agreed that they should be received, conveyed, and dealt with in accordance with the terms, conditions and regulations published in the Official Tariff Book of the Cape Government Railways in force in March, 1905. He denied that he undertook to deliver the said goods by any specified train or within any particular time. The goods were received by the defendant at Tweefontein Station at 10 a.m., on the 11th March, 1905, and were despatched therefrom at 3.22 p.m. on the same day, arriving at the Cape Town Goods Station at 11.45 a.m. on the 12th March. The 12th March was a Sunday, and in consequence of there being no reasonable facilities for delivery of the goods to the Table Bay Harbour Board Cold Store

between their arrival and 7.50 a.m. on the 13th March, they were duly delivered at the time last mentioned, and the delivery was a delivery within a reasonable time. Defendant admitted that the goods were excluded from the mail boat sailing for England on March 15, but otherwise denied paragraphs 12 and 13; but said the regulation of the Union-Castle Co. referred to was neither within his contemplation nor within his knowledge prior to the accrual of this cause of action. It was provided by clause 154 of the Tariff Book Regulations, that the Railway Department would not be responsible for any damage arising in respect of any articles from loss of any fair, show or market, or from non-delivery within any particular time. Defendant admits the value of the grapes and the request and refusal to pay the sums demanded. Neither the defendant, nor his agents or servants, had been negligent in regard to the conveyance of, or dealing with, any of the goods referred to in the declaration, and he denied his liability to the plaintiff in respect to the sums claimed. Plaintiffs, in their replication, said they had no knowledge of the damage, nor was it ascertainable until the machinery was erected.

Mr. Struben for plaintiff. Mr. Searle, K.C. (with him Mr. Evans), for defendant.

Mr. Struben submitted that the onus lay upon the defendants to prove that there was no negligence on their part.

Mr. Searle said he wished to apply for an amendment of paragraph 10 of the plea to alter the time of despatch to the 72 up train, which was booked to leave Tweefontein at 9.25 p.m.

Maasdorp, J., consented to allow the amendment.

Mr. Searle contended that the onus of proof was upon the plaintiff, because the department did not admit having received in a good condition.

Maasdorp, J., held that upon the pleadings the plaintiff should commence the case.

Lester MacGuire Dicey, one of the managing directors of the plaintiff company, spoke to the damaged condition of the generator on its arrival at Hex River Station. Mr. Patterson, a clerk at the station, came up at Hex River, and told him that the 7.4 up train would be used for fruit each day. There was a notice in the working time-table that this particular train would be used for fruit. The train passed Hex River about 12.15 each day. He knew the train ran on the day in question, because they shipped other goods by it.

Cross-examined: Witness would endeavour to produce the working time-book from which he obtained his information. It was a book supplied to the firm similar to the one produced marked "private, working time-book." He would be surprised to learn that grapes

belonging to other large shippers had been kept in the Cold Storage for 8 or 9 days. He should not like any of the company's grapes to be kept in the Cold Storage, so long before being despatched by the mail steamer. He took no steps to sell the grapes after he found that they had missed the steamer. He had heard that the grapes were sold a month afterwards. He did not make any attempt to sell them at any time, because he thought the grapes would not make more than the price of the cases, 6d. each.

Mr. Searle: That would be 50s., and yet these grapes made, a month later, about £8.

Witness: It might have been on a bare market.

By the Court: The fruit was consigned to the Harbour Board Cold Store. It was an arrangement made between the Harbour Board and the Fruit Exporters' Association that all fruit should remain in the cold store for 48 hours to cool before being shipped.

Alfred W. B. Nicholson, clerk in Messrs. Spilhaus's office, stated that when he received the receipts from the ship for the machinery there was nothing to show that the machinery had been damaged.

Cross-examined by Mr. Searle: According to the tally and manifesto the machinery left the ship undamaged. If there had been any damage it would have been mentioned.

Frank Robb, secretary to the Harbour Board, said the Railway Department really took over goods at the Docks, but the Harbour Board loaded the goods from the ship, and brought the trucks to the exchange siding at the bottom of Adderley-street. When goods were damaged they were set aside and examined by the representative of the consignee, and the ship representative. If there was no mark on the receipt to that effect, the goods were not damaged. As regarded the grapes it was the practice of the Union-Castle Co. to refuse shipment of fruit unless it had been cooled in the cold storage for 48 hours. Fruit arrived at the store every day, and men were at the cold storage on Sundays.

Cross-examined by Mr. Searle: He could not say whether the goods were "lightered" or landed from the ship. He had been told, however, they were "lightered." The fruit would have been accepted on its arrival. As soon as the fruit was put in the cold storage the Harbour Board acted in the capacity of agent to the shipper. The fruit was sold by the Harbour Board on the market on May 6, and realised £7 15s. 9d. The fruit was kept two months in the cold storage, and it had evidently deteriorated.

Re-examined by Mr. Struben: The fruit could have been sent to any cold store outside the docks. In 1903, the

custom was to have a separate damaged list, and not a discrepancy list.

Walter Hudson, manager of the engineering department of George Findlay and Co., who had the contract to erect the general machinery at Hex River, stated he saw the machine in the case on the side. The case had been considerably damaged. It was not usual to take a machine of that description to pieces before starting it. Towards the end of September, he saw the machine, and noticed the pulley side fractured, which he attributed to the case falling on that side.

Cross-examined by Mr. Searle: The machine could have been examined in a day, but he noticed no external damage on the first occasion.

Mr. Ohlsson, in the employ of the Orchard Company, stated that when the case containing the machinery was being lowered from the truck he saw that it was broken. The case was handled carefully.

N. Shaw, who was in charge of the machinery when it was erected, said he superintended the "off-loading." When the tarpaulin was taken off the truck he entered the truck, and found the case smashed over the part where the pulley was. When he went up to Hex River in September the machine had been placed in its bed. He started the machine working, but after an hour or two it was found that oil was leaking and the bearings getting hot. On taking the machine to pieces, it was found that there was a slight crack in the castings.

Cross-examined by Mr. Searle: The machine was carefully lowered from the truck. There was considerable risk in off-loading such a machine.

By Maasdorp, J.: There were no railway officials present when he off-loaded.

J. E. Watkins, wireman employed by Messrs. Findlay, said he helped to "off-load" the machinery, which was done with proper care. The case was smashed at one end.

John Bell, market agent, said he was well acquainted with the sale of fruit in Cape Town. There was not much sale of grapes in Cape Town in March. Grapes were scarcer, and therefore more valuable in May.

Cross-examined by Mr. Searle: After they had been kept in storage for three weeks, the grapes would deteriorate rapidly.

Edward Kitley, stationmaster at Hex River, said in February he gave instructions that a truck was to be put on specially for fruit. He told Mr. Dacey that a truck for fruit would be sent to Cape Town every day for the early morning market and to the docks by the 74 train.

Cross-examined by Mr. Searle: He never made a special agreement with

Mr. Dicey outside the consignment note. He had not acted outside his instructions.

Mr. Struben closed his case.

Patrick Burgin, in the employ of the Railway Department, said that from the facts of the case he believed that the claim was not a *bona-fide* one. He was of opinion, if, by rough shunting, the case was broken, the head part of the truck would have suffered. He could not discover any rough handling from Worcester onwards—that was his section.

Cross-examined by Mr. Struben: He made his report two and a half months after the letter from the department.

Frederick Riley, guard of the train from Worcester to Touw's River, stated that the truck was taken on to De Doorns and sent back because the Orchard Siding was full. Witness had to report anything he found broken. Although it might not really be his fault, he would be responsible for rough shunting. The only shunt was at De Doorns.

Cross-examined by Mr. Struben: The delay of 214 minutes was caused through witness having to wait for another train. It was unnecessary to make a remark on his journal that the Orchard Siding was full.

O. Hansen, in charge of the Harbour Board Cool Chambers, noted instances where fruit had been sent to England after being stored in the chamber over a week.

Wm. John Ingleby, who was on duty at the Docks, stated that the train arrived about two hours late.

Cross-examined by Mr. Struben: He did not expect any consignment for the cold store as late as that.

By Maasdorp, J.: The truck was the only one that arrived by the train for the Docks.

James Patterson, sectional clerk in the Chief Traffic Manager's Office, who saw Mr. Dicey, said that he merely asked the latter for suggestions with regard to a better co-operation with the fruit-growers for a more perfect service.

Robert Barber, at present acting chief clerk to the present Traffic Manager, said that he would be aware of any arrangement for the carriage of fruit, if it interfered with the service. He knew of no specific arrangement with the Fruit-growers' Association.

Thos. Mundy, in the employ of the Railway Department, produced the time-book, showing that the 72 up arrived at 11.50 a.m. on March 12th. The train was booked to leave Tweefontein at 9.25 p.m. The 74 up was due to leave Tweefontein at 1.1 p.m., and due to arrive at Cape Town at 12.25 a.m.

George Burgess, foreman at Tweefontein Station, stated that the loading of the grapes was completed about 10 o'clock on the morning of the 11th March. By an oversight, the truck was not put on to the 74 up. He attributed

the oversight to an insufficiency of staff at the time.

Cross-examined by Mr. Struben: It was rather a serious oversight.

Joseph Baker, clerk in the employ of the Harbour Board, stated that he drew attention to the 110 cases that arrived on Monday, but he could not get the shipping order for Wednesday. When fruit was put in the steward's chamber, it was done through an arrangement between the consignors and the shipping company.

James Patterson, of the Railway Department, said it was quite understood that fruit should come up by the special train. The 48 hours rule with regard to placing fruit in the cold storage he did not know.

Cross-examined by Mr. Struben: Mr. McEwen, General Manager of the Cape Government Railways, tried to assist the fruit-growers, and gave instructions that fruit for export was not to be delayed in delivery.

Thomas Gilham, guard in the employ of the Cape Government Railways, gave evidence as to carefully carrying the truck of machinery from De Doorns to Orchard Siding.

Alexander James Robb, Assistant General Manager of the Cape Government Railways, stated he was a member of the Harbour Board since the 8th June last. The 48 hours rule with regard to cold storage he had no knowledge of until a few minutes ago.

This closed the evidence for the defendants.

Mr. Struben read the evidence, taken on commission, of Mr. Perse, secretary to the Fruit-Growers' Association, which set out that special arrangements were made with the Railway Department and the Harbour Board for the storing and dispatch of the export fruit. The fruit for export was usually plucked a trifle green.

Counsel having been heard in argument,

Cur. Adv. Vult.

Postea (June 16th).

Maasdorp, J.: The plaintiffs, who are a joint stock company, carrying on the business at Hex River of growing, selling, and exporting fruit, seek to recover from the defendants the sum of £20, as damages suffered by them through injury, caused by the defendants' negligence to a machine belonging to the plaintiffs, which the defendants had undertaken to carry by rail from Cape Town to Orchard Siding. The defendants deny that the injury to the machine was the result of their negligence, and plead further that it was provided by clause 145 of the Government Railway regulations that all damage to, defect or deficiency in a consignment was to be pointed out in writing at the time of its delivery, and that the Railway Department would not entertain any claim where this had not been done, and, further, that no claim for any damage, de-

fect, or deficiency would be allowed unless made within three days after the delivery of the goods to the consignee. The defendants say that the plaintiffs failed to comply with this regulation. The plaintiffs in their replication admit that they failed to give notice in terms of the regulations, but state that the damage could not be ascertained until the machinery was erected and worked, and that notice was given within a reasonable time after the injury was discovered, and they further plead that the regulation is unreasonable and bad. It appears that the machine in question was landed at the Cape Town Docks on the 2nd June, 1903, and passed into the hands of the Harbour Board, who acted in the matter as the agent of the plaintiffs, and there is abundant evidence to show that the case was in good order when received by the Harbour Board. The Board in the execution of their duty placed the machine upon a railway truck, and delivered the truck into the custody of the defendants at the Exchange Siding in the Cape Town Railway Station. Up to that point the Harbour Board acted as the agents of the plaintiffs, and if any damage had been done to the machine while in their custody, the defendants would not be responsible for the injury. I am satisfied upon the evidence of Mr. Robb, the responsible officer of the Harbour Board, that the parcel was in good order, when delivered to the defendants. Robb states that if the injury to the box containing the machine had occurred while the articles was in possession of the Harbour Board, the matter would have been inquired into at once, and there is nothing upon the railway consignment note, or in the other evidence adduced to prove that the parcel was at that time otherwise than sound and in good order. On the 3rd of June, the truck was taken on by the Railway Department, and on the 4th it was taken past Orchard Siding, which was full, to De Doorns Station. On the 5th, it was brought back to Orchard Siding, where it was left at the disposal of the plaintiffs. At Orchard Siding no railway officials are stationed whose duty it is to unload the trucks in order to make delivery of goods, and I am of opinion upon the construction of the 143rd regulation that when the truck was left at Orchard Siding, the responsibility of the defendants ceased, and delivery to the plaintiffs was complete. The question to be decided is whether the injury to the machine occurred before or after the truck was left at the siding. Three witnesses, Paulse, Shaw, and Wilkins, were called for the plaintiffs, who stated that they assisted to take the case containing the machine from the truck, and they noticed that the case was broken before it was taken off the truck. None of the defendants' witnesses had any knowledge of the condition of this case, during transit or upon its arrival

at Orchard Siding. And although we have the statements of two of the guards that while they were in charge the work of conveyance and shunting was done in so careful a manner that nothing occurred which could account for an injury to all appearance the result of a severe blow, I cannot lose sight of the fact that there is no evidence relating to the time when the truck stood at De Doorns. Upon the whole of the evidence, I do not feel justified in doubting the truthfulness of Paulse, Shaw, and Wilkins, and I come to the conclusion, notwithstanding the difficulty of accounting for the injury, that the parcel was in good order when it came into possession of the defendants, and was damaged when delivered at Orchard Siding. From the description of the damage to the side of the case, I have no doubt that the violence which broke the case also damaged the machine through the severe impact on the pulley. Upon discovery of the injury, the plaintiffs, on the 5th of June, sent for Hudson, who found the box standing in a shed belonging to the plaintiffs, the lid was off, and Hudson, who made a casual inspection, did not then detect the injury to the machine. In his opinion, it would have taken a fortnight to ascertain the injury after the machine was removed from the siding. The machinery was not erected until September, 1903, when Hudson, who is in the employ of George Findlay and Co., made an inspection, and on the 29th September he gave his written report, which has been put in. On the 3rd of October, the plaintiffs sent in their claim to the defendants. Apart from the conditions contained in the regulations, I am of opinion that the defendants would have been liable for the damage suffered, and the question remains whether they are absolved by the conditions contained in the regulations. Regulation 145 reads as follows: "Claims for loss and damage. All damage to, defect, or deficiency, in a consignment must be pointed out in writing at the time of its delivery, and the department will not entertain any claim when this has not been done. All claims giving full particulars of the loss or damage must be sent in to the Traffic Managers. No claim for any damage, defect, or deficiency will be allowed unless made within three days after the delivery of the goods to the consignee." When the goods in question were delivered to the defendants, the plaintiffs through their agents agreed, as appears from the consignment note, "that this consignment is to be received and to be conveyed and dealt with in accordance with the terms, conditions, and regulations published in the official Tariff-book in force at this date, with which we acknowledge ourselves to be acquainted." There is no doubt upon the evidence that in this case the plaintiffs were, in fact, acquainted with the regulations in

the Tariff-book. Seeing that the goods were delivered on the 5th of June, and notice given and claim made on the 3rd of October, it is clear that the regulations were not observed. But the plaintiffs contended that the regulation is unreasonable and bad, and not binding on them. It was held in a case decided by the High Court of the Transvaal that the question of reasonableness does not arise where the regulations are expressly embodied in the contract between the parties, as was done in this case. The same opinion was expressed by Bramwell B. in the case of *Lewis v. the Great Western Railway Company* (20, L. J. Exch., 430); and I am myself inclined to take that view, but it is unnecessary to decide that point of law now, because I am perfectly satisfied that the regulation is reasonable. A similar condition was held to be reasonable in the case of *Lewis*, already cited, where Chief Baron Pollock said: "It is reasonable that the complaint should be made at once, so that the railway company may be in a position either forthwith to furnish proof that the goods were duly delivered, or if there be any persons in their employ guilty of want of due care or honesty, they may be got rid of, and not kept longer in the employ of the company, causing the loss of goods entrusted to their care. This is only reasonable and just." It seems to me that the present case fully illustrates the reasonableness of the rule, because if the damage to the box had been pointed out to the defendants before it was removed from the truck, as might have been done, all this litigation would have been saved. After a lengthy trial this Court has come to the conclusion that the damage occurred while the box was in the custody of the defendants; but in October, when the claim was made, the defendants, whose duty it was to ascertain if it was well founded, were hardly in a position to collect the evidence which was considered necessary to decide the question in this Court. I come to the conclusion that the regulation is reasonable, and formed part of the plaintiff's contract, and that they were not entitled to bring forward their claim after the lapse of the time stipulated in the regulation. Upon this part of the case judgment must be given for the defendants. Upon the other branch of the case it appears that on Saturday, March 11, 1905, the plaintiffs delivered to the defendants 110 cases of grapes at the Tweefontein Station, for carriage to Cape Town, for the purpose of their being dispatched by Wednesday's mail steamer to England. These cases were loaded in a truck, which the plaintiffs expected would be attached to a goods' train passing Tweefontein at 1 o'clock on Saturday afternoon: it was also the intention of the defendants' servants to attach the truck to that train.

There was no express agreement that this should be done, but it was in the ordinary course of business to send fruit by the 1 o'clock goods train. The grapes were intended for export by the next mail steamer, and that fact was well known to the defendants' servants, who received the goods for carriage, and I think it should be taken as part of the undertaking on the part of defendants' servants that they would use due diligence to deliver the grapes in Cape Town in time to be shipped. Under ordinary circumstances, fruit arriving at the ship's side on Tuesday afternoon would be in time for shipment. By some oversight the truck containing the grapes was not sent on by the 1 o'clock train, which arrived at Cape Town on Sunday morning, but was dispatched on Saturday evening, and arrived here at about midday on Sunday, and on Monday morning the grapes were delivered to the Harbour Board, acting as the plaintiffs' agents. There was ample time to have the grapes placed on board the mail steamer if no special obstacle existed. But the plaintiffs say there was a further duty under the contract imposed upon the defendants. It appears that the Union-Castle Company refuse to take on board and place in their cool chamber any fruit which has not been in a cool chamber for at least 48 hours immediately prior to being received on board. That would necessitate the fruit being in a cool chamber by Sunday evening in order to be shipped on Tuesday evening, the latest time for receiving fruit on board. The plaintiffs say the defendants by their contract undertook to deliver the grapes to the Harbour Board on Sunday morning, in time to allow of their being placed in the Harbour Board's cooling chamber before Sunday evening, and through their default the grapes were only delivered on Monday morning, in consequence of which the ship refused to take them. It is quite clear that there was no express agreement to deliver this particular consignment of grapes within the time above mentioned, but it was contended that the defendants were fully aware of the ship's rule, and made their contract subject to it, and undertook as an implied condition to carry the goods so as to meet the rule. I do not say now that if any servant of the Railway Department had made an express contract in those terms that it would have been binding, in view of the authorised regulations on the subject, nor do I find that knowledge of the ship's rule would have introduced the above-mentioned condition as an implied agreement. It is unnecessary, in the view I take of the case, to decide those questions. In my opinion, the plaintiffs have failed to prove that the defendants knew of the ship's rule, and there is positive evidence given by reliable witnesses that they did

not. I come to the conclusion that when the defendants were prepared to deliver the goods to the Harbour Board on Sunday afternoon they had performed their contract, and that the delivery on Monday morning was a good delivery within the terms of their contract. I have said that it appeared to me that at most there was an undertaking to deliver before the mail steamer left, but it must not be taken that I decide that such an undertaking on the part of any servant of the Railway Department is binding upon the defendants, in view of the conditions contained in their regulations, especially in their regulation No. 154, in force at the time. Judgment is given in both claims for the defendants, with costs.

[Plaintiff's Attorneys: Syfret, Godlonton and Low. Defendants: Reid and Nephew.]

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

ADMISSIONS. { 1905.
June 8th.

Mr. Burton moved for the admission of Wm. Abercrombie Shaw as an attorney and notary.

Application granted and oaths administered.

Mr. Van Zyl moved for the admission of Abraham Kriel le Roux as an attorney and notary.

Application granted and oaths administered.

Mr. Roux moved for the admission of Gerhardus Petrus Vosloo as an attorney, and asked for leave to the applicant to be sworn in Pretoria.

Application granted, subject to the applicant appearing personally to take the oaths.

PROVISIONAL ROLL.

TURKINGTON V. HUMPHREYS.

Mr. Long moved for provisional sentence on a promissory note for £25, less £15 paid on account, together with interest.

Order granted.

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GERBER V. VON WITT.

Mr. Douglas Buchanan applied for a provisional order of sequestration to be discharged.

Application granted.

HODGES AND CO. V. MUNDRICH.

Mr. J. E. R. de Villiers moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

VAN DER BYL AND CO. V. SACKS AND LIVERSON.

Mr. Payne moved for the discharge of a provisional order of sequestration.

Provisional order discharged.

NAUDE V. NOORDEN.

Mr. Douglas Buchanan moved for provisional sentence on a promissory note for £14 15s., with interest.

Order granted.

WALKER V. LURIE.

Mr. Lewis moved for a provisional order of sequestration to be made final.

Order granted.

ILLIQUID ROLL.

GABIER V. AJAM. { 1905.
June 8th.

Service, affidavit of—Notice of bar.

Judgment cannot be granted under Rule 319, unless an affidavit of service of bar is produced. The mere service is not sufficient.

Mr. Douglas Buchanan moved for judgment, under Rule 319, in default of plea.

Buchanan, A.C.J., said that there was no affidavit of service of bar upon the defendant.

Ordered to stand over.

Later in the day, Mr. Buchanan presented an affidavit by the plaintiff's attorney, stating that he had sent a notice of bar to the respondent at her address.

Buchanan, A.C.J., said that the service of bar was not sufficient. The matter must stand over until Thursday next, pending production of an affidavit of better service.

FRASER AND CO. V. UDWIN BROS.

Mr. Douglas Buchanan moved for judgment, under Rule 329d, for £267 12s., goods sold and delivered, with interest, *a tempore mora*, and costs. Order granted.

VAN ZYL V. MORITZ

Mr. De Waal moved for judgment under rule 329 (d) for £100, being amount paid at the special instance and request of the defendant. Order granted.

MURRAY, WRIGHT AND MOLTEÑO V. PORTER.

Mr. P. S. T. Jones moved for judgment under rule 319, in terms of declaration for account of moneys collected for plaintiff as agent, for debate and payment of amount found to be due upon debate.

Buchanan, A.C.J., said that the case would come under Rule 329d.

Judgment granted in respect of summons, as prayed, account to be rendered within 14 days.

DUNELL, EBDEN AND CO. V. NIEBURG.

Mr. Swift moved for judgment under rule 329 (d) for £1,971 4s., balance of account for goods sold and delivered, with interest, *a tempore mora*, and costs. Order granted.

DAVIES BROS. V. ISRAELSOHN.

Dr. Greer moved for judgment under rule 319 for £45, balance of rent due, with interest, *a tempore mora*, and costs. Order granted.

Dr. Greer said he took it that the temporary interdict against the goods in the shop would continue until the writ of attachment was issued.

Buchanan, A.C.J., said that execution could be taken out at once, and the interdict would still stand.

REHABILITATION.

Mr. J. E. R. de Villiers applied for the discharge of Juliana Pauline Vogts and for her reinvestment with the estate, the creditors having accepted an offer of composition.

Order granted.

GENERAL MOTIONS.

Ex parte BOTHA. } 1906.
} June 8th.

Dr. Greer moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

Ex parte TOWN COUNCIL OF RIVERSDALE.

Mr. Sutton moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

Ex parte DE WAAL.

Mr. De Waal moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

SAVAGE AND SONS V. ESTATE ULYATE.

Sir H. Juta, K.C., moved for leave to appeal to the Privy Council on behalf of Savage and Sons, who were defendants in the action.

Mr. J. E. R. de Villiers (for the respondent) said that the petition did not set out that the matters at issue amounted to £500.

Sir H. Juta: The amount is between £3,000 and £4,000.

Leave to appeal granted on the usual terms, subject to applicants filing an affidavit that the amount in suit was over £500.

KAROO BORING CO V. HALL.

Mr. Lewis moved for leave to purge default, and to file a plea. Mr. Upington was for the respondent.

Mr. Lewis: All that the applicant company can be required to show is a reasonable cause for their default, and that they have a *bona fide* defence. The plaintiff objects that defendants' affidavits do not enter sufficiently into details. They certainly do show that defendants have a *bona fide* defence.

Mr. Upington was not heard.

Buchanan, A.C.J.: The plaintiff (Hall) took out a summons on the 27th February, and after that defendant tendered £112 odd. On the 15th April defendant was informed by plaintiffs' attorneys that the tender would be accepted provided he paid costs to date. Defendant did nothing on this, and thereafter on the 4th May, he was served with notice of bar, not having filed his plea, and on the 9th May judgment was taken against him. He says that at that time he was travelling about, and was unable to attend

to the matter in East London. He had had ample notice of the case, and he admitted a debt within £9 of the plaintiff's claim, and made a tender. The tender was accepted, and defendant did not carry out his arrangement. I certainly think there are no *bona fide* grounds shown for the application, and the Court will therefore make no order, applicant to pay costs.

Ex parte POWRIE.

Mr. Sutton moved for the appointment of Mr. F. R. Elliott as trustee under an ante-nuptial contract.
Order granted as prayed.

Ex parte ELLIOTT.

Mr. Sutton moved for the appointment of Mr. F. R. Elliott to be trustee under an ante-nuptial contract.
Order granted as prayed.

PEARSON V. WERNBERG AND DECKER.

Mr. Douglas Buchanan moved for an order of attachment, by reason of the respondents' contempt of Court in failing to obey an order to pass transfer of certain property at Retreat, or to refund the amount paid by the applicant to the respondents.

Order of attachment granted against Wernberg, and costs against both respondents.

Buchanan, A.C.J., said that there would be no order of attachment against Decker, as he had not been served with notice of the application.

VAN DER HOFF AND VISCHER V. BECHUANALAND ESTATE SYNDICATE.

Sir H. Juta, K.C., moved for leave to sue by edictal citation for transfer of certain property, or in the alternative for £1,000 damages.

Order granted, attaching a certain farm *ad fundandam jurisdictionem*, citation to be returnable on the 15th August, costs to be costs in the cause.

VADASZ V. VADASZ.

Mr. Burton moved for the petitioner (wife of the respondent) for an order for two minor children to be delivered up to her. Dr. Greer was for the respondent.

Mr. Burton said that a divorce suit was pending between the parties, in which the present applicant was the defendant. She declared that she was absolutely innocent of the charges made against her. The children had in the

meantime been removed to Nazareth House, by direction of their father.

Dr. Greer applied for a postponement of the application.

Application postponed until the 15th inst., applicant in the meantime to have access to the children at all reasonable times.

Ex parte WILLIAMS.

Mr. Sutton moved for petitioner for leave to sue *in forma pauperis* for a decree of divorce against his wife.

Rule *nisi* granted, to be returnable on the 15th inst.

Postea (June 15th). Rule made absolute.

HERMANN AND CANARD V. DA SILVA AND RODRIQUES.

Mr. Douglas Buchanan moved for the rule *nisi* to be made absolute directing respondents to pay over certain money.
Rule made absolute.

Ex parte MORUM BROS.

Mr. Gutsche moved for leave to sue by edictal citation, Oliver Charles Hallam for a debt of £96. Petitioners were at Mount Fletcher, and Hallam was now believed to be in Natal.

Leave to sue granted, personal service, failing which citation to be published once in the "Kokstad Advertiser" and "Natal Witness," and to be returnable on August 1.

VAN RYN WINE AND SPIRIT CO. V. LEDERMAN.

Sir H. Juta, K.C., moved for a rule *nisi* to be made absolute, restraining the respondent from stocking, buying, or in any way dealing in, Colonial wines and spirits, except those purchased direct from the petitioners, and from advertising the Colonial wines and spirits of Green and Co., or any other persons except the petitioners. It appeared that the respondent was the lessee of a certain bottle store at the corner of Harrington and Commercial streets, Cape Town, and that the applicants alleged that they had a servitude on the premises binding the lessee to purchase Colonial wines and spirits for them. Petitioners proposed to institute an action to enforce the servitude.

Mr. Upington read a replying affidavit by Hyman Lederman (the respondent), and also an affidavit by Mr. Archibald Bultitude, of Messrs. Ohlsson's Ltd. It was stated in the affidavits that Lederman succeeded Isaac Purcell as lessee of the premises, and that the evidence of the latter would be important. He

was, however, absent from the Colony, and respondent asked for a postponement. Purcell had a letter from the petitioners, which was of great importance, and varied the original agreement.

Counsel having been heard in argument on the facts.

Buchanan, A. C. J., said that the rule would be made absolute, pending an action to be forthwith instituted by the applicants, costs to abide the result. He added that it was a question for the applicants whether Ohlsson's Breweries, Ltd., should not be joined with Lederman as co-defendants.

TRUSTEE TORQUE ELECTRICAL ENGINEERING CO. V. HERRON.

Sir H. Juta, K.C. (with him Mr. Gardiner) moved for a commission *de bene esse* to take the evidence of Walter Bernard Phelps, of Cape Town, and John Edward van Stittert Neale, late of Cape Town, and now of Johannesburg.

Mr. Alexander (for the respondent and plaintiff in the action) opposed the application so far as Mr. Neale was concerned.

Sir H. Juta said that this case was quite unique. The pleadings showed that it was essential that Mr. Neale's evidence should be preserved. It appeared that the Torque Company had certain rights with the Exhibition people to carry out the electric light installation, and this Torque Company was a partnership, in which the defendants alleged that the plaintiff was a partner. Plaintiff denied that. Then that partnership was made over to a company called the Neale-Herron Company. These two gentlemen held all the shares, and they formed a company to carry out this contract with the Exhibition. The Torque Company and the Neale-Herron Company occupied offices in the same building. The Torque Company contracted all the debts, and the Neale-Herron Company received all the receipts.

[Buchanan, A. C. J.: A very good arrangement.]

Mr. Alexander submitted that it had not been shown on the affidavits that there was any danger of Neale's evidence being lost.

Application granted, the evidence of Mr. Phelps to be taken in Cape Town before Mr. Advocate Giddy, K.C., and of Mr. Neale to be taken in Johannesburg before Mr. Advocate Percival Smith.

Ex parte ESTATE SCHOOLMAN.

Mr. Alexander moved for the appointment of Mr. A. N. Foote to be provisional trustee in this estate, with power

to carry out repairs to the property, and collect the rents.

Order granted as prayed.

Ex parte BALL.

Mr. Swift reported that he had certified in reference to this matter, which was an application for leave to sue *in forma pauperis* for divorce.

Rule nisi granted, to be returnable on the 29th inst.

Postea (June 30th).

Mr. Swift moved on the petition of Christina Jinette Ball for the rule nisi calling upon her husband, Walter Thomas Ball, East London, to show cause why she should not be granted leave to sue *in forma pauperis* for divorce, to be made absolute.

[Buchanan, A.C.J.: You are not asking for any money from defendant?]

Mr. Swift: We simply ask for leave. I may say that a letter has been received from defendant admitting the adultery.

[Buchanan, A.C.J.: (reading the letter): What does he mean by this sentence: "It will also be of interest to know that the children were placed on the scaffold with me in Cape Town, and they were hatless, bootless, and in a shocking condition."]

Mr. Swift: I don't understand that. The children, I understand, are living with the wife's parents at Worcester, or somewhere up-country.

[Buchanan, A.C.J.: One thing that he says apparently is that the woman had money in the Savings Bank, and she has withdrawn it. She now says that she is, apparently, destitute.]

Mr. Swift: Yes. She, at present, I believe, is a housemaid or servant of some sort in Cape Town.

Rule made absolute, Mr. Swift to act as counsel and Mr. P. M. Cloete as attorney in the forthcoming trial.

BROUGHTON V. BROUGHTON.

Mr. Upington moved for an extension of the return day of a citation calling upon the respondent to show cause why the petitioner should not be granted a decree of divorce.

Return day of citation extended until the 1st August, publication to be as directed in the original application, and trial to be set down for the 11th August.

MOLLER V. WATERMEYER.

Mr. P. S. T. Jones moved for provisional sentence upon a mortgage bond for £310, the bond having become due by reason of notice, and for the property hypothecated to be declared executable.

Mr. Gardiner appeared on behalf of

the respondent, and moved for an amendment of the bond to strike out the clause relating to three months' notice being given. Petitioner (F. C. Watermeyer), in an affidavit, said that Mr. Moller agreed to let him have the bond as long as he paid the interest, and that he entered into the agreement without knowing of the existence as to conditions of notice.

Mr. Jones read a replying affidavit, in which it was stated that the applicant was an experienced man of business, and that the condition was quite usual.

Mr. Gardiner said that Mr. Moller was trying to take advantage of the error of the applicant in signing under the impression that the bond embodied the agreement that he entered into with Mr. Moller.

Mr. Jones said that Watermeyer had deliberately signed a document with his eyes open, and which he must have been presumed to have read. Mr. Moller was no party to the signing of the document, the bond being signed by Mr. Watermeyer and Mr. Moller's power of attorney. He submitted that the applicant had mistaken his remedy, and that such a document could not be amended upon motion. The applicant should proceed by action.

Buchanan, A.C.J., said that in the absence of any dispute as to the verbal agreement entered into between the parties, there was nothing on the affidavits to prevent the Court now dealing with the matter. He failed to see any necessity for going into an action. An order would be made for the amendment of the bond by striking out the words "and shall be obliged" and "or receive." The application of Watermeyer for an amendment of the bond would be granted, but no order would be made as to costs in this matter. The application of Moller for provisional sentence would be refused, with costs.

Ex parte ROOS.

Mr. Sutton moved for the appointment of petitioner as provisional trustee in the insolvent estate of Dorothea Louisa Pfuhl, widow.

Order granted as prayed, costs to come out of the estate.

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

REX V. DEWET AND OTHERS. } 1905.
June 9th.

Mr. Burton moved, on behalf of Theunis de Wet and five others, who are awaiting trial on charges of murder and assault at Villiersdorp, to be admitted to bail.

Mr. Nightingale was for the Crown.

It appeared that the prisoners had been committed for trial at Swellendam on a charge of assaulting one John Rooi, so as to cause his death, and of assaulting two others. The prisoners were sent to the gaol at Caledon, and an application for bail made to the Resident Magistrate at Caledon had been refused.

Mr. Burton said that there would be prejudice to the prisoners in the preparation of their defence if they were detained in custody pending the trial.

Mr. Nightingale said that the position of the Attorney-General was that the application was premature, because the matter was at the present moment being further investigated.

[Buchanan, A.C.J.: You mean the preparatory examination is to be reopened?]

Mr. Nightingale: That is so. Counsel went on to say that he was quite prepared to say that the evidence was such that De Wet might reasonably be admitted to bail. He thought that a bond of £100 would be sufficient in that case. He objected to the granting of bail in regard to the other prisoners.

Mr. Burton said that there was really no evidence against the other prisoners in reference to the alleged assault on the man who died, except against the prisoner Zimmerman.

Buchanan, A.C.J., said that the application would be postponed until the conclusion of the preliminary examination, when it could be renewed if the Attorney-General determined to proceed with the indictment of the prisoners. De Wet would be admitted to bail, to the satisfaction of the Resident Magistrate of Caledon, in his recognisance of £100, and one surety in a like sum. The application so far as the other prisoners were concerned, would be postponed *sine die*, until the conclusion of the preparatory examination.

Ex parte THE INSOLVENT ESTATE SEAGULL.

Mr. Gardiner applied, on behalf of the trustee in the insolvent estate Seagull,

for an extension of the commission already granted to take the evidence of certain additional witnesses, so as to include the clerks employed at four of the local banks already mentioned, the manager and accountant of the Robinson Bank, and the trustee in the insolvency.

Buchanan, A.C.J., said he thought the application was too sweeping. Power would be given to examine the manager and accountant of the Robinson Bank, and the trustee in insolvency (Mr. J. D. Simons). If others were desired to be included, a further application should be made to the Court.

HIGSON V. HIGSON.

This was an action for restitution of conjugal rights, brought by the wife against her husband, William R. Dixon, of Cape Town, on the ground of his unlawful and malicious desertion. Mr. Russell was for the plaintiff; there was no appearance for the defence.

Mr. Russell read the evidence of the plaintiff, taken on commission in England, which was to the effect that her husband had not contributed to the support of herself and children since 1899. Although he had been in South Africa for some years, he had never asked her to join him.

Decree of restitution granted, defendant to return to or receive the plaintiff on or before the 31st August, failing which, rule to issue calling upon the defendant to show cause on the 15th October why a decree of divorce should not be granted, personal service to be effected.

FOX V. FOX.

This was an action brought by Walter Fox, of Cape Town, and late of Kimberley, against his wife, Evelyn Frances Fox (born Glynn), for restitution of conjugal rights, failing which, a decree of divorce, by reason of her malicious desertion. Mr. Upington was for the plaintiff; there was no appearance for the defendant.

Decree of restitution granted, defendant to return to the plaintiff on or before the 30th June, failing which a rule to issue calling upon the defendant to show cause on the 13th July why a decree of divorce should not be granted as prayed.

Postea (July 13th). Decree absolute

NUTTALL AND CO. V. CAPE TOWN GAS LIGHT AND COKE CO.

Contract—Arrangement terminable at the discretion of one party.

This was an action brought by E. Nuttall and Co., contractors, Cape Town,

against the Cape Town Gas Light and Coke Co. to recover a sum of £370 13s. 2d., damages for alleged breach of contract by reason of the defendant company's failure to supply tar required in the carrying out of street contracts to the City Council.

The declaration set out that on the 11th February, 1904, plaintiffs entered into an agreement with the defendants whereunder the defendants undertook to supply from their works at Cape Town and Woodstock to the plaintiffs a sufficient quantity of tar for the requirements of their business up to an amount of 16,000 gallons per month at 4d. per gallon. Tar was so supplied from time to time. Plaintiffs, for the purposes of the aforesaid agreement, erected at Woodstock, with the consent of the defendants, and on the defendants' premises, certain tanks, and the defendants agreed to pump the tar supplied by them to the plaintiffs into these tanks, which had cost £59 17s. 4d. On July 12, 1904, the defendants, without reasonable notice, refused to supply the plaintiffs with any tar, and repudiated the agreement. Plaintiffs, in consequence purchased tar elsewhere in Cape Town and from abroad up to the 30th December, 1904, to a total amount of 25,060 gallons, and they claimed as damages the difference in the cost of this tar and the contract price of 4d., and also £59 17s. 4d., the cost of the tanks aforesaid. Plaintiffs prayed for judgment for £370 13s. 2d. as damages.

Defendants, in their plea, said that on the 11th February, 1904, arrangements were entered into between the parties as to the price of tar to be bought by the plaintiffs, and sold by the defendants, viz., 4d. per gallon, defendants to do the loading at Cape Town and plaintiffs to do the loading at Woodstock. Defendants denied that any agreement was entered into to supply the defendants with 16,000 gallons per month or any definite amount. The plaintiffs erected the tanks at their own cost. Thereafter, owing to the plaintiffs having no further tar to sell, they supplied no more tar to the plaintiffs. Defendants prayed for the claim to be dismissed with costs.

Mr. Close (with him Mr. Swift) was for the plaintiff; Sir H. Juta, K.C. (with him Mr. P. S. T. Jones), was for the defendants.

Edmund Nuttall, a partner in the plaintiff firm, said that his firm carried on business in England. In 1903 there were negotiations for the contract with the City Council for the making up of streets and side-paths. He had a report from one of the firm's representatives Tar would be largely required for the side-walks. In July, 1903, witness came out to see about a tender being put in for the contract, and in that month his firm entered into a contract with the Council for making up the unadopted streets. The footpaths

were to be of tar macadam. On the 15th July witness saw Mr. Reilly, the secretary of the company, about the supply of tar. Mr. Reilly said that he would let them have as much tar as they required at 4d. per gallon. Witness told him that it would be six months before they required any tar. The price was fixed verbally at 4d. Witness pointed out to Mr. Reilly that 100,000 to 115,000 square yards of pavement were to be made up. Witness went home, and returned in November to make preparations on the spot for carrying out the contract. They had correspondence in February, 1904, with the secretary of the defendant company, this being carried on on behalf of the plaintiffs by their manager (Mr. Trimmer). In January, 1904, his firm got another contract with the Corporation for the laying of the continuous footways at a schedule price per square yard. They reckoned altogether that they had 120,000 to 140,000 square yards to do; the average required was slightly over a gallon of tar per square yard. They wanted the tar for about eighteen months, during which period they expected to complete the contract. At an interview in February Mr. Reilly agreed to let them have the tar from time to time as they required it. They also made arrangements for the erection of the tanks at Woodstock. At the time of the interview at which the contract was entered into witness had no knowledge whatever of the Gas Company having entered into a contract with the B.S.A. Asphalt Company. In March the Asphalt Company commenced interdict proceedings against the present defendants (14, C.T.R., 229). Witness met Mr. Reilly in April, and the latter told him that the B.S.A. had no case against them, and there would be no difficulty about supplying witness's firm with tar. He added that rather than supply the B.S.A. at 2d. per gallon, he would turn the tar into the sea. Witness again went to England, and the supply of tar to his firm was discontinued in his absence. His firm had to order their tar from elsewhere, having given notice to the defendant company that they would hold them responsible for any difference of cost. They got some tar from the B.S.A. Company, and the remainder from England. The amount of 16,000 gallons per month was fixed, because of the possibility of a contingency with their plant, which might necessitate in some months working night and day and a double demand. The average amount mentioned to Mr. Reilly was 7,000 or 8,000 gallons. The amount actually taken in the five months was about 31,000 gallons. They had only claimed up to the end of 1904, but at the end of the contract they proposed to send another account to the defendant company.

Cross-examined by Sir H. Juta: He

expected that the defendants would always keep at their disposal 16,000 gallons of tar per month, whether they actually required it or not. His opinion was that his contract with defendants did not terminate until the conclusion of his contracts with the Town Council. He did not understand what was meant by "without reasonable notice" in the plaintiffs' declaration. They had used the tanks to a certain extent.

Re-examined: He took it that six months was "reasonable notice" in a matter of this sort.

Arthur Kerr Trimmer said he was manager in Cape Town for plaintiffs. He came out to start this contract, and when the machines were ready to start work, he went with Mr. Nuttall to Mr. Reilly's office to arrange about the price and the supply of tar. Figures were put before Mr. Reilly, showing the amount required—16,000 gallons a month being given as the maximum, with the machines working night and day. In July Mr. Reilly informed him about the action by the B.S.A. Asphalt Co., and told him that his counsel had advised him to settle, in which case the supply of tar to plaintiffs would have to stop. Witness told him that if they had to get tar at an increased price, they would claim the difference from defendants, and Mr. Reilly said, in that case, the defendants would have to put their side of the question. Witness subsequently got the tar, partly from England and partly from the B.S.A. Asphalt Co.

Cross-examined by Sir H. Juta: They did not want to bind themselves down to take any specific quantity, but the defendants were bound to supply a certain amount. He maintained that the contract between the parties was in the correspondence. He admitted having received a letter from the defendants in November, in which they said that the contract could not go on till the end of time. He did not reply, because he took it that defendants' letter was a reply to one he had sent. The Gas Company knew from the commencement what time was meant, that the tar was to be supplied during the continuance of the municipal contracts.

By the Court: The letters contained no specific reference whatever to the principal contracts.

Sir H. Juta read a letter sent by the witness to his principals in July, 1904, regarding the stoppage of supply by the defendants, and suggesting means to be taken to import a supply. Counsel asked witness whether that was the letter which would be sent by a man to his principals if the contract had been broken?

Witness said that there was no need for him to say anything to his principals about the contract having been broken.

Sir H. Juta: Yet, in the face of that letter, you have the audacity to say that

there was a contract to supply you with tar?

Witness: Yes, for our requirements.

Mr. Close closed his case.

Sir H. Juta called

Edward Patrick Reilly, manager of the defendant company, who said that on the 2nd June, 1903, he saw Mr. Nuttall, and had a conversation with him in regard to a supply of tar for the street-paving works. He said that he would supply them with tar at 4d. per gallon. He again saw Mr. Nuttall and Mr. Trimmer on the 6th February, 1904, and had a conversation in regard to the supply of tar from the Woodstock Works. It was arranged that Nuttall's should build the tanks entirely at their own cost. As to the subsequent interview of the 11th February, he treated plaintiffs as ordinary retail customers at 4d. per gallon, the reason being that plaintiffs could not guarantee to take any specified quantity. Witness did not agree to supply plaintiffs with any specific quantity. The works were capable of making 18,000 to 19,000 gallons per month; he had already a contract with the B.S.A. for 6,500, and he should consequently have been utterly unable to supply plaintiffs with 16,000 gallons. A shorthand clerk, Paris, was present at the interview, and he made a note of what took place. Between February and July, 1904, the plaintiffs many times had to go with a short supply, because there was no tar at the works.

Cross-examined: He thought Mr. Nuttall was mistaken when he said that he did not leave England until the 6th June. He fixed the date by reason of his marriage being two days later.

Richard W. Paris, chief clerk in the defendant company's office in Cape Town, said that he was a shorthand writer, and was employed in February last year by the company. Witness dictated a letter to the plaintiffs from his shorthand notes of an interview between Mr. Reilly, Mr. Nuttall, and Mr. Trimmer. There was no mention of quantities at the interview, neither was there any mention of time. The discussion was all about the price, the plaintiffs wanting to obtain the tar at a lower price than 4d.

Cross-examined: He made the notes almost at the close of the interview, at the instigation of Mr. Reilly.

Mr. Nuttall (recalled) said that he was in Manchester on the 2nd June, 1903, leaving Southampton for the Colony on the 6th June.

Karl Toucher, of Cape Town (called by Mr. Close), spoke to an order received from Nuttall for the erection of tanks at Woodstock.

This concluded the evidence.

Mr. Close having been heard in argument,

Judgment was given for the defendants, with costs, his lordship holding

that the arrangement to supply the plaintiffs with tar was such that the defendants could terminate it at their discretion.

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

COLONIAL GOVERNMENT V. } 1905.

MATTHEUS. } June 13th.

This was a special case stated for the opinion of the Court in regard to whether the defendant, Hendrick Petrus Mattheus, of Uitenhage, who was a candidate in the Legislative Council elections for the South-Eastern Circle, was liable for a share of certain expenses incurred by the returning officer.

The special case was stated as follows:

1. The plaintiff is William Aldred Collard, in his capacity as Assistant Treasurer of the Colony and Receiver-General of Revenue, and as such representing the Colonial Government. The defendant resides at Uitenhage.

2. On or about June 28, 1904, the defendant and one Hurdall were the sole candidates at an election for the representation of the South-Eastern Electoral Province in the Legislative Council.

3. The Returning Officer of the said province who was an officer appointed by the Colonial Government to act at the Election as Returning Officer according to law in pursuance of his duties as provided for and declared in the 16th and 17th Sections of the Illegal Practices Prevention Act, 1902, from time to time gave public notice of the names and addresses of the respective agents and sub-agents of the said candidates forthwith upon the same being declared to him in conformity with the said Act.

4. The public notice aforesaid included the advertisement of the said names and addresses in certain newspapers circulating in the divisions, districts, field-comnetoies interested in the aforesaid Election. The plaintiff annexes hereto a schedule showing the titles of the said newspapers, the dates of the said advertisements and the costs of the same in so far as the defendant is concerned.

5. The particulars marked with a star (*) in the said annexure are particulars of advertisements in which the names and addresses of the agents or sub-agents

of the defendant and those of the agents or sub-agents of the said Hurndall were jointly published, and the amounts shown as the defendant's share of cost in regard to those particulars are the half of the total cost of the said advertisements. Those not marked as aforesaid are particulars of advertisements in which the names and addresses of the agents or sub-agents of the defendant alone were published.

6. The plaintiff has defrayed the costs of advertising as shown in the said annexure, and thus has expended the sum of £22 12s. 3d.

7. The plaintiff contends that the said sum was expended by him on behalf of the defendant, and that he is entitled to a refund thereof by the defendant.

8. The defendant denies that the said sum was expended, or that plaintiff is entitled to a refund thereof from him. Defendant contends that the said sum was expended by the plaintiff in discharge of a liability necessarily and lawfully incurred on behalf of the Colonial Government, to wit, the said Returning Officer in his capacity as such and in the performance of a duty imposed upon him in his said capacity by sections 16 and 17 of Act 26 of 1902 as a matter of public policy and for the public benefit.

SCHEDULE.

Advertisements on behalf of the Hon. R. F. Hurndall and Mr. H. P. Matthus (candidates at the Legislative Council Election for the South-Eastern Electoral Province in June, 1904).

Year and Date of Month.	In what Paper.	Subject: Election Agents or Sub-election Agents	Mr. Matthus' share of Cost.
1904.			£ s. d.
* June 2, 9, 16	Journal	Election Agents	1 4 0
- 18, 21	Journal	Sub-elect'n Agents	1 16 0
* - 3, 10, 17	Penny Mail	Election Agents	1 0 3
- 20, 22	Penny Mail	Sub-elect'n Agents	1 4 0
* - 4, 8, 11	Uitenhage Times	Election Agents	1 13 9
* - 25	Uitenhage Times	Sub-elect'n Agents	1 13 9
* - 9, 16, 23	Chronicle	Election Agents	1 17 6
* - 3, 10, 17	E.P. Herald	Election Agents	1 10 0
- 21, 21, 22	E.P. Herald	Sub-elect'n Agents	3 0 0
* - 2, 7, 15	Daily Telegraph	Election Agents	1 16 0
- 18, 20, 21	Daily Telegraph	Sub-elect'n Agents	3 12 0
* - 8, 15, 22	Re-Echo	Election Agents	1 5 0
* - 9, 16, 23	Alice Times	Election Agents	1 9 0
			32 12 3

Mr. Nightingale (or plaintiff): The first question we have to decide is, what are election expenses. (See sections 21 and 26 of Act 26, of 1902.) Sections 16 and 17 show that the charges in question are chargeable against the one candidate, and not against all. Section 48 of the Constitution Ordinance is the only one which deals with expenses, and it refers to Parliamentary Elections only. Section 7 of Act 26, of 1902, and Part 2 of the schedule show that the Returning Officer may charge for expenses of printing and advertising. The Act from section 16 onwards deals with expenses which may be brought up.

[Buchanan, A.C.J.: Can the expenses of fixing polling days and calling for nominations be brought up?]

I think not.

[Buchanan, A.J.C.: They would be in Council elections; but it may be that many expenses would be charged in Council elections which would not be in Assembly elections.]

See Part 4 of the first schedule of the Act. As to when a candidate should become responsible for election expenses see Rogers on Elections (Vol. 2, p. 158). When a candidate has sent in his acceptance to the Returning Officer he becomes responsible. Section 25 fixes the limits of what the Returning Officer may charge. The object of the Act is to prevent the candidate from being unduly burdened. If a candidates does not appoint agents he becomes his own agent. He is not bound to advise the Returning Office of that fact. The appointment of agents and sub-agents is purely voluntary, and therefore Government should not be burdened with the cost of these. Sections 24 and 25, of 46 and 47, Vict., C. 51, correspond with sections 16 and 17 of our Act as to advertising. See also Maxwell on Statutes (p. 70 and 71) on the value of preambles and head lines. The general scope of our Act shows that this charge may be legally made against the candidate.

Mr. Bisset (for the defendant): The plaintiff's case rests upon an implied contract. Every such contract rests on the supposition that money is expended for the sole benefit of the candidate. By section 37 of Act 9, of 1883, an agent must be appointed in writing. Act 26, of 1902, orders the Returning Officer to publish the names of agents and sub-agents. This is done in the interests of the public and the duty of doing it is cast upon the Returning Officer. This reasoning has been adopted by the English Courts (see Parker on Election Agents, p. 286, and cases there cited). These cases show that English law does not recognise an implied contract between the High Bailiff and the candidate. See also *Watton v. Sanders* (2 Camp., 640). English law goes further than our law in casting liability on the candidate, 2 and 4—Cap. 5, section 71—Ballot Act of 1872, and 38, 39, Vict.,

C. 84, section 1. The principles of English law have been adopted by our law save that the Constitution Ordinance makes the Assembly candidate, but not the Council candidate, liable for the expenses of election. See Instructions of Colonial Office, section 19, sub-section 13, p. 140; also sub-section 45 (c), and at p. 147, sub-section 48, and sections 23 and 24. Of course, I do not cite these instructions as having statutory authority. Counsel for the plaintiff relies on Part 2 of the schedule to Act 26, of 1902, sub-section 3, but the expenses there alluded to have no relation to the expenses incurred by the Returning Officer in the execution of his duty. Here again we have a distinction between Council and Assembly candidates. Sections 16, 17, and 26 show that it was never the intention of the Legislature to make Council candidates liable. See also section 24 (c).

Mr. Nightingale, in reply,

Buchanan, A.C.J.: This is a special case, in which the Government claims from the defendant the cost of certain advertisements inserted in different local papers, advertising the election agents or election sub-agents of the defendant. The amount claimed is not a question submitted for the consideration of the Court, but only the legal question whether or not the defendant is liable for these expenses. The plaintiff claims the amount, on the ground that the money was expended by the Government on behalf of the defendant, and the Government is entitled to the refund thereof; defendant denies his liability, on the ground that this was done by the returning officer in his capacity as such, and in pursuance of a duty imposed upon him by statute law. It is interesting to look at the different positions in which the Constitution Ordinance passed in 1872 placed candidates for the Legislative Council and candidates for the House of Assembly. In the old Constitution Ordinance no provision whatever is made for the refund of any expenses incurred in the election of candidates for the Legislative Council. In the case of election of members of the House of Assembly, where a poll is demanded, and there is a contest, provision is made for the expenses of a poll being divided among the candidates who contest the election. It is true both Houses are elective, but it is clear that a distinction is drawn, not only in the manner of election and the manner of nomination, but also in the charges to be made. In Legislative Council elections nominations are made by means of requisitions, which are sent in to the Colonial Secretary. In House of Assembly elections nominations are made at a public meeting of electors called for that purpose, and in neither case do the Government claim that they are entitled to any ex-

penses for the notices calling for the requisitions or nominations of candidates. The Statute only provides that in the event of a contest, the candidates before the poll shall enter into security or pay costs in the amount of £50 to satisfy any expenses incurred by the Government for which the candidates are liable. There is no departure from this distinction drawn in any of the subsequent Acts that I can find that have been referred to. It is true that when we come to the Illegal Practices Prevention Act of 1902, under a chapter headed "Election Expenses," certain charges are specified. It is provided by the sections under this chapter, 16 and 17, that a candidate shall nominate his agent or sub-agents, or, if he does not nominate his agent or sub-agent, that he himself shall be considered as his own election agent, and these sections require that when nominations are made, the returning officer shall publish in the "Gazette" (and for this the Government claim no return), and in the usual places in which Government notices are posted, publishing to the electorate the names of the agents and sub-agents. Nothing whatever is said in these sections as to the charges for these notices being recoverable from the candidates. But, in the same chapter (section 26), the returning officer is directed to publish the returns made to him by candidates of their election expenses, and for these returns so published, he is expressly by this Statute authorised to charge the candidates. This might be an argument in favour of saying that where the Statute does not specially authorise the charging of the expenses for notices of agents and sub-agents, it does authorise the charging for a summary of election expenses generally—it would be, I say, a strong argument for holding that, at any rate, as far as members of the Legislative Council are concerned, Parliament did not intend that they should be charged with these expenses. Whether or not these expenses are chargeable against candidates for membership of the House of Assembly is not a question that the Court has now any need to decide. A sound argument might be founded on the provisions of the Constitution Ordinance, which make candidates liable for the expenses of a poll, but that is not the question before me. The defendant in this case was a candidate for the Legislative Council. The only ground upon which this action is brought is an implied contract. It is clear from the English cases that have been cited that a returning officer is entitled only to claim expenses which by Statute he is positively declared entitled to recover, or other expenses which the candidate takes upon himself or by his acts, it is implied that he authorises expenses to be incurred on his behalf. There is no

Statute that I can find, and no Statute has been relied upon, declaring that these expenses shall be incurred by such candidates, and there is no conduct on the part of the defendant in this case to show that there is an implied contract. I think that the judgment must be in favour of the defendant's contention, that he is not liable for the expenses claimed, and, of course, that judgment must carry costs. It should be clearly understood that I am deciding the liability of candidates for the Legislative Council, and not of candidates for the House of Assembly.

[Plaintiff's Attorneys: Reid and Nephew. Defendant's: G. Trollip.]

VISSER V. BAKER AND { 1905.
OTHERS. } June 13th.

Will, joint—*Fidei Commissum*—
Insolvency of fiduciary—
Rights of minor fidei-com-
missories.

The late P. and his wife made a mutual will, by which their landed property was bequeathed to their two sons by a fidei-commissary bequest subject to a life interest in favour of the survivor, "in order that he or she may be better enabled to maintain, support and educate our children, &c." After the death of P., his widow married B., and subsequently the estates of B. and his wife were sequestrated. Their trustee claimed the life usufruct of Mrs. B. in the estate of her former husband. The defendants claimed that the words of the will "in order that, &c.", amounted to a prohibition against alienation of the usufruct.

Held, that these words only implied an expression of desire on the part of the testators as to the way in which the usufruct should be employed, and that the trustee was entitled to judgment for the same.

This was a special case brought by the insolvent estate Price as plaintiff, and Susannah Mary Price and others, as defendants, for the determination of the rights of the insolvent estate in relation to a certain will.

The special case was stated in the following terms:

1. The plaintiff, Floris Albertus Visser, of Queen's Town, is the duly elected and confirmed trustee of the insolvent estate of Susannah Mary Baker, now married without community of goods to Leonard George Baker, by whom she is assisted in this suit.

2. Her estate was sequestrated on the 4th day of August, 1904.

3. The defendants are Susannah Mary Baker, formerly Price, born Staples, now married out of community of property to Leonard George Baker, and by him herein assisted as far as need be, and she is sued in her capacity as the mother and natural guardian of the four minor children born of her marriage with the late Charles James Price, and George Edward James, George Norman Price, and the said Susannah Mary Baker (married and assisted as aforesaid), and they are sued in their capacity as executors testamentary of the estate of the late Charles James Price, hereinafter called the testator.

4. The testator died on the 21st day of November, 1895, and was at that date lawfully married with community of goods to the aforesaid Susannah Mary, who was born Staples, and they had theretofore duly made on the 22nd December, 1894, their joint mutual last will and testament, whereof a true copy is annexed, and marked "A."

5. Under the said last will and testament, certain farms, to wit, Lot No. 4 W, Thrift, and Bushey Park, forming assets of the joint estate were specially bequeathed to the two sons of the testator and testatrix for certain sums payable after the death of the survivor and in the said will it was specially directed that the survivor should be authorised and allowed to keep the whole of the farm or immovable property of the joint estate under his or her entire direction and administration, and to remain in the full and undisturbed possession thereof, and in the enjoyment of the usufruct or the rents, issues, and profits thereof for and during the term of his or her natural life in order that he or she may be better enabled to maintain, support, and educate the children of the testator and testatrix until they become of age or marry.

6. There were at the death of the testator, and still are, four children of his said marriage, two sons and two daughters, and they are all minors, and are of the ages of 18, 14, 12, and 9 years, the first and third being sons.

7. The said Susannah Mary (born Staples) as surviving spouse of the testator adiated and accepted the benefits under the said will, and has hitherto enjoyed, *inter alia*, the usufruct, rents, and profits of the aforesaid farms.

8. In April, 1904, the said Susannah Mary (born Staples), who was married a second time in November, 1903, to Leonard George Baker aforesaid, did with his assistance enter into certain three leases of the farms aforesaid, namely: (a) Lot No. 4 W she let to one Lowell Eldred Price for a period of three years from the 1st April, 1904, at an annual rental of £52 10s. (b) Thrift she let to one J. G. Frost for the same period at an annual rental of £100; the said Susannah Mary (born Staples) purported to cede the said lease on or about April 28, 1904, to one Thomas Bailey as security for a debt; the plaintiff intends to take steps to have the said cession set aside as an undue preference. (c) Bushey Park she let to one George James (one of the executors and defendants) for the same period at an annual rental of £87 10s. A true copy of one of the leases is herewith annexed, and marked "B." The others are similar, with changes of the name of the lessee and the rental; the lease (a) is in the hands of the defendants.

9. The plaintiff contends, as against the defendants, that he is entitled in his said capacity and during the lifetime of the insolvent, for the benefit of her creditors, to the rentals and other benefits accruing to the lessor (now insolvent) under the said leases and the custody of the said leases, and, further, to an account of all rentals received by the defendants or any of them under any of the said leases, with a debate of such account and payment of the balance found due.

10. In the alternative, the plaintiff contends in his said capacity that he is entitled to receive out of the rentals derived from time to time under the said leases such sums as this Honourable Court may direct to be paid over to him for the benefit of the creditors of the insolvent, and submits that his rights in his said capacity should be declared and defined by this Honourable Court.

11. The defendants contend that so long as there are minor children of the testator living, who have to be educated, supported, and maintained, the usufruct of the said farms bequeathed to the said Susannah Mary Baker for the education, support, and maintenance of the said minor children cannot be paid over to or enjoyed by the creditors of the said Susannah Mary Baker, and that, therefore, the plaintiff is not entitled to the said rents.

12. Wherefore the parties pray for judgment upon their respective contentions or for such relief as may seem meet with costs of suit.

"A."

Be it hereby made known.

This is the last will and testament of us, Charles James Price and Susannah Mary Price (born Staples) married together in community of property, and

at present residing at Tarkastad, in the district of Tarka, being of sound and disposing mind, memory, and understanding, hereby revoking and annulling all wills, codicils and other testamentary acts heretofore passed by us or either of us desiring that the same shall be of no force and effect whatever.

And before proceeding to the institution of heirs, we do hereby declare to give and bequeath to the survivor of us one-half part or share of all the movable assets, inheritances, legacies, credits, and things whatsoever and wheresoever the same may be which shall be left at the death of the first dying of us as his or her own sole and absolute property.

And in regard to the landed property in our estate, we do hereby declare to give, devise, and bequeath the same to our sons in manner following—subject, however, to the usufruct thereof hereinafter mentioned in favour of the survivor of us, namely:

1. To our son Stanley Charles Price our farm called Lot No. 4 W., in extent 802 morgen and 397 square roods, situate in the district of Tarka, upon condition that he shall pay in to our estate within three years, after the death of the survivor of us, the sum of one thousand pounds (£1,000) sterling, bearing interest at the rate of 5 per cent. per annum reckoned from the date of the death of the survivor of us.

2. To our son Cecil Bold Price our farm called "Thrift," in extent 1,515 morgen and 403 square roods and our farm called Bushey Park, in extent 960 morgen or thereabouts, both situated in the district of Queen's Town, upon condition that he shall pay in to our estate within three years after the death of the survivor of us the sum of eighteen hundred and ninety-three pounds (£1,893) sterling for our said farm "Thrift" and the sum of fourteen hundred and forty pounds (£1,440) sterling for our said farm Bushey Park bearing interest at the rate of 5 per cent. per annum and reckoned from the date of the death of the survivor of us, and in case either of our said sons shall not have attained the age of majority at the death of the survivor of us, such period of three years within which such sums of money are directed to be by them paid into our joint estate, together with the interest thereon, shall be reckoned from the date of attaining their majority respectively.

In the event of either of our said sons predeceasing us, the bequest of the aforesaid farm property made to such son shall devolve upon his co-legatee upon the same conditions as are set forth in such bequest.

It is our will and desire that the amounts required to redeem the quit-rents at present payable to Government upon our above-mentioned farms called

Thrift and Lot No. 4 W. shall be a charge upon our joint estate, and in the event of there not being sufficient funds in our estate at the death of the survivor of us to do so, the amounts required to redeem the same shall be deducted from the respective sums of money to be paid in to our estate by our said sons as aforesaid.

In the event of our acquiring any further farm property, we direct that the same shall devolve upon any son yet to be begotten during our present marriage, upon condition that he shall pay in to our estate the sum of twenty shillings per morgan for the same, upon the same terms of credit as above set forth for our other sons.

In the event of any of our sons not having attained his or their majority at the death of the survivor of us, we direct that our executors hereinafter named shall let out our farm properties on hire, until such time as our said sons shall respectively attain their majority and the rents thereof, together with all interest receivable from the Master of the Supreme Court, on the portions of inheritance hereinafter mentioned shall be kept by our said executors in one fund and applied by them in such manner as they may think fit towards the maintenance, support, and education of our minor children. We further declare to nominate and appoint the children already begotten, or which shall or may hereafter be begotten during our marriage, to be the sole heirs in equal portions, share and share alike, save and except as is hereinafter mentioned in the case of whichever of our sons shall happen to inherit the farm Bold Point of all the rest residue and remainder of our joint estate, goods, effects, stock, chattels, inheritances, credits, and things whatsoever and wheresoever the same may be, which shall be left at the death of the first dying of us, whether movable or immovable, and of what nature or kind soever, whether the same be in possession, reversion, remainder, or expectancy, nothing excepted, and in the event of any of our said heirs hereby appointed predeceasing us, then and in such case the share of him or her so dying shall devolve upon his or her issue by representation according to the laws of succession "per stirpes."

We further direct that whichever of our sons shall happen to inherit the farm called Bold Point under and by virtue of the mutual will of the testator's parents, Joseph Price and Ellenor Matilda Price (born James), dated the 5th day of March, 1888, such son shall not be entitled to inherit or receive under this our will any portion of the sum or sums of money to be paid in to our estate as aforesaid for our farm properties; and we further direct that the sum of nine hundred pounds (£900) sterling which is payable in respect of

the said farm Bold Point in to the estate of the testators' said parents, shall be paid out of our joint estate.

We do hereby further direct that the survivor of us shall be authorised and allowed to keep the whole of our farm or immovable property under his or her entire direction and administration and to remain in the full and undisturbed possession thereof and in the enjoyment of the usufruct or the rents, issues and profits thereof for and during the term of his or her natural life in order that he or she may be better enabled to maintain, support and educate our children until they become of age or marry.

We further direct that our said executors shall as soon as conveniently may be after the death of the first dying of us cause a just and true inventory to be made of the movable assets of our joint estate, and the same to be fairly and equitably valued and appraised by two impartial persons or sold by public auction at the option of the survivor of us in order by so doing to ascertain the portions of inheritance of our heirs out of the estate of the first dying of us, and after the deduction of one moiety of the whole of our said movable property which is bequeathed to the survivor of us as above mentioned, the survivor of us shall be obliged within two years after the death of the first dying of us to pay out such portions of inheritance of the remaining moiety to such of our said heirs as may have attained majority, and in the case of those who may be minors to the Master of the Supreme Court of this Colony together with interest reckoned at the rate of five per cent. per annum from the date of such valuation, but in case the survivor shall prefer to realise the said movables by public auction as aforesaid, then and in that case the portions of our respective heirs shall be paid out forthwith to such as may be majors and in the case of minors to the Master of the Supreme Court of this Colony.

With reference to the appointment of valuers, we direct that one shall be appointed by the survivor of us and the other by our other two executors with power to such valuers to appoint an umpire, who shall decide in case of disagreement between such valuers as to the value of the said movables or any portion thereof.

We declare to nominate and appoint the survivor of us together with George Norman Price and George Edward James to be jointly the executors of this our will, administrators of our estate and effects and guardians of our minor children, giving and granting unto them all such powers and authorities as appertain in law to those capacities, and especially those of assumption and substitution. We reserve to ourselves the right from time to time, and at all times hereafter, to make all such altera-

tions in or additions to this our will as we may think fit either by a separate act or at the foot hereof desiring that all such alterations or additions so made under our own signature may be held as valid and effectual as if originally inserted herein.

Lastly, we declare this document to be and contain our mutual last will and testament, and desire it may have effect as such or as a codicil or otherwise as may best consist with law.

In witness whereof we have hereunto set our hands at Tarkstad on this twenty-second day of December in the year of Our Lord eighteen hundred and ninety four in the presence of the subscribing witnesses:

As witnesses:—E. J. Stanley, Wm. Kidger, Chas. J. Price, S. M. Price.

Mr. Searle, K.C. (for plaintiff): The whole question is: what is the true construction of the will with regard to the rights conferred upon Mrs. Price (now Baker)? I submit that the will confers upon her a usufruct, and that this usufruct passed to her trustees on her insolvency. As it has more than once been pointed out by the Court, the power conferred by section 10 of the Insolvent Ordinance is very wide. In this case, a usufruct is conferred, and the matter or object in respect of which that usufruct is to operate is indicated, but no trust can be thus imposed by our law. This matter was fully considered and decided in *Zeederberg v. S.A. Association* (5 Searle, 266), and this decision was approved in *Van der Byl v. Executor of Michau* (2 Juta, 430). These cases are entirely in point. In fact, in the present case, the present will presents a stronger case for the trustee (the plaintiff) than did the respective wills in either of these cases. For here an out and out usufruct is given, in order (as it is stated) that the survivor may be the better able to maintain the children. That, however, is not sufficient to constitute the survivor a fiduciary of the usufruct, and that must be the defendant's contention.

There is no case in which the Court has held that such words as these can make the children *fidei commissaries*. The English law, is that in order to take a bequest under a will out of the operation of the Bankruptcy laws there must be a "gift over," that is some specific person must have the ownership transferred to him to bar the claim of the trustee. It was decided in *Hidding's Trustee v. Colonial Orphan Chamber* (2 Juta, 273) that the same rule applies to our law. Had it been held otherwise, we should find ourselves landed in extreme difficulties in many cases which might possibly emerge. As an example, suppose the children were all minors and that they were all concerned so that there would be a legal duty incumbent on the parent to sup-

port them: would it be held that he could not spend a penny of this usufructuary interest on himself in the event of his insolvency? Take the case of the children being well provided for; and here it is clear that they get a substantial amount of the testator's assets as paternal inheritance. However, cannot the survivor deal with the usufruct? It is true that we have here an alternative prayer for an inquiry, but that is not a logical position for the other side to take up. Either there is a *fidei commissum* of the usufruct of the farm in the children (and a *vested fidei commissum*, see *Strydom's case*) or there is surely an interest which passes to the trustee. *Zeederberg's case* (5 Searle, 266) has stood for many years, and, I submit should not now be overruled. The only case which can be said to tend the other way is *Appel and Lipschitz v. Appel* (21, S.C.R., 611), and that that only in virtue of an *obiter dictum*, and the will was not in the terms of the present will. There are numerous cases in which the Court has interpreted *fidei commissum* in such wise as to impose the least possible burden on the person in possession, and that is the rule of Roman Dutch Law. See judgment of Connor, J., in *Blignaut v. Cilliers* (Buch., 1868, p. 206), and *Voet* (36, 1, 7).

Sir H. Juta (for defendants): We only say that as *fidei commissaries* nothing vests in us, and as long as these heirs are minors, the creditors cannot claim. The cases cited on the other side do not apply. The only similar case is *Appel's Zeederberg's case* was not at all similar. This case is much stronger than *Appel's*. The Court has always made provision for minors. Then see Sec. 2 of the will as to the proviso respecting the quit-rent farms. In the event of the death of the survivor, the trustees must use the rents, and profits for the benefit of the minors. After the death of the survivor the *fidei commissary* heirs might take the inheritance, but were bound to provide for the minors. This will is stronger than the will in *Appel's case*. If the trustee wishes to take the property he must take it subject to the burden of providing for the minors.

Mr. Searle (in reply): *Appel's case* is not decisive, but there the legacy was only for the maintenance of the children, see *Voet* (42-1-43), cited by Bell, J., in *Zeederberg's case*. The trustees in the insolvent estate may clearly take the goods unless the alienation of the goods required for the minors is clearly prohibited. Defendant's counsel does not object to the trustee taking the estate if he devotes it to the maintenance of the children. This case is stronger than that of *Zeederberg*. True, the testator has said that he wished the usufructuary to use the property for the support of the minors; but that is not a condi-

tion. The usufruct is clearly vested in the survivor, and the trustee does not claim anything but that. Suppose a tutor had misconducted himself, could the minors come into Court and claim the usufruct?

Sir H. Juta referred to Sande on Restraints (3-1-1).

Buchanan, A.C.J.: The late Mr. Price, who was married out of community to his wife, during his lifetime acquired apparently a considerable amount of property. He made a joint will with his wife, in which he divided all the movables between himself and his wife, and the landed property was specially bequeathed to two sons on certain conditions. Then the testators, by their mutual will, subjected the landed property to a certain *fidei commissum*, or burdened it with a life interest in favour of the survivor. Price dying in November, 1906, his wife took the benefits given her by the will, and she continued to enjoy the life interest given by the will. She later on married one Baker, and both Baker and the defendant (his wife) had had their estates sequestrated as insolvent. The trustee claims the benefit of the bequest of the life interest to Mrs. Baker. There is no doubt that the Insolvent Ordinance is wide enough to entitle the trustee to take any future as well as present rights, and if it were a life interest pure and simple that was bequeathed there would be absolutely no doubt as to the trustee's right to take it. But the question arising in this case depends upon the terms in which the life interest has been bequeathed. The clause in the will in question is shortly as follows: "We do hereby further direct that the survivor of us shall be authorised and allowed to keep the whole of our farm or immovable property under his or her entire direction and administration, and to remain in the full and undisturbed possession thereof, and in the enjoyment of the usufruct or the rents issues and profits thereof for and during the term of his or her natural life." Then come these words: "In order that he or she may be better enabled to maintain, support, and educate our children until they become of age or marry." The question is whether these words which I have just read impose a condition on the bequest of such a nature that the trustee, who can only step into the legatee's shoes, can take the usufruct without being burdened by any condition at all. I think it may be argued that the trustee can only take what property is vested in the insolvent, and if that property is vested in the insolvent distinctly subject to a condition the trustee who takes the property must take it subject to that condition. It may be a hard case that the late Mr. Price's property should go to pay the debts of the second husband, but that is not the question now before me. I have to look at it from a strictly

legal point of view, and decide whether these words, "in order that he or she, etc.," amount to such a condition as is binding both on Mrs. Baker and the trustee. Now, after hearing the argument, and referring to the cases decided, I am bound to follow the expression of the opinion of the Court on previous occasions, and I must look at the words used by Chief Justice Hodges as "more an expression of expectation and desire, and not as a positive direction and command." I think, therefore, that, there being no gift, I cannot hold that it is a condition that is obligatory on the trustee. It seems to be more an expression of desire. Under these circumstances, the trustee is entitled to judgment, and I will give judgment so far as clause 9 of the plea is concerned, up to the word "leases." Before saying anything as to the question of costs, I would like to hear what counsel may have to say.

Mr. Searle having addressed the Court,

Buchanan, A.C.J., said that judgment would be for the plaintiff, declaring him entitled in terms of clause 9 up to the word "leases," costs to come out of the fund

[Plaintiff's Attorneys: Walker and Jacobsohn; Defendants' Attorneys: Silberbauer, Wahl and Fuller.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAARDORP.]

VOGER V. VOGER. { 1905.
June 13th.

Mr. P. Jones appeared for the plaintiff, and asked for an extension of the return day of edictal citation. Plaintiff was suing for restitution of conjugal rights, failing which, a decree of divorce for malicious desertion, but up to the present it had been impossible to serve the citation personally on the defendant. The order was altered to allow the citation to be served personally on the defendant or at the defendant's father's residence in Holland. The return day was extended to August 17.

JACOBSON V. SCHULTZ. { 1905.
June 13th.
" 14th.

Lessor and lessee—Mental capacity of lessor.

This was an action brought by Solomon Jacobson, a general dealer, of Kakamas, in the district of Kenhardt, for an order compelling the defendant

Johannes P. Schultz, a farmer, residing at Nous West, to give plaintiff possession of certain premises, and for damages for not having given up possession at an earlier date, or as an alternative, damages fixed at £1,000 for breach of contract.

The plaintiff's declaration set out that he was a general dealer, residing at Kakamas, and the defendant was a farmer, residing at Nous West. On or about the 5th October, 1904, the parties entered into a written agreement of lease, whereby the defendant let to the plaintiff certain premises at Nous West for five years, beginning on the 5th October, 1904, at a rental of £20 per year, for the purpose of starting a shop business. The plaintiff had paid to the defendant the sum of £10 as and for six months' rental of the premises, under the agreement. Relying upon the agreement, the plaintiff disposed of the business which he was then carrying on at Puffadder, and took out a licence for his shop at Nous West, and subsequently forwarded his transport wagons with goods to Nous West, for the purpose of opening his proposed business there. The defendant refused to allow the plaintiff to go near the farm, and refused and still refuses to give the plaintiff possession of the premises let to him, or to carry out the agreement. By reason of the defendant's breach of contract, the plaintiff had suffered considerable damage. The plaintiff claimed: (a) An order compelling the defendant to give him possession in accordance with the terms of the agreement; (b) payment of an amount as damages reckoned at the rate of £2 per day, from the 5th October to the date of possession; (c) as an alternative, payment of the sum of £1,000 as damages for breach of contract.

The defendant in his plea stated he admitted that the lease was signed, but said that it was obtained from him by one Bremner and Ossrey, acting on behalf of the plaintiff, at a time when he (the defendant) was ill in bed, incapable of managing his own affairs, and partly delirious, or suffering from the after-effects of deliriousness, and that the agreement of lease was thereby *ab initio* null and void. Defendant held that at the time when the agreement was made his mental condition must have been quite apparent. Defendant on November 2, immediately on regaining control of his senses, at once informed Bremner and the plaintiff that he could not recognise the contract, and that he repaid the sum of £10 to the plaintiff, which payment the plaintiff accepted. Defendant denied that plaintiff disposed of his business at Puffadder, in consequence of obtaining the lease at Nous West. Defendant denied that he had committed any breach of contract.

Mr. Burton (with whom was Mr.

Lewis) appeared for plaintiff, and Mr. MacGregor (with whom was Dr. Greer) appeared for the defendant.

Mr. Burton said that, seeing that there was a written agreement, and that it was admitted by the defendant; the onus lay on the defendant of beginning the case, but as the plaintiff had to prove his damages, he would open the case.

Louis Ossrey stated he was an assistant in plaintiff's store at Kakamas. He knew the defendant for some time; he was a farmer. Last year witness was assisting in a business at Puffadder, which was near the border of Namaqualand. In October last plaintiff gave witness certain instructions, and in consequence he, accompanied by Mr. Bremner, went to a farm called Quaybees to erect a shop. They were not satisfied, and went to defendant's farm Nous West. They met the defendant in the front of the house. His wife was with him. Defendant was complaining of a cold, but beyond that there did not seem to be anything wrong. Witness told defendant that Mr. Jacobsohn had sent them to look out for a place to set up a store, defendant suggested that they should have a shop on his farm. He said he had already let a shop to Millar Bros., but there was no agreement that there should not be a second shop on the farm. Defendant said he knew that Millar Bros. would be vexed, but that as he had a large rent (£58) to pay yearly, he had to do something. He said that Millar Bros. were paying him £40 a year, and if witness would pay him £25 he could live comfortably. Witness drew up an agreement, to take the place for five years at an annual rent of £20 a year. The defendant signed it. The next morning Mrs. Schultze said that they would not have much room in the house with the two shops, and suggested that the plaintiff should build a small house for himself 300 yards away, and he would give up the room and kitchen. The defendant said that if the plaintiff wanted the place at once, if they erected a tent for him he would move into it. Witness paid defendant £4 on account, and arranged to give him £6 more on his return from Puffadder. The plaintiff's business at Puffadder was sold to a man named Stroonau. Witness had had instructions to sell the plaintiff's business at Puffadder if he could arrange with defendant. Witness, who had been accompanied by Bremner, returned to Nous West, the defendant's farm, about 12 or 13 days after. The defendant then refused to abide by his agreement, and would not allow plaintiff to take over possession. Owing to losing the house, plaintiff sustained a loss by disposing of his shop at Puffadder, which showed a profit of £700 or £800 a year. The plaintiff got in a large stock of goods, which he had to store at Kakamas. There was a business loss of about £400 on it.

Cross-examined by Mr. MacGregor: There were a few farmers and another dealer on the farm when witness first got there. Witness did not consider that the attempt to get a shop in the same building as Millar's was sharp practice. There were plenty of farms in the district. Both shops could thrive. Other people wanted to get shop rights on that farm. Schultz was not in bed when witness arrived at the farm. Witness did not know that he had been very ill. The agreement was signed in the bedroom. Neither witness nor Bremner were partners in plaintiff's business. Witness heard nothing about defendant returning the £10 to plaintiff. The business at Puffadder was sold for £225. The reason for the low price was that the building was on the Government Reserve.

Re-examined by Mr. Burton: When he returned to the farm and paid the balance of £6, the defendant appeared satisfied with the contract he had made with the plaintiff.

Julius Bremner said he was with the previous witness when the negotiations with respect to the letting of a shop on defendant's farm to plaintiff took place. He corroborated the statement made by Osrey with regard to the conversation that took place. Defendant was coughing, and had a headache, but otherwise he appeared to be all right, and in possession of his senses.

Cross-examined by Mr. MacGregor: It was eleven o'clock in the morning when they reached the farm on October 5. Schultz appeared to be all right, and the next day when they left Schultz was also well.

Solomon Jacobsohn, the plaintiff, said last year he had two businesses—one at Puffadder and the other at Kakamas. He wished to dispose of his business at the former place, because it was too far from Kakamas, and he sent his two assistants, Osrey and Bremner, to see if they could buy a business nearer to Kakamas. When his assistants came back they brought the contract they had entered into with Schultz. As the result of a letter which he heard had been received from defendant, he put off for a few days his journey to Nous West.

Cross-examined by Mr. McGregor: When witness purchased goods from the wholesale dealer, he had six months' credit on drapery, after which he had to pay interest at 7 per cent. On groceries, he had to pay interest after three months. Osrey was on Nous West Farm about November 6. Witness saw the defendant about the 10th November. Witness remembered Millar and a man named Ringer going into his shop about the middle of November. Ringer did not hand him a letter from Schultz. When witness saw Schultz, he said he had had a bad cold. Puffadder was rather far away from witness's principal business. Strunnen's

shop might have done witness harm, but if he could have done so, he would not purchase witness's business. Witness only sold him about £100 worth of stock. Witness did not know of any farmers in that district having gone bankrupt recently, but some might go.

Mr. McGregor: Then you must be going to collect your accounts?—I get any money I can.

Have you any money out at interest?—No; I wish I had.

Do you lend farmers money?—If I find a farmer hard up, I lend him a few pounds.

Re-examined: Schultz never asked witness if he had received £10.

Louis Osrey (re-examined): The profits on the Puffadder business were about £350 yearly. It cost about £27 10s. to take the goods from Puffadder to Nous West.

Cross-examined by Mr. McGregor: Witness did not go to see defendant shortly before the King's Birthday. Defendant did not ask witness if he had received a letter from him.

By Maasdorp, J.: If the plaintiff did not get these premises back, he would have to try and get some elsewhere.

Mr. Burton closed his case.

Jacobus P. Schultz (the defendant), examined, stated that in August last year he was ill, suffering from typhoid fever and inflammation of the lungs. He was ill three months, and was not quite well yet. In fact, on the way down to Cape Town for the present case he was taken ill. His head had been affected. On October 5 Mr. Goldstein had asked him for the right to put up a shop, but witness told him he could not sell it, as he had agreed to give it to Millar Bros. Witness was taken ill shortly after, and was removed to his bedroom. When he again came to his senses, about twenty days had elapsed. Witness did not remember seeing either Osrey or Bremner, nor did he recollect signing the agreement. When he recovered, his wife handed him the agreement and £10. Witness did not see Osrey on October 18. Witness did not remember writing to plaintiff telling him that he must not bring stock on to the farm. He recollected having a letter written to Jacobsohn, returning the £10, and stating he did not know what he had done when he was supposed to have signed the agreement. Mr. Millar, accompanied by Mr. Ringer, took the letter. Osrey called at the farm again about November 6. He said he understood that Mr. Millar had got witness to break his contract. Witness replied that he had not. Osrey then asked witness if he could bring the goods to the farm, but witness told him he could not. The contract with Millar was made in the July previous to the October. Other people had also tried to get the shop. Mr. Goldstein was

one of them. Witness told him that he could not give it to him, and that he would have to apply to Millar for it.

Cross-examined by Mr. Burton: There were some days during his illness when he was not in his proper senses. His wife would know when he had full control of his faculties. The letter sent to the plaintiff was not dictated by the Millars.

Elias Goldstein, a trader, said he remembered being on the farm at Nous West on October 5 at about 8 o'clock in the morning. He talked business with Schultz in the breakfast room. Schultz told him that he had not been well, and about ten o'clock Schultz went to his bedroom feeling ill. He seemed very weak, and later in the day Schultz fell off a chair in which he was sitting.

Cross-examined by Mr. Burton: There was rather a commotion when defendant fell off the chair, and when he was taken into the bedroom witness did not see him again. When Ossrey and Bremner came, they went into the bedroom.

Mrs. Van Niekerk stated she often attended people when they were ill. She remembered in October last attending Schultz, who was very ill. She was in attendance on him when Ossrey arrived. She went home that evening, but Mrs. Schultz sent for her again next morning, as he was very ill. His illness continued during the whole month of October. During his illness at times he did not know what he was doing. He was constantly conceiving different plans. On one occasion he told his wife to bake and slaughter, as he intended "trekking" to the Transvaal. On the afternoon of October 5 he was not in a condition to transact business. In fact, he was not in his right mind. Witness did not see a letter going from Nous West with money in it.

Cross-examined by Mr. Burton: Witness gave her "patients" home remedies. She often mixed the medicine for them. She gave Schultz medicine on several occasions. He was suffering from inflammation of the lungs from the previous August. The fever left him in October. He was suffering from the effects of fever when Ossrey and Bremner visited him. Witness nursed him constantly whilst giving him medicine. Witness's house was five minutes' walk from Nous West. When witness went into the house she saw Schultz lying on the bed. He was sick, she spoke to him; but he did not reply. She pointed out to his wife that he was very ill. She did not speak to either Ossrey or Bremner when she saw them.

Christina Susannah Viviers stated that she also attended sick people. She had visited the defendant occasionally, and helped to nurse him. She saw him in the month of September. He was de-

lirious from fever and inflammation of the lungs.

Albertus van Niekerk, Nous East, stated he was a farmer. In October last he visited the defendant. He signed the contract between Miller and defendant as a witness. Witness remembered Ossrey and Bremner arriving at the farm. Schultz was very ill during that day. Ossrey asked witness how Schultz was, and he replied that he was very bad. Later on they went into the bedroom. They said they wanted to see how he was. When witness went into the bedroom afterwards, he found Schultz lying on the bed. Schultz wrote to Jacobsohn in November returning the £10 and declaring the contract null and void.

In cross-examination, witness said he was much surprised when he heard of the lease between Schultz and Jacobsohn.

William van Niekerk, jun., said that on October 5 Schultz was ill when Ossrey and Bremner arrived. Bremner and Ossrey, however, went into the bedroom, where he saw them sitting on chairs in front of the bed. Schultz's condition was such that he could not do any business.

Cross-examined by Mr. Burton: He did not go into the bedroom, and he did not hear any talking. Schultz was too ill to do business. Schultz had spoken rationally to him that morning.

Abraham E. Millar said he had a contract with Schultz for a shop on Nous West. He arrived at Nous West at the end of October, when Schultz was too ill to talk business that day. A few days later he spoke to Schultz about a contract with Jacobsohn on November 2. Schultz gave him a letter to give to Jacobsohn. Witness gave the letter to a man named Ringer, who took the letter to Jacobsohn's shop.

Cross-examined by Mr. Burton: He heard about the contract between Schultz and Jacobsohn when he was on his way to Nous West to set up business. He had a few goods, and goods on order were coming round from Cape Town to Port Nolloth. Schultz told him what was in the letter he wrote to Jacobsohn. Witness eventually set up business at Nous West, and was still there. He could not say what his profits were for the past six months.

Harry Ringer said he took a letter written by Schultz to Jacobsohn, and he saw Jacobsohn take £10 out of the letter.

Mr. Saacs, Deputy Sheriff for the district of Kenhardt, said the nearest doctor to Nous West was at Kenhardt, a distance of 128 miles, and the doctor's fee to attend a patient at Nous West would be forty guineas, exclusive of conveyance.

Mr. Boonzaier, black and white artist, said he had a few minutes previously seen Schultz write his name, and comparing it with the signature on the con-

tract there was a slight difference. In the signature on the contract there was a stroke short in the "h" and "u," and it might have been written when the writer was ill or nervous.

Mr. McGregor closed his case. Counsel were then heard in argument.

Mr. Burton said that with regard to the question of liability he submitted that undoubtedly the burden of proof rested on the defendant. The plaintiff alleged a contract of lease for certain premises, and the contract was put in. It was a written contract executed by the parties, and there was no question as to the signatures, and the contract was admitted. The special defence had been set up that at the time this document was signed by the defendant he was ill in bed, suffering from deliriousness, and that he was incapable of doing his business. That was the defence, and the burden of establishing it to the full rested on the defendant. A defence of that sort was a very exceptional one, and one which had to be proved up to the hilt. The plea was not one that one would expect. One would have expected that the defendant would plead that he did not understand what he was doing, but it stated that he was ill in bed either delirious or suffering from the effects of deliriousness. There was no allegation that he did not understand the contract when it was signed. What one would expect in a plea would be that it was alleged that he was in such a condition that he was unable to understand what he was doing. It appeared from the evidence that he set up a plea of oblivion. Generally speaking, the Roman-Dutch law on the matter was very limited. It was summarily that obligations required a free exercise of the will which could not be present where judgment was impeded in its action, as, for instance, in the case of lunatics. There was some authority with regard to drunkenness. He had been unable to find any Roman-Dutch law which set forth a defence like the present one. In "Kotze's Van Leeuwen" it was stated that all obligations must arise out of the free exercise of the will, which could not take place where there was a hindrance of the will. The English authorities went considerably further, and the obligation which rested on a person who set up a defence of this nature was a very heavy and serious one. It was held there that a person could not raise a point of insanity unless it was known to the other party at the time of the signing of a contract that he was insane, and the burden of proving lay on the person seeking to avoid the contract.

[Maasdorp, J.: I do not think our law goes as far as that.]

I think not. Continuing, he said that if the Court was satisfied on

the facts that this allegation by the defendant was true, and that he was absolutely *non compos*, he was not prepared to maintain that he was bound by his contract, unless he subsequently could be held to have ratified it. He specially referred to that, because even if the circumstances were as alleged by the defendant, his subsequent conduct showed that he was quite satisfied with what had been done. He submitted that the defendant had not discharged the burden of proof that rested on him. Mr. Burton then reviewed the evidence at some length, after which he said he submitted that the defence was not a *bona fide* one, and that the defendant consequently was bound by his promise, and to fulfil his contract, and if he did not do so, to pay the plaintiff certain damages.

Mr. McGregor said the man's illness must have been an illness of a very serious nature, and Mr. Ossrey had endeavoured to make it appear as slight as possible. It was a good stroke of business on the part of Ossrey to endeavour to oust Miller from the business in this district. The plaintiff wished a man to break a contract with another man. How could he ask a Court of Law to give certain rights when the getting of such rights must make a man break his contract? They did not impute that the signature on the contract was a forgery, but they did say that Jacobsohn was not in law a consenting party.

Mr. Burton was not heard in reply.

Maasdorp, J., said the plaintiff in this case claimed specific performance of a written contract of lease, and damages for delay in complying with the conditions of the contract, or, as an alternative, he claimed £1,000 as damages for breach of contract. The plaintiff's case was based on two agreements—written contracts of lease. The one signed by the defendant as lessor, and the other signed by Ossrey on behalf of the plaintiff as lessee. The defendant admitted in his plea that the contract was signed by him, but he said that it was obtained from him by one Bremner and Ossrey, acting on behalf of the plaintiff, at a time when he (the defendant) was ill in bed, incapable of managing his own affairs, and partly delirious, or suffering from the after effects of deliriousness, and that the agreement of lease was therefore *ab initio* null and void. The defence consequently set up in this case was that if the contract was executed, he was not in a state of mind to give consent to this contract. It would, therefore be necessary for the Court to try and arrive at what the mental condition of the defendant was after the contract was entered into, and if it was discovered that he was then suffering from a temporary derangement of mind as a result of fever from which he had been suffering, and that this illness had induced such a feeble condition of mind

that he was incapable of managing his own affairs, then the Court would arrive at the conclusion that this contract was null and void. Under the circumstances placed before the Court by the witnesses for the plaintiff, which was wholly different from the state of circumstances which had been deposed to by the witnesses for the defence, it appeared that Mr. Bremner and Mr. Ossrey, seeing that it was necessary to change the place of business from Puffadder nearer to Karkanas, set out with the intention of seeing a farmer living near to the drift with a view to establishing a shop there. When they arrived at defendant's shop, they were unaware that there was any likelihood of obtaining a place of business from the defendant, but they said that the defendant on being informed of their mission, told them that they could have a shop on his farm. Under these circumstances they entered into the lease. It was clearly established that during the negotiations two documents were drawn up which must have been the result of some conversation between them, and the writing of these documents must have taken some little time. They must have been writing in some part of the house, where the parties were exposed to view to any person who might go into the rooms. It was also stated that during the negotiations they referred to the contract made by Mr. Millar. They had elicited from the defendant that this document was kept in some case in the front room, and not in the bedroom where the defendant was supposed to have been. Not a single one of the witnesses for the defence saw any of these transactions. The explanation given by the plaintiff's witnesses for this was that they saw nothing of it, because they were not there. It was difficult to understand how they could have been there and not have seen these documents drawn up. It had been said by the witnesses for the defence that before Ossrey and Bremner arrived at the farm, that the defendant had had a fit, and was placed in bed in a dying condition, but notwithstanding the serious condition he was in, Mrs. Schultz, his wife, was engaged trading with a trader, and not paying any attention to her dying husband. He came to the conclusion that if the witnesses put forward by the defence had been present during the day, they must have left before this agreement was signed. There had been evidence led to show that the defendant was in a frail state of health but no evidence had been led to show that he was unable to do business. His wife must have been in and out of the room repeatedly, and was it likely that she would allow her husband, who was mentally deranged, to carry on a business agreement with these two men? Now Schultz admitted that he had recovered from his trance about the middle of October, but nothing

was done until the 2nd November, when Mr. Millar arrived on the scene. It was apparent that Mr. Millar was not expected. With regard to that letter, there had been a great conflict of evidence, and he had come to the conclusion that Mr. Millar and Mr. Ringer had not satisfied him that that letter went into the hands of the plaintiff. Upon the whole of the evidence he had arrived at the conclusion that it was impossible to decide otherwise than that when that contract was entered into the defendant was in full possession of his faculties. The plaintiff claimed specific performance that would be rather difficult to grant, and therefore the Court could not do so. The way to assess damages was to ascertain what loss the plaintiff had sustained. Mr. Millar's statement was that he was only making a bare living out of the place. It was expected that there would be some profits, and he was rather inclined to take the measure of damages at something not much more than the actual losses. The Court thought that if he was awarded £100, it would meet the justice of the case.

[Plaintiff's Attorneys: Friedlander and Du Toit; Defendant's Attorneys: Dampers and Van Ryneveld.]

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

MATRIMONIAL CAUSES.

MEYER V. MEYER. } 1905.
} June 14th.

This was an action brought by Arend Meyer, of the Paarl district, against his wife, Sophia Petronella Meyer, of the Stellenbosch district, for restitution of conjugal rights, failing which a decree of divorce. Mr. M. Bisset was for the plaintiff; there was no appearance for the defendant.

Wm. Thomas Birch, clerk in charge of the marriage register, Colonial Office, gave evidence as to the registration of the marriage.

Arend Meyer (the plaintiff) said he was married to the defendant on the 23rd September, 1884. There had been issue nine children, eight of whom were surviving.

Witness and his wife often quarrelled, and about two and a half years ago she left him. He had tried to get her back, but without success. She left him because he accused her of spending too much money, and because he said that his son must come home as soon as his work was finished.

Decree of restitution granted, defendant to return to the plaintiff on or before the 20th July, failing which rule to issue, calling on the defendant to show cause on the 3rd August why a decree of divorce should not be granted.

Postea (August 3rd). Rule made absolute.

TURNBULL V. TURNBULL.

This was an action brought by Magdalena Jacoba Turnbull, of Cape Town, against her husband, Charles Henry Turnbull, whose whereabouts is unknown, for restitution of conjugal rights, failing which a decree of divorce. Dr. Greer was for the plaintiff; the defendant was in default. The suit was by edictal citation.

Wm. Thos. Birch, clerk in charge of the marriage register at the Colonial Office, gave evidence as to the registration of the marriage.

Plaintiff said that she was married to the defendant in 1879. They lived happily together in Cape Town until 1883, when the defendant left her of his own accord. She did not know of any reason for his going away. Defendant was a baker.

[Buchanan, A.C.J.: What do you want a divorce for now? Your husband must be 65 years of age?]

I want to get a chance to be married again, my lord. I want someone to support me.

A decree of restitution was granted, defendant to return to or receive the plaintiff on or before the 20th July, failing which a rule to issue calling on the defendant to show cause on the 3rd August why a decree of divorce should not be granted.

Postea (August 3rd). Rule made absolute.

RICHARDS V. MILLS. { 1905.
 { June 14th.

Contract—Verbal—Inchoate.

Though a verbal contract is binding on the parties, yet if it be agreed that the contract should be reduced to writing, in order that the parties may discuss the terms thereof, the preceding verbal contract must be regarded as inchoate.

This was an action brought by Walter W. Richards, farmer, Queen's Town dis-

trict, against James David Mills, farmer, Fort Beaufort district, for specific performance of a certain sheep lease and damages.

The declaration set out that on the 25th July, 1904, it was agreed between the defendant and one George Richards, the duly-authorised agent of the plaintiff, that defendant should let to the plaintiff, who was carrying on farming operations in the Orange River Colony, 200 merino ewes, of 2, 4, 6 and 8 teeth, in equal numbers, for a period of three years, at a rental of 2s. per sheep per year, payable in advance. Plaintiff was to purchase the said sheep at the end of three years at 20s. per head. Defendant had the option of receiving the whole or part of the purchase price at any time before the expiry of the period of hire. Plaintiff gave two sureties for the fulfilment of his part of the undertaking, and it was agreed that a written agreement in the above terms should be drawn up and executed by the parties. Thereafter the plaintiff had a written agreement drawn up embodying the above terms, and the said agreement was duly executed by himself and two sureties on the 8th August, 1904. On the 12th August the said George Richards, acting as aforesaid, duly tendered to the defendant £20, first year's rental, and requested him to complete the said written agreement and tender the said sheep to the plaintiff. The defendant refused the said tender, and refused to complete the agreement or deliver the said sheep as agreed upon, and though frequently requested to comply with his undertaking, he had neglected to do so. Plaintiff had suffered damages in the sum of £150, and would be damaged to the extent of £400 during the period of three years if plaintiff failed to carry out the contract. Plaintiff claimed immediate delivery of the sheep, an order directing the defendant to execute the said written agreement and damages in the sum of £150, or, as an alternative to this claim, damages in the sum of £400 and costs.

Defendant, in his plea, said that negotiations were entered into between himself and George Richards for the letting to the plaintiff of 200 merino ewes. The period of rental and option of purchase were discussed, but no terms were come to as alleged. No definite or concluded contract was agreed upon either then or at any time between the parties. It was arranged that the plaintiff should submit for approval of the defendant on or before the 12th August a written form of agreement; and it was of the essence of the negotiations that the said written agreement should be submitted on or before that date. Plaintiff failed to present an agreement on or before that date, but on the 19th August, George Richards presented a certain written document to the defendant for approval, which, how-

ever, did not set out the true nature of the negotiations between the parties. He prayed that the claim may be dismissed with costs. The replication was general.

Buchanan, A.C.J., remarked that it seemed a pity that the witnesses should have been brought to Cape Town for this case, and that the trial could not have taken place nearer Queen's Town.

Mr. Burton (with him Mr. J. E. R. de Villiers) for plaintiff; Sir H. Juta, K.C. (with him Mr. Sutton), for defendant.

George Richards, farmer, Hopfield, district of Queen's Town, said that he had been on very good terms with the defendant for many years. Witness's son was the plaintiff in this action, and had a farm in the Orange River Colony. The veld was good on his son's farm, and witness was requested by him to try to arrange for the hire or purchase of sheep. Witness saw the defendant, and had some talk with him about hiring certain of his sheep. Witness went down to the defendant's farm on the 20th July, and on the 24th July witness and defendant entered into a contract for the hire of the sheep. The sheep were to be of 2, 4, 6, and 8 teeth, in equal numbers. On the 25th July, witness arranged that Mr. A. J. Green and Mr. Lovemore, the latter of whom was present, should be securities. Mr. Lovemore prepared a memo. of the conditions of the contract. When witness presented the lease to be signed the defendant said it was a one-sided affair, and that he would not sign it. Defendant before then had told him that he had had some bother with his brother, and that he would be glad if he (Richards) could arrange to get the sheep elsewhere, otherwise he (defendant) would have to let him have the sheep. Witness said that he would try to get sheep elsewhere, but at no time did he release the defendant from his agreement. He made every endeavour to obtain sheep, but he did not succeed. It was impossible to get sheep, although both witness and his son had tried both in the Colony and in the Orange River Colony, even until February of this year. He had been very anxious to avoid unpleasantness with the defendant. In regard to the question of damages, he calculated that his son would have lost at the end of three years about £425 by not having had the sheep.

By the Court: The memorandum produced was a correct copy of the agreement. It said nothing about the lambs, but the lambs were to be retained by plaintiff.

Walter W. Richards (the plaintiff) bore out his father's evidence. When defendant repudiated the agreement, witness tried to get other sheep, but without avail, and he wrote to defendant stating that the matter must go

through, as he had arranged to take another farm.

Henry Thomas Lovemore, farmer and boring contractor, said there was an agreement between plaintiff and himself to share the sheep when plaintiff got them from defendant, and the agreement between the parties was entered into in his presence. Witness made notes of what took place, and these notes were read by Mr. Mills, who said it was all right.

Cross-examined: Witness was to share any damages that were awarded in this action, as he was to have got half the sheep, but plaintiff was paying the costs of the action.

Mr. De Villiers closed his case.

Defendant, in his evidence, said that on the first interview on the 25th July, no agreement was concluded, because, in the first place, witness had to be satisfied as to sureties, and in the second place, the safe custody of the sheep. It was arranged that Geo. Richards should present a written form of agreement on the 12th August. Witness dipped his sheep, and they were ready to be handed over on the 12th August. George Richards did not come to his farm until Friday, the 19th August; witness was quite sure as to the dates. Witness told Richards that he had come too late, and that he did not intend to hire out the sheep, as he thought he could do better on his own account. He did not promise to let Richards have his sheep if he were unable to find any elsewhere.

Cross-examined: Witness denied that he had ever told the plaintiff's father that his farm was over-stocked. The memo. made by Mr. Lovemore was read over to witness. He did not agree to the sureties proposed by George Richards. He was not satisfied as to who should be responsible for the sheep during the term of the lease. He told George Richards definitely on the 19th August that he was going on his own "hook." Witness did not hear anything further from George Richards between the 19th August and late in September, and he therefore thought that Richards had in the meantime obtained sheep elsewhere.

Mrs. Elizabeth J. Mills (mother of the defendant) said that her son was expecting Mr. Richards, sen., to call on the 12th August. Mr. Richards, son., however, did not come until the following Friday, the 19th August.

Sir H. Juta closed his case.

Counsel having been heard in argument on the facts,

Buchanan, A.C.J., said that he thought it might be laid down as a principle of law, with us especially, that verbal contracts if fairly proved were binding, if the parties had entered into a contract, and the reducing afterwards to writing was merely to be a record of what had been decided upon, the writing was not necessary to

make a valid contract, but if it were the intention of the parties to have the document reduced into writing, so that they could discuss the terms, they were not bound until the contract had been discussed and duly executed. In this case the onus was on the plaintiff to prove that what took place on the 25th July was an out-and-out contract. This was denied by the defendant. Looking at all the circumstances, he (the learned judge) had come to the conclusion that the only judgment he could give was one of absolution from the instance with costs. The plaintiff had not discharged the onus that lay upon him of proving that a contract was entered into on the 25th July. Defendant would be allowed his expenses as a necessary witness.

SUPREME COURT

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN]

ADMISSIONS

{ 1905.
{ June 15th.

Mr. P. S. T. Jones moved for the admission of Kenneth Wiley as an attorney and notary.

Application granted and oaths administered.

Mr. Close moved for the admission of Mr. E. V. Bergh as an attorney and notary.

Application granted and oaths administered.

HEYNES, MATHEW AND CO. V. CHETTY.

Mr. P. S. T. Jones moved, as a matter of urgency, for an order enabling the petitioners to enforce their landlord's lien on certain perishables at the Central Fruit Store, Longmarket-street, Cape Town, and to sell the said perishables for the benefit of their claim of £120 due for rent. Respondent occupied a shop forming part of Heynes, Mathew and Co.'s buildings, corner of Adderley and Longmarket streets, and petitioners had reason to believe that certain judgments had been taken against her in the R.M.'s Court.

Order granted as prayed, pending an action to be instituted forthwith.

PROVISIONAL ROLL.

EQUITABLE FIRE ASSURANCE CO. V. LA GRANGE.

Mr. Douglas Buchanan moved for provisional sentence for £48, interest on a mortgage bond, and for £3 12s. 6d. insurance premium and stamps.

Order granted.

FARRELL V. ABEND AND SOLKER.

Mr. Sutton moved for provisional sentence on a promissory note for £299.

Order granted.

LOMBARD V. MYBURGH.

Mr. De Waal moved for provisional sentence on a promissory note for £300, with interest.

Order granted.

CAPORN AND CO. V. ROWE ROWE.

Mr. Close moved for provisional sentence on a bill of exchange for £255 14s. 9d., endorsed by the defendant as surety.

The affidavit of the defendant admitted that he signed the bill of exchange, but the bill in its present state was not, he said, in that form when he signed it. Certain material alterations had been made since he signed the bill in regard to the period of payment. He submitted that under the circumstances the plaintiffs had lost all recourse by law against him. The affidavit of George Rowe Rowe, broker of the defendant, stated that his brother Henry was in no way a party to the alterations made in the bill.

The answering affidavit of William Lindley, manager of the plaintiff company, stated that the alterations were made in the presence of Henry Rowe Rowe. Deponent went on to explain the circumstances under which the draft had been drawn, as an outcome of a debt due from George Rowe Rowe for bricks supplied.

The replying affidavit of Henry Rowe Rowe entered in detail into the whole transaction.

Buchanan, A.C.J., suggested that the parties should go into the principal case.

Mr. Close argued that the matter was one that could properly be determined now.

Mr. Gardiner (for defendant) was not called upon.

Buchanan, A.C.J., said that there was a direct conflict on the facts as disclosed by the affidavits. The parties would be ordered to go into the principal case, costs to abide the result.

RIGG V. WESSELS.

Mr. De Waal moved for provisional sentence on a promissory note for £105 3s. 4d., with interest.
Order granted.

PROVIDENT LAND TRUST V. O'CONNOR.

Mr. Watermeyer moved for provisional sentence on a dishonoured cheque for £150.

Buchanan, A.C.J., said that a telegram had been received from the defendant, who stated that he was leaving Kimberley for Cape Town, but he did not say that he had a defence to the claim. Provisional sentence would be granted.

OHLSSON'S BREWERIES V. WESTWOOD.

Mr. Gutsche moved for provisional sentence on a lease for £225, rent due for three months.
Order granted.

PARKER V. STEVENSON.

Mr. Sutton moved for provisional sentence for £81, interest on two mortgage bonds.
Order granted.

GALLOWAY V. TIRAN.

Mr. Baily moved for provisional sentence on an I.O.U. for £10, with interest and costs.

Order granted, subject to the document put in being stamped if required.

ESTATE WORDON V. SAILT.

Mr. Sutton moved for provisional sentence on a mortgage bond for £750, due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

VISSER V. GOEDHALS.

Mr. Alexander moved for a decree of civil imprisonment on a judgment of this Court for £80, together £7 10s. costs. Defendant, it was stated, resided at Humansdorp, and plaintiff resided at Hanover.

Order granted.

ILLIQUID ROLL.**ARDEENE V. BIDEN.**

1905.
June 15th.

Mr. P. S. T. Jones said that this matter was standing over for production of an affidavit of service of notice of bar. He moved for judgment for £100, and produced affidavit of service as required.

Order granted.

YATES V. FISHER.

Dr. Greer moved for judgment, under Rule 319, in default of plea, for cancellation of a certain contract, repayment of £300 paid as deposit and costs of suit, a claim for damages having been dropped.

Order granted.

RECEIVERS ASSIGNED ESTATE HARRISON V. GIOVANNI AND DI BIASSIO, TRADING AS DI BIASSIO.

Mr. Searle, K.C., moved for judgment, under Rule 319, in default of plea upon a declaration for cancellation of lease of certain premises at Observatory-road by reason of two breaches of the conditions of the lease. Counsel said that he now applied for judgment against Luigi di Biassio for cancellation of the lease and for £40 10s. due by way of rent. The claim for damages would not be pressed.

Order granted.

SHUR AND ABRAHAMSON V. SCHAPERA.

Mr. Lewis moved for judgment, under Rule 329d, for £80 15s. 7d., goods sold and delivered and moneys disbursed.

Order granted.

TURF HALL ESTATE V. OAKLEY.

Mr. Bailey moved for judgment, under Rule 329d, for £175, being first and second call on shares in the Turf Hall Estate, Limited, less £35 paid on account.

Order granted.

JOHNSON AND CO., LTD. V. ROYAL HOTEL COMPANY, LTD.

Mr. Van Zyl moved for judgment, under Rule 319, in default of plea for £207, with interest *a tempore morae* and costs.

Ordered to stand over pending proof of service of notice of bar.

GENERAL MOTIONS.

RAUBENHEIMER V. RAUBEN-HEIMER. { 1905.
June 15th.

Divorce—Order for restitution of conjugal rights.

Before divorce can be granted for failure to comply with an order for restitution of conjugal rights, service of the rule nisi must be proved by affidavit. It is not sufficient to show that the rule must have come to the defendant's knowledge in some way or other (e.g.) because he or she was present in Court when it was granted.

Mr. P. S. T. Jones moved for a decree of divorce in default of the wife's compliance with an order for restitution of conjugal rights.

His Lordship said that there was no affidavit of service of rule.

Mr. Jones said that the defendant was now in court, as she was when the rule was issued.

His Lordship said that no order could be given until the rule had been served. It would be necessary to serve the rule on the defendant.

Mr. Jones applied for an extension of the return day.

His Lordship said that the return day would be extended until the 22nd June, and the rule nisi would be extended until the 6th July.

Ex parte ESTATE HORN.

Mr. Long moved for a rule nisi under the Derelict Lands Act to be made absolute.

Rule made absolute.

VADASZ V. VADASZ.

Mr. Burton moved, on behalf of Mrs. Vadasz, for delivery of certain minor children.

The applicant stated in her affidavit that she was defendant in a divorce case. Some time ago the present respondent went to her house with a detective named Osberg, and demanded the two children. He locked her up, and took the children away. The children were now in the Nazareth Home, and expressed a wish to return home.

Dr. Greer, for the respondent, admitted that he took the children away, but did so because of her neglect and misconduct. He had put them into the Nazareth Home for safety sake. He locked her up because he feared she

would take some of the clothes that he had packed in a box for the children.

Buchanan, A.C.J., declined to make any order on the application, but directed the plaintiff to go to trial during the present term.

Ex parte ESTATE OF DEAN.

Mr. Watermeyer moved for leave to raise a loan on mortgage.

The application was granted.

Ex parte DEWDNEY AND WERNICH.

Mr. De Waal moved for leave to register an ante-nuptial contract.

The application was granted.

Ex parte YOUNG.

Mr. Douglas Buchanan moved for authority to sell certain property.

The application was granted.

Ex parte GREENING. { 1905.
June 15th.

Attorney—Professional misconduct—Removal from roll.

This was an application by Robert Greening, of Cape Town, for re-admission to practise as an attorney of the court.

The petitioner's affidavit stated that on the 16th March, 1904, he was suspended from practice as an attorney of this court for twelve months, in consequence of certain irregularities in connection with his insolvency, which was held to be culpable, and for which he was punished. The proved debts of his insolvency amounted to £750 or thereabouts. He also owed £250, unproved. During the period of his suspension, he had been unable to make any arrangements to pay his debts or maintain himself, beyond securing a very poor and precarious livelihood at miscellaneous clerical work. He was willing, if his application were granted, to devote the whole of his income, saving a small allowance for his own maintenance, to the payment of his debts. He had no other means of support than the practice of his profession, and was unacquainted with any other business or calling.

The affidavit of William Scott Bigby, of Pietermaritzburg, secretary of the Natal Law Society, stated that Greening, on the facts in regard to the conviction in Cape Colony coming to their society's notice, was suspended on their application by the Supreme Court. In 1899 or 1900 a complaint was made to the Law Society concerning

Greening, but owing to the disorganisation caused by the war, no steps were taken at that time.

The affidavit of Alexander John McCallum, secretary of the Cape Law Society, stated that on the 17th April the society applied for an extension of the return day until the 1st June, to enable them to make proper investigation as to certain charges made against the petitioner, both in this colony and in Natal. It was alleged, for instance, that he received from clients numerous sums of money, for the express purpose of paying the fees of counsel, and that he converted the said sums to his own uses, and that he had been guilty of fraud. Deponent had also received certain information from Mr. A. Cathcart Nicholls, of Durban, regarding malpractices and unprofessional conduct in Natal on the part of the petitioner. On these grounds, deponent asked for an extension of time to the 1st June.

The affidavit of Henry Cathcart Nicholls of Durban, stated that between 1898 and 1900 he had numerous transactions with the petitioner, of which he set out particulars. On the 25th March, 1900, Greening left Natal for England. He returned in February, 1901, but avoided Durban. In February, 1901, deponent instituted an action against Greening for the sum of £400, due to him, but owing to Greening's being in hiding and his continuous change of address, service could not be effected on him until the end of March. Appearance was entered by Greening to the summons, but he abandoned his address, and again went into hiding. Deponent obtained judgment for £310, with interest and costs. That judgment was still unsatisfied. Greening was cited by the Government to appear in reference to the unstamped documents and other irregularities in his protocol, and then absconded. Deponent, on investigating Greening's affairs, found numerous instances of irregularity in the course of his practice.

The affidavit of James Murray, of Durban, a carrier, stated that in January, 1900, he employed Greening to collect a debt for him, and although Greening collected the whole or the greater part of the debt, he (Murray) could not get any account or payment from him.

The affidavit of George Alfred Moss, of Cape Town, stated that in the case of Rex against Moss and Savage, heard at Paarl in 1902, he employed Greening as his attorney, and Mr. Schreiner and Mr. W. P. Buchanan appeared as counsel. During the few months that Greening had charge of the case, he paid him about £550. A considerable portion of this money was handed to Greening on the representation that it was required to pay counsel's fees. The de-

pouent afterwards learned from Mr. Schreiner and Mr. Buchanan that neither of them had received their fees from Mr. Greening. He paid a cheque for £75 to Greening for the specific purpose of having 50 guineas paid to Mr. Schreiner.

An answering affidavit of the applicant stated that in regard to the complaint alleged by Mr. Digby no notice was given to him at any time. He went on to say that he denied all and singular the insinuations and innuendoes of Mr. McCallum's affidavits, and objected to all such parts thereof as savoured of opinion, argument, hearsay, and the like. In regard to Mr. Cathcart Nicholls's affidavit, he said that Mr. Nicholls was unhappily afflicted with dementia, and was, he verily believed, of unsound mind, although not so found by judicial inquiry. Mr. Nicholls was refused admission as an attorney in Natal upon the finding of the Supreme Court that his bad character and intemperate habits debarred him therefrom. Applicant went on to allege that during his absence from Natal in 1900 he gave Nicholls his general power of attorney and gave into his custody all his property and considerable sums of money for collection. Thereafter, Nicholls endeavoured to extort money from him by means of blackmail and threats. He gave Nicholls a promise of £400, secured by promissory notes or bills of exchange, subject to the fulfilment of his promised service. He (Greening) declined to meet these, and Nicholls in turn declined to render him any account of his dealings. As to the provisional judgment, deponent intended to return and contest the claim put forward by Nicholls, but was prevented from doing so by financial incapacity. Deponent went on to make other allegations against Nicholls.

The affidavit of Helena Olsen, Addison-road, Sak River, stated that she was one of the plaintiffs in the case of Olsen and others against Boyd and others, and that Greening was her legal adviser. At various times in 1902 she paid him considerably over £450 with a view of carrying on the case. On several occasions Greening was paid money on the distinct representation by him that it was required to pay counsel's fees. One of these payments was a sum of £25, for which she received a receipt signed by Mr. W. G. Coulton.

Applicant's answering affidavit stated that although he received over £400 from Mrs. Olsen, his expenditure for her one way and another was about £600, and his costs if made out would amount to over £1,000. He denied having received a sum of £25 for counsel. One sum was paid to Mr. Coulton and the other to him (deponent) for his own fees. He had never failed to effect any specific purpose for which money had been paid to him. Moss's affidavit he declared was worded

to deceive. He acted for Moss and his partner Robertson in many matters besides the criminal case. He denied having received £550 from Moss. The 50 guineas for Mr. Schreiner he (Greening) duly paid over. There was another sum of 50 guineas paid to Mr. Schreiner, but Moss had not yet paid that to him (Greening), nor had he paid him Mr. Buchanan's fees. In regard to the instances mentioned by Mr. Nicholls, deponent denied having taken Natal clients' money. He denied that he was cited to appear by the Government on his protocol. The Master or Registrar of the Supreme Court, Natal, wrote to him to call and see him. He did so, and satisfied him. His appointment was cancelled. He had no recollection of James Murray. Moss, he said, in November last, told him that the secretary of the Law Society was canvassing for complaints, and had offered him £10 to make one. Moss had demanded £10 from him under threat of making affidavit against him. The affidavit of Hildyard Home Drummond, stated that in November last Moss went into his office and asked Greening to assist him in a job. He apologised to Greening for having treated him badly, and said that the Law Society had offered him £10 to make a complaint against him, but that he could not conscientiously do so. The affidavit of William Frederick Robertson, stated that Moss had made misrepresentations in regard to the transactions between them arising out of the criminal case between them. Robertson went on to accuse Moss of having betrayed Greening by misrepresenting him to Mr. Schreiner, betraying deponent by denying that there had been a partnership between Moss and himself, and betrayed both Mr. Schreiner and Mr. Buchanan by avoiding their fees and blaming Greening.

The affidavit of William Gordon Coulton, solicitor, Cape Town, stated that the statement of Mrs. Olsen's affidavit in paragraph 5, to the effect that £25 was paid to Greening, was untrue. The said sum was paid to him (deponent). Paragraph 6 was also untrue, inasmuch as the £25 therein referred to was paid to Greening, not for counsel's fees, but on account of his own fees.

The affidavit of Edward Collins, of Criterion Chambers, Cape Town, stated that on the 26th July, 1902, while employed by Greening as a clerk, Greening handed to him £52 10s. in cash, with instructions to pay same to Mr. Schreiner. This deponent did.

The replying affidavit of Geo. Alfred Moss, denied the allegations contained in the applicant's affidavit to the effect that he acted for him in another capacity. The statements with regard to the alleged bribe were unfounded. Greening at the

time with one Drummond was running a native labour bureau, and engaged him to act as a native conductor, but as he kept him for a fortnight without doing anything, he claimed his fee of £10, which had been agreed upon. Greening was arrested in December, but was acquitted. He had also read Drummond's allegations, which were false. He annexed to his affidavit cheque counterfoils to prove that he had paid Greening £300. He knew Greening well, and believed him to be thoroughly untrustworthy and unreliable in both public and private life.

A further affidavit made by Mrs. Olson was also read in support of her previous affidavit. The further affidavit of the secretary of the Incorporated Law Society stated that the petitioner was on the 12th April, 1902, admitted an attorney of the Supreme Court. In his petition for admission he allowed it to be understood that he had come direct from England. That after his admission the Law Society discovered that he had been practising as a an attorney and notary in Natal, and that he had absconded from Natal, and that at the date of his admission to the Supreme Court steps were being taken in Natal with a view to having him struck off the rolls, and that he had already been removed from the roll of notaries. That in corroboration of the foregoing he directed the attention of the Court to the affidavits of W. S. Bigby and H. Cathcart Nicholls. On the 14th March, 1903, petitioner surrendered his estate as insolvent, and the trustee experienced the greatest difficulty in obtaining from the insolvent anything approaching a correct statement of his affairs. In October, 1903, Greening was charged with culpable insolvency. He was convicted and sentenced to three months' imprisonment with hard labour, and in consequence was suspended from practising as an attorney for a period of one year. After his release, petitioner went into the office of an attorney named Gerald Scanlon (who has since absconded) where he acted ostensibly as clerk, but in reality acted as a partner of the firm. After leaving Scanlon's office, petitioner, in conjunction with an individual named Home Drummond, and a party named Shortle, initiated and carried on in Cape Town a concern known as the Native Labour Agency Company for the purpose of recruiting natives for the mines. Greening came under the notice of the police, and in common with Drummond and Shortle, appeared in due course in dock at the Wale-street Criminal Court on a charge of obtaining money on false pretences, but owing to a scarcity of evidence the case for the prosecution failed, and the accused were discharged. That thereafter, Greening, in common with Drummond, carried on business, the nature of which was unknown to deponent, at Rhodes Buildings,

St. George's-street. At present, Greening, in common with Drummond, was carrying on a weekly newspaper called "South African Truth." Greening was still an undischarged insolvent. With regard to the affidavit of June 1, it appeared that all the expenditure of "£600" and costs of "over £1,000," totalling in all to over £1,600, was incurred within the very short period of six months. Receipts had been lodged with deponent for a sum amounting to £425 for money paid by Mrs. Olsen to Greening in connection with the case referred to. On the 17th April, deponent wrote to the Attorney-General requesting him to obtain a note of fees due and outstanding by Greening to counsel, and he received from Mr. Advocate Schreiner, K.C., Mr. Advocate Searle, and Mr. Advocate Alexander statements showing the amounts due to them by Greening, but still unpaid. Acting under instructions, the attorneys to the Law Society communicated with the parties to several of the cases noted in Mr. Schreiner's and Mr. Searle's memoranda. That the letters were returned marked "No Address." That Greening owes a considerable sum amounting to the best of deponent's belief to £70 to Mr. Advocate Buchanan, who is at present in England. The allegation contained in the affidavit with regard to the Law Society attempting to bribe Moss was devoid of any foundation. Moss, when approached on the subject of making an affidavit relative to Greening's admission, evinced no desire to do so, and it was only upon urgent representations that he consented to do so.

The applicant in person; Mr. Burton (with him Mr. Alexander) for the Law Society.

The applicant said he was labouring under great disadvantage, because appearing as he did for himself he was too conscious of his imperfections to do himself full justice. He started practice in this Colony in 1902, but this practice was rather short-lived. He was returned a culpable insolvent, and the Chief Justice, in dealing with him, struck him off the rolls for a year, but gave him an opportunity of retrieving himself. When he made his application for reinstatement, the Incorporated Law Society opposed it, as they said they wanted to get affidavits from Natal, which were to be served on him. The matter was put off until April 20, but did not come on until May 4, when it was again adjourned until the present. The society now put in affidavit of one Cathcart Nicholls, whom the Law Society of Natal would not admit as an attorney. He held that they should render to Cæsar the things that are Cæsar's, and render to Natal the things that belonged to Natal. He had to appear in Natal during the coming month to apply for reinstatement, and then the Natal charges

could be brought before him. In Cape Town the Law Society had depended on the affidavits of Moss and Mrs. Olsen. Now, he (the applicant) was in a humble sphere of life, but Moss was humbler still, as he filled the useful, but lowly, position of a publican, and was he a competent man to judge of his (the applicant's) private life. Moss had stated he paid him £500. He had not had time to reply to the affidavit. He had had to disburse money for him in different kinds of business. In one case he settled the claim a barman brought against him for £50. When Moss got out of his trouble he did not want to pay Mr. Schreiner his fee, but he had to do so. He had, when the proceedings were brought against him, several cases which he had to hand over to other attorneys. He was rather surprised at Mrs. Olsen. Her case was a very complicated one, and he formed the opinion that the Ordinance of 1826 could be set aside, but the Court found differently. He went on with the case for these people, who would not take any advice, and they finished up by paying him a great deal less than he disbursed for her. Up to the time he had seen the affidavit by Mrs. Olsen, she expressed nothing but gratitude to him. He did not know how far the Court would rely on Moss's statements, but they would see how exceedingly reckless he was in some of them. Moss denied that he had taken Robertson for him in any case but a criminal case. He had not been able to answer that affidavit, but, if necessary, he could bring witness to show that he had. Moss denied that he had not taken Robertson into partnership, but the Court held differently, and Moss now had the audacity to impugn the finding of the Court. If Moss believed that he (Greening) was untrustworthy, why did he apply to him for a job. In conclusion, he said he appeared before that Court as a man who had done wrong, for which he was sorry, and as a man who had been severely punished. He asked the Court to give him a chance. It was not an unworthy ambition to try to do right again.

Mr. Burton was not called upon.

Buchanan, A.C.J.: The applicant in this case was an English solicitor, and by virtue of his qualifications, was admitted to practice at the Natal bar. He left Natal and came to the Cape Colony, and on his papers he was also admitted to practice as an attorney of this court. While so practising, he was charged with culpable insolvency and convicted, and on his conviction he was suspended in this colony and also in Natal. The learned Chief Justice who suspended him gave him leave to apply again in twelve months to be reinstated. Since the insolvent

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDO.-P.]

DARTER V. DARTER.

{ 1905.
June 16th.

This was an action for an order for the restitution of conjugal rights brought by Mrs. G. Darter against her husband, Aiden Albert Darter, failing which a decree of divorce in consequence of his malicious desertion.

The plaintiff's declaration stated she resided in Cape Town, and the defendant was born in Cape Town, but his present address was unknown to her. She was married at Bulawayo in 1898. She was married by ante-nuptial contract. On or about the 2nd October, 1902, whilst on a visit to England, the defendant deserted her, and had not since returned.

Mr. Cloose for plaintiff; defendant in default.

Georgina Darter, the applicant, stated she was married to defendant in Bulawayo in 1898. They lived together there about 14 months, and he then joined a regiment and went to the front. Witness came to Cape Town. Defendant went to England in 1901, but returned again. He then started as a broker. Defendant was of a roving disposition, but made Cape Town his headquarters. In 1902 he went to the Orange River Colony, in charge of the Native Refugee Camp. Plaintiff then went to Germany, and in May, 1903, she joined the defendant in Hamburg. He sent her across to England, as he would not allow her to stay with him.

[Maasdorp, J.: What do you mean by allow?]

Witness: He told me he was in difficulties, and that I would have to go away if I did not give him money. Witness then went to Newcastle, in England, and he followed her. The defendant went to London, as he said his father was ill. She found that such was not the case, but that the father was going on a holiday. She went back to live with him in London in a boarding-house. There was a lady living in the house, and she was put out by the landlord. The defendant left the following morning, and she did not see him again until the next day. She made inquiries as to his absence, and he said he had got drunk and slept at an hotel. The defendant agreed to meet her at his cousin's that evening and she went there, but he did not turn up. She received a letter from him, stating that he had gone to Rochester for a holiday. Subsequently, she received another letter, in which he stated that he had

was struck off, the Incorporated Law Society heard something to his discredit. This Court has often reinstated attorneys who have been struck off the rolls for misdemeanour, and who by their conduct have shown that it was merely a mistake, and who were entitled to be reinstated. Is the present one of those cases? I am clearly of opinion that it is not. The secretary of the Law Society of Natal has communicated with the secretary of the Law Society of Cape Colony intimating that, although the applicant had been suspended in Natal because of his suspension in Cape Colony, affidavits had been filed by people in Natal with regard to his conduct there, and there was also another charge made by the Government of Natal, to the effect that, whilst acting as a notary public, he conducted his business in such a way as to practically defraud the Government. In Natal he had acquired money from clients which he had not fully accounted for, and he also entered into arrangements with clients to settle their claims against him, arrangement which he in a letter proved that he did not intend to carry out. It is true that he has been acquitted on the charge of theft by means of false pretences, but the fact of his being acquitted on such a charge is no reason why he should be reinstated. The Court does not require to take into consideration the charges alleged against him in Natal, because he has been guilty of improper conduct in this country. The improper conduct in Natal was not brought to the notice of the Court when the applicant was first admitted. The Court has to decide whether the applicant is a person who should be allowed to take up the position of an officer of this Court, and to be allowed to treat the public in the way he had treated them in the past. Two extraordinary cases have been revealed during the hearing of the petition. One was a case which has been before the Court, and in which he collected some £450 as costs for a case that did not necessitate one tithe of that amount, and after getting it, he defrauded, not only his clients, but the bar, of the money he received from his clients for them. Then, in the other case, a man was charged with assault, and paid him £550 to conduct the defence and fee counsel, and he had not paid counsel one penny of the amount due to them. Is that a man to be an officer of the Supreme Court and to deal with the public? I distinctly hold he is not.

The applicant applied for leave to appeal.

Buchanan, A.C.J., said he could not give it, and there was no good in the applicant applying hereafter for reinstatement unless his conduct justified it.

decided to strike out for himself, and had gone to America under an assumed name. She did not know his present whereabouts.

[Maasdorp, J.: How do you propose to effect service of the order?]

Mr. Close: In the same way as the notice was served.

[Maasdorp, J.: Do you know his father's address?]

Witness: Yes. It is Good Hope House, 13, St. John's Wood-road, London.

Decree of restitution granted, the defendant to return to or receive the plaintiff on or before the 15th August, failing which rule to issue calling upon him to show cause on the last day of the term why a decree of divorce should not be granted as prayed. Personal service to be effected if possible, and a registered letter to be addressed to the defendant at his father's residence.

Postea (Aug. 31st). Rule made absolute.

VAN DER MERWE V. COLONIAL GOVERNMENT. { 1905.
June 16th.
" 20th.

Negligence — Railway Department—Damages.

This was an action brought by Carl Petrus van der Merwe, residing at Wellington, against the Colonial Government to recover the sum of £173, being the value of certain tobacco, consigned from the Transvaal to Wellington last October, and alleged to have arrived in a damaged condition at Wellington and for £10 damages.

The claim was an alternative one. The plaintiff claimed £173 and £10 damages, and the defendants could retain the tobacco, or on the other hand, a sum of £100, the plaintiff to retain the tobacco.

The plaintiff's declaration stated that he purchased 2,008 lb. of tobacco at Vereeniging, and consigned it to Wellington by train. It became the duty of the defendants to deliver the tobacco in the same condition as it was handed to them. This they failed to do. Plaintiff consequently refused to accept delivery of the tobacco, and claimed the value from the Railway Department. Plaintiff offered to sell the tobacco by auction; if the department would agree to pay the difference between the amount realised and the amount the tobacco cost, but this the defendants declined to do.

[Maasdorp, J.: What do you claim the £10 damages for?]

Mr. Searle: I suppose that was put in for expenses, but I won't press that claim.

The defendants' plea admitted the consignment of the tobacco. They admitted that it was their duty to deliver the consignment in good condition, but they

denied that it was received into their custody in proper condition. The damage was caused by the sweating of the tobacco. They denied liability, and prayed that the claim might be dismissed with costs.

Mr. Searle, K.C. (with him Mr. Close), appeared for the plaintiff; and Mr. Burton (with him Mr. Nightingale), appeared for the defendants.

Mr. Searle said a good deal of the evidence in this case had been taken on commission, and would be read at a later date.

Carl Petrus van der Merwe (the plaintiff), stated he was a speculator. He imported tobacco from the Transvaal and sold it to dealers. On the 19th October he had some tobacco at Vereeniging, Transvaal. He consigned the tobacco to Wellington Station. There were 81 bags, a bale, and a package. He paid £159 16s. for the tobacco there, and in addition had to pay wagon charges. He was claiming £173, which was not a very high price, as it worked out at 1s. 6d. per lb. There were 30 bags of cut tobacco, which was thoroughly dry. In the bale there were 40 bags of tobacco weighing between 4 and 5 lb. each. The package contained roll tobacco. He saw the tobacco being loaded. It was in good order and condition. Witness inquired from the checker how long the tobacco would take to arrive at Cape Town. He said six days. Witness then left Vereeniging and proceeded to Wellington. The tobacco had not arrived in the six days, so witness, who had sold the tobacco to a Mr. Liebrandt, placed the matter in the hands of his attorney. Mr. Liebrandt cancelled the sale, in consequence of the tobacco not arriving. The tobacco arrived the following morning, so witness went to inspect it. He was accompanied by a Mr. Malan. The tobacco was wet. It was not the cause of sweating. By the 16th the tobacco had been removed from the wet sacks and placed in dry ones. The roll tobacco was in a fish sack. If the tobacco had been opened out and dried the day it arrived, the damage might not have been so great, but the stationmaster covered it up with a tarpaulin. The tobacco in that state was only worth 3d. or 4d. per lb. He was prepared to keep the tobacco if the defendants paid him half the value.

In cross-examination, witness said he had sold the tobacco to Liebrandt for 2s. per lb. He paid Van Zyl from 9d. to 1s. per lb. for the tobacco he purchased from him. He paid in cash, but never bothered about a receipt for cash. He bought more from another Mr. Van Zyl, and paid from 1s. to 1s. 6d. per lb. and paid Van Aswegen from 1s. to 1s. 3d. per lb. Witness tried the tobacco, but it would not smoke. Hoffman, the checker, told witness that if there was not sufficient traffic to war-

rant a through truck, the delivery of the tobacco could not be guaranteed. If Hoffman said that the tobacco was damp when delivered at Vereeniging Station, it was incorrect. Witness did not intend to reject the tobacco if it was in good order. He was sorry to find that the tobacco was damaged, because he could easily have sold the tobacco. All the bags showed signs of wet, the whole bag in some cases being wet right through. Three bags and the wool bale were soaking wet. The bale was packed in the middle of the bags. At the first inspection he only looked at 10 or 12 bags. He would not say that the bags had not been used previously, but at any rate they were clean. It was not correct that the great bulk of the tobacco was in good condition. There were more than three bags opened, but not more than six. Wet tobacco would not sweat enough to stain the bags in which it was carried. He remembered one roll of tobacco being opened, and found to be damp inside, although it was dry on the outside.

Re-examined by Mr. Searle: If the tobacco was wet on the 1st of November, it would be possible a fortnight later for the tobacco to be dry on the outside, but still wet inside. He had never told the Government that he would be willing to take back the tobacco and pay the expenses.

Jacobus Malan, living at Wellington, said he remembered the plaintiff asking him to look at some tobacco in the goods shed at Wellington. The tobacco was in a bad condition, being wet. Eight or ten of the bags were partly wet. The condition of the tobacco could not have been caused by sweating. The water dripping from the bags was rain water.

Cross-examined by Mr. Burton: Four of the bags were especially wet. There were some bags which were wet at the edges, but not in the middle, or wet on one side only. The whole of the bale was wet.

A witness named Rhondio stated that if tobacco sweated it would not stain the sack. In his opinion, what he saw would not be occasioned by tobacco sweating. Tobacco would not sweat unless it was damped.

Cross-examined by Mr. Burton: If tobacco was damped for sweating purposes, and not properly dried, it would not stain the sacks. Two years ago witness received 12 bags of tobacco which had been wetted on the journey. He could not dispose of it. Witness did not examine the tobacco.

Pieter de Villiers stated he examined the tobacco about 16 days after it arrived. It was all in bags. Mr. Van Eyk cut a bag open, and witness examined the contents. There were stains on the bags. In witness's opinion, they were caused by the tobacco getting wet.

It was not caused by sweating, as if it sweated to that extent the whole bag would be stained. The contents of the bag opened were mildewed. Witness dealt in tobacco.

Cross-examined by Mr. Burton: Witness was a hawker by trade. He only examined one bag.

Jacobus Roubaix, a carrier, stated he had been employed by the railway company, but had left them. He saw the sacks in question about six weeks ago. They were stained. The stains were caused by water. Cut tobacco now fetched 2s. 6d. per lb., and roll tobacco 2s. Witness saw Smith, the checker, who told him that Van der Merwe would not take the tobacco because it was wet.

Cross-examined by Mr. Burton: Witness knew nothing about the growing or drying of tobacco.

Bertram de Kock, a carrier, of Wellington, stated he saw the tobacco in the goods shed. The stationmaster had the damaged tobacco on a "sail" on the floor. There were three kinds of tobacco. The men in the shed were engaged in sorting the tobacco.

Mr. Searle closed his case.

Richard Smith, a railway guard, stated he was guard of the "97 down" from Norval's Point to Naaupoort on the 27th October. The truck in which the tobacco was conveyed was well sheeted and properly fastened. No rain fell during the journey, because if there had he would have made an entry of it.

Cross-examined by Mr. Searle: Witness knew nothing of the contents of the truck. Witness was first spoken to about this truck during the present month. It was his duty to see the truck sheeted, and if that was not done it would be noted.

Frederick Coxon, a railway guard, stated he was in charge of the train which conveyed the truck from Naaupoort to De Aar. His journal showed that the trucks were all right, and the weather was fine.

Mr. Burton said evidence had been given on commission by the stationmasters at Norval's Point, Naaupoort, and De Aar as to the custody of the truck at the respective stations, and it would be put in in due course.

Mr. Clinch was guard of the train which conveyed the truck from De Aar to Beaufort West. According to his journal, nothing unusual occurred.

Arthur John Coleman, foreman at Beaufort, stated the truck was at Beaufort for twelve hours. It was not interfered with while there. There was no rain during that time.

Sedgwick Waterworth said he was guard of the train to which this truck was attached from Beaufort West to Touws River. The truck was properly sheeted and in good condition.

Cross-examined: He first heard that there was a complaint about eight weeks ago.

John Henry Lynch, foreman at Touws River Station, said that the truck was detained there. During the detention of the truck at Touws River no rain fell, according to his book. The cause of the delay there was want of engine power.

John Markhams Bloom, another foreman at Touws River, said there was no rain between the time of the arrival and departure of the truck.

Frank Farrington, guard of the train containing the truck between Touws River and Worcester, said no rain fell up to the arrival at Worcester.

J. Behr, a number-taker at Worcester Station, remembered the truck arriving at Worcester and leaving the same day for Wellington. There was no rain during the time the truck was at Worcester.

John McKay, stationmaster at Touws River, but stationmaster at Wellington last November, said that when the plaintiff complained to him about the non-arrival of the tobacco, witness replied that the Railway Department did not guarantee to convey goods to arrive at the station on a certain day. He saw the bags of tobacco when they had been unloaded in the goods shed, some of the bags and the bale having patches of moisture upon them. The bags were not dripping wet, and all but five appeared to be all right.

He examined the bags on the morning of their arrival. Five bags and a bale were partly damaged by patches of moisture. On the 2nd November the plaintiff said he would call next day for an examination in the goods shed or De Villiers' store, but he failed to do so. Witness reported to the Traffic Manager that six of the bags were damaged by wet. On the 2nd November the contents of the six bags that showed moisture were sifted out, and, in all, about 80 lb. were damaged. At the official examination on the 16th November, the plaintiff, and Van Eyk only examined a couple of bags, and assumed all the others were damaged. When he saw the bags on the first occasion, he could not say what caused the damp.

Cross-examined by Mr. Searle: The foreman had the bags arranged for examination when witness first saw them. He could not say whether "wet" implied damaged by water. Witness advised Van der Merwe to claim for the actual loss. With the exception of the five bags he had referred to, the bags were dry. He had handled the whole of the bags, but did not take any tobacco out, except from the five bags. He simply looked at the tops of the others.

Albert Smith, a checker at Wellington Station, said he remembered the

truck containing the tobacco arriving at Wellington Station. The truck was perfectly sheeted. The bags occupied about one quarter of the truck, and the flooring of the truck where the bags did not lie was dry. He, with others, started unloading, and after they had removed the top layer, they noticed a bale that was wet, and also three bags, whilst two other bags were also "clammy." He considered that the bags containing the tobacco had been used previously to this consignment. He handled the whole of the bags.

Cross-examined by Mr. Searle: He examined the sheet carefully, because of the damage to the tobacco.

Percy Miller said that he was a checker at Wellington in November last. He was present when the truck containing the tobacco was unloaded, and the sheet covering the tobacco was in good condition. The bags only occupied about a quarter of the flooring of the truck. When off-loading, they found that the bottom of five bags showed signs of dampness.

Cross-examined by Mr. Searle: He could not say the remainder of the bags were discoloured.

Peter Engledough, a checker on the railway at Wellington, said the truck containing the tobacco was properly sheeted. In unloading, he noticed that five bags showed signs of dampness, also a bale.

Cross-examined by Mr. Searle: He noticed a little damp on the bags at off-loading.

Arthur Colton, general merchant, of Wellington, who inspected the tobacco on the 16th November at the request of the stationmaster, said he pointed out to Van Dyk that the rolled tobacco was musty, as a result of being put up before it was properly dry. The cut tobacco had evidently sweated. He could put the same class of tobacco down at Wellington at 9½d. a lb. The bulk of the tobacco was merchantable. In all, about six bags were unmerchantable as smoking tobacco. Mr. Van Eyk, who seemed annoyed with the stationmaster, picked up a bad roll and walked away.

Cross-examined by Mr. Searle: For seven or eight years he had not imported tobacco from the Transvaal. It all depended on how the tobacco was packed in the first instance whether it sweated or not. It was his opinion that the damp stains came from the inside. He had a sample submitted to him within the last ten days, offering him any quantity at 9½d. a lb.

Fred. K. Becker, general dealer, of Wellington, who also examined the tobacco at the request of the stationmaster, stated that he found mouldy tobacco in four or five bags. Out of the lot he considered sound, he picked out ten or twelve bags, and found the contents negotiable.

Cross-examined by Mr. Searle: The first time he saw the consignment was the 22nd. The appearance and smell of the tobacco would tell him whether it was good or not. He only smoked from one bag. He had the tobacco in view if it was thrown on the market.

Edward Frost, clerk in charge of the Wellington Goods Station, who was on duty when the plaintiff came to ask about the cost of delivery, stated that the plaintiff offered to take delivery, as he was sick of the whole business.

Cross-examined by Mr. Searle: If the plaintiff had offered to pay the delivery charges, witness would not have taken it.

Thomas Alfred Mundy, chief claims clerk of the Western system, said that the expression, "damaged partially by water," came from the twisting of a telegram from stationmasters.

Mr. Burton closed his case.

Mr. Close read the evidence taken on commission of Stephenus van Zyl, who sold the tobacco to the plaintiff, which set out that the tobacco was packed in good condition, and did not get wet on its way to the station. Other witnesses from the C.S.A.R. testified to the despatch of the tobacco to Wellington in dry weather.

Mr. Nightingale read the evidence, taken on commission, of Ben Collins, a checker, of Kroonstad, which set out that the tobacco, which was transhipped there, was despatched in good order. No rain had fallen that night. The checker at Wellington testified to the proper sheeting of the packages. It looked like rain at Bloemfontein, but the tobacco was properly covered. The guard who conducted the train to Norval's Pont produced his journal, which showed rain. He would not swear that the rain could not get through the sheets. Other evidence set out that the truck was not interfered with in its passage down the line.

Counsel having been heard in argument on the facts,

Maasdorp, J., said that the plaintiff's case was that he delivered a quantity of tobacco in a number of bags to the defendants at Vereeniging to be conveyed from Vereeniging to Wellington, and he said that the tobacco when so delivered was in good order and condition. He complained that when the tobacco arrived at Wellington it was found to be wet, and that its condition was such that it was unmerchantable, and that he sustained loss. He now sought to recover the damage so suffered by him from the defendant. The defendant admitted that if the goods were received in good order and condition it would have been his duty to deliver them in the same condition. The defendant also admitted that when the tobacco arrived at Wellington it was wet, but he said that the condition in which

it was was caused by a process called sweating. The Court had now to decide whether the condition in which the tobacco was produced by sweating or whether it was the result of wetting the tobacco got from rain. His Lordship reviewed the evidence, and said there was evidence of the external application of moisture, and the only conclusion the Court could come to was that that external moisture must have come from the rain. Upon the whole of the evidence he came to the conclusion that the bags got wet after they got into the possession of the defendant, that the wetting was the result of rain, and that the rain could not have got on to the bags without the default of the defendant. The defendant would therefore be liable in damages for any loss the plaintiff might have suffered from the injury to the tobacco. On the point of the damages, there was a good deal of evidence, and he might say at once that he found the witnesses for the defence had given their evidence truthfully and candidly, and upon their evidence he ascertained the amount of the damage that was done. If it had been left merely to the plaintiff's evidence, he was very doubtful whether he could upon that evidence have come to the conclusion that so much damage was done, because the plaintiff took no care to make a fair examination of the goods. The only fair examination was made by the defendant's witnesses, and they had satisfied the Court that eight bags were damaged. The value of the tobacco in these amounted to £39, but there was not total loss, and he thought it would be a fair allowance if damages were awarded to the extent of two-thirds of the value of the tobacco. Judgment would therefore be for the plaintiff for the sum of £26, with costs.

[Plaintiff's Attorneys: Faure, Van Eyk and Moore. Defendant's: Reid and Nephew.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

Ex parte PHILIPS. { 1905.
June 16th.

Mr. Gardiner moved, as a matter of urgency, for leave to sue by edictal citation and for the attachment of certain property at Paarl, *ad fundandam jurisdictionem*. Petitioner was a wagon-builder at the Paarl, and one Van Sittert, who was now in Damaraland, was indebted to him in the sum of £140. Van Sittert was the owner of certain landed property at the Paarl, which petitioner asked leave to attach.

timber, and they agreed—it is a perfectly clear agreement—to supply him with wood to the value of £48 sterling, upon certain condition which are set out in writing, and which are admitted to have been an agreement between the defendants and Bouklas. The agreement was that the timber should be supplied on condition that Bouklas built a boat with it, and that he should finish the boat within eight weeks from the date, and there is a further important condition that he should not have the right to sell, or in any way dispose of, the said boat, which shall be and remain the property of the said W. and G. Scott, until the said Bouklas shall have paid them in full for all materials supplied by them to him. Now this agreement, if it mean anything at all, means this, that they agreed to supply him with timber, and only on condition that the article built with that timber becomes their property. It does not seem to me to be a matter in which they suspend, by any condition, the passing of the property to a purchaser, but it does seem to me that they make a contract by which that timber remains their own, and the article which it builds becomes their own until the purchase price of the timber is paid. I do not think that matter is affected by the subsequent clause in the agreement, in which they agree that the boat may be sold through W. and G. Scott, instead of by them, and that the purchase price must be paid at their Cape Town office, they, on their part, agreeing to pay to the said Bouklas as profit on the said boat any balance after deducting the cost of the timber. That article means that Bouklas shall not have the power of disposing of the boat, but still he may find a purchaser and sell it through them, but the important reservation is made that the purchase price has to be paid to them at their office. The boat was finished about the end of October, or beginning of November, and it lay upon the beach at Rogge Bay for sale, and ostensibly must have looked to the world as if it were Bouklas's boat. Afterwards, Bouklas did a dishonest thing. He did find a purchaser, he found the unfortunate plaintiff in this case, who thought he was dealing with an honest man, and who seems to have parted with his good money to the extent of £85 to Bouklas, who was then, apparently, on the point of absconding, which he subsequently did as soon as he got the money. Skarabino thereupon took possession of the boat, but the defendants at once stepped in, and asserted their rights. In face of such a clear agreement as this between the defendants and Bouklas, it seems to me a pity that plaintiff did not come to some sort of compromise with W. and G. Scott, who, I dare say, under the circumstances, would not have been hard upon

him if they thought that he had bought *bona fide* from Bouklas. They might have been content as long as their claim for the price of materials had been satisfied. The plaintiff produced a legal document, showing the sale from Bouklas to him and the consideration that was paid. Unfortunately, *bona fide* purchasers sometimes have to suffer by reason of the dishonesty of the person from whom they purchase. Numerous instances of that sort might be cited, for example, of stolen horses being sold to unsuspecting purchasers. Although Skarabino has acted *bona fide*, he has had the misfortune to buy what I must hold to be another person's property from a dishonest vendor, who held himself out to be the owner. I regret very much that Skarabino must suffer this loss. I regret still more that he has added to that loss by what must be very expensive legal proceedings. Had the matter to be decided been whether there was or was not a suspensive condition by Scotts as to this timber, I think I should have taken time to consider, because it does seem to me that Dr. Greer's argument is one that deserves careful attention, and I should have liked to look out authorities as to whether a person, selling raw material to be worked into some other article, like a boat or a suit of clothes, can hold a suspensive condition over the finished article by reason of having been owner of the raw material. The principle would be an important one, and I do not for a moment wish to be taken by this decision to decide that particular question. I look upon this question, not as one of a sale by Scotts under a suspensive condition, but a sale on a condition which is perfectly clear that the article when made should be their actual property. Under these circumstances, much as I sympathise with the plaintiff in this case, I feel that there must be judgment for the defendants, and I suppose that costs must follow the result.

Dr. Greer having addressed the Court on the question of costs,

Hopley, J., said that the case, he thought, should not have come into court, and he saw no reason for departing from the ordinary rule, that costs must follow the result. Judgment would be entered for the defendants, with costs, including costs of applications on motion.

[Plaintiff's Attorney: S. Jones. Defendant's: Reid and Nephew.]

SUPREME COURT

[Before the Acting Chief Justice (the Hon. Sir JOHN BUCHANAN), the Hon. Mr. Justice MAAS ORP, and the Hon. Mr. Justice HOPLEY.]

VILANDER CONCESSIONS SYN-
DICATE V. COLONIAL GOV-
ERNMENT. 1905.
June 19th.

[For Head Note to this case and re-
port of the Special Case, see 15. C.T.R.
207.]

This was an appeal to a full Court from a judgment given on March 7th, 1906, by De Villiers, C.J., sitting as a Divisional Court.

The judgment then given was practically absolution from the instance. The concessions in dispute were two in number, and were given by the Chief Vilander to one A. H. Carstensen. These were set out in the special case stated 15 C.T.R. 207.

Mr. Searle, K.C. (with him Mr. McGregor), for appellants. Sir H. Juta, K.C. (with him Mr. Nightingale), for the respondent Government.

Hopley, J., asked when Vilander died. Sir H. Juta said that Vilander was shot during the late war.

Mr. Searle: We want to know what our rights are. The plaintiffs contend (1) that these concessions are still of full force and effect and binding on the Colonial Government; (2) that the plaintiffs are entitled to have their rights decided by the Court; (3) to obtain an order declaring the Government bound to recognise these concessions. (4) To obtain an order directing the Government as to the granting of any further concessions, and the conditions under which such concessions (if any) are to be granted. The Government deny all our contentions, and say that they can make grants, including that of minerals, without regard to the concessions. A further contention of the Government is that the rights of the concessionaires have lapsed by non-payment of fees after May 5th, 1891. But the Concession Court, with all the facts before it, confirmed the concessions, and its judgment is binding in law. We paid Vilander, and then his executors.

[Buchanan, A.C.J.: But the Concession Court could control payments only previous to the date of their decision.]

We paid Vilander up to the date of his death, and then we paid his executors. The date of his death is quite immaterial, as payment to his executors was as good as payment to himself. We hold that both payments were good. Even if they were not, Government might have a right to demand payment of dues and even of arrears,

but they have no right to claim forfeiture.

[Buchanan, A.C.J.: They do not claim forfeiture; they only say that you are not entitled to your declaration of rights till you pay.]

Either the concessions have lapsed by reason of non-payment or not. They contend that our concessions are valueless as Government is entitled to all precious stones and minerals. Their real contention is, that by reason of the judgment of the Concession Court the concessions are practically of no value whatever.

[Maasdorp, J.: If you were to tender now, would they not recognise your right?]

No, doubt. Possibly we may have paid to the wrong parties, but on tender we have a right to our lease. *Estate Thomas v. Kerr and Another* (13. C.T.R. 526).

[Hopley, J.: There the whole case turned upon the mining laws of Bechuanaland.]

We say that the judgment of the Concession Court only gives us rights subject to any mining laws (as to the way of working mines, etc.) which do not conflict with our rights.

[Buchanan, A.C.J.: And those laws include the payment of rates.]

I cannot admit that; we paid these when we paid our £500. We are not bound to pay for a monthly licence; for if we are in the same position as other prospectors, our concessions are valueless.

[Maasdorp, J.: Do you claim exclusive rights?]

That is not our point, but we say that we are not bound in the same way as ordinary prospectors.

[Maasdorp, J.: After you have chosen your area can you go beyond it?]

No, but we had a right, first to 400 square miles, and subsequently to the whole territory.

[Maasdorp, J.: That supposes that you find there.]

The concession says "All minerals, etc. . . . wheresoever found."

[Maasdorp, J.: Suppose that the same concession was given to a number of other people; would they not be in the same position as yourselves?]

Yes, but still our concessions would be of considerable value. See Proclamation (British Bechuanaland) 169, sec. 3-19 and 21. Section 2 is not against me. The Concession Court could not admit rights beyond reasonable limits, but they could give exclusive rights within reasonable limits. The whole object of the establishment of this Court was to protect concessions which were not admitted by the ordinary law.

[Maasdorp, J.: Could the Court have confirmed a concession which was beyond reasonable limits?]

It could limit such concessions. See Section 23 of the Proclamation.

[Buchanan, A.C.J.: And they limited your concession by making it subject to all laws of British Bechuanaland.]

Then what is the use of the concession?

[Maasdorp, J.: Are you satisfied with the judgment of the Concession Court?]

Yes, but we want a declaration that the judgment is binding on the Government. The Government deny that we are entitled to this.

[Maasdorp, J.: They admit it is binding, but subject to the laws of British Bechuanaland.]

The question is whether this means all laws, or only those which do not conflict with our concessions. That is the whole point. See Section 22 of the proclamation. If Section 21 stood alone it might have seemed that the Concession Court could not give us exclusive rights, but Section 22 shows that this is not so.

[Hopley, J.: What rights do you say you have; not exclusive rights?]

We have a right to prospect and win minerals, etc., to import machinery, and we can prospect without a monthly licence. The general rights of ordinary prospectors are ruled by Act 31 of 1896; but in order to rightly interpret the judgment of the Concession Court we must look to the law then in force in British Bechuanaland, viz., Proclamation (B.B.) 63 of 1889.

[Buchanan, A.C.J.: It may be that the concessions are valueless.]

[Maasdorp, J.: It may have been the object of the Concession Court to make them valueless. That is often done where concessions granted by native chiefs are unreasonable.]

Then the Court could have refused to ratify them at all.

Sir H. Juta was not called upon.

Buchanan, A.C.J.: This action was brought in the Divisional Court in the form of a special case, which set out the facts agreed upon by the parties and their several contentions. The Divisional Judge held that the facts set forth did not entitle the plaintiffs to the declaration of rights claimed in the premises and gave judgment of absolution from the instance, leaving it open to the parties to take fresh proceedings and to supply fuller information upon essential matters not disclosed in the special case. This judgment has been appealed against. The action was founded on certain two concessions granted by the native chief Vilander as far back as 1889 and 1890. At that time Vilander's country was not under British control. Under the concessions a payment of £500 a year was stipulated for to be paid by the concessionaires to the chief. In 1891 Vilander's country was annexed to British Bechuanaland, and in 1895 British Bechuanaland was annexed to this Colony. The Government of this Colony is now sued, I take it, as the successors of the chief. When

the annexation of Vilander's territory to British Bechuanaland took place, and British Bechuanaland was in the position of a Crown Colony, a proclamation was issued by the then executive Government establishing a Concessions Court, by which all concessions given by the native chief before the annexation were to be considered and adjudicated upon. Large powers were entrusted to this Court, and the concessions in question were brought before that tribunal.

This Concession Court gave judgment allowing plaintiffs' claim as having been proved, "subject to all laws and regulations of British Bechuanaland relating to mines and minerals and otherwise, in force in the said territory." In the special case the plaintiff asked the Court to declare that this judgment was binding on the Government, and that the plaintiffs were entitled to have their rights in, arising out of, and under the concessions declared. The only specific declaration of rights asked for, however, was an order declaring that as to all grants of land already issued by the Government in the said territory, the Government was bound to recognise that the reservation in the said grants of mining rights and of precious stones was made for and on behalf of the plaintiffs; and further, to direct that the Government should insert in any future grants of land, a condition subjecting such grants to the rights of the plaintiffs. His Lordship, the Chief Justice, who presided in the Divisional Court, has in his reasons conclusively shown that it is impossible, with the information supplied in the special case, to make the declaration asked for in the premises. The learned Judge clearly stated his opinion that the judgment of the Concession Court, never having been appealed against, became binding under the proclamation, upon the concessionaires as well as upon the Government. For myself I fully concur in this view. But when we look at the case stated we find that it is alleged that the £500 per annum reserved under the concessions was, notwithstanding the annexation of his territory, paid to the chief up to the time of his death, and after his death it was paid to his executors. It had never been paid to, or tendered to the Government. In the Divisional Court a preliminary objection was taken that this non-payment had worked a forfeiture, but His Lordship pointed out that this question had not been clearly raised in the case stated. But it is a matter which will have to be considered before any declaration of rights can be made. Then again it would appear that the judgment of the Concession Court, in effect, took the place of the concessions, and limited the rights of the parties in the future.

This judgment, while granting the claim under the concessions, made it subject to all the laws and regulations of British Bechuanaland relating to mines and minerals and otherwise in force in the said territory. No objection was taken to this declaration of the Concession Court. But the plaintiffs wish to go further. They say, assuming the judgment still stands, His Lordship ought to have declared that the meaning of the judgment was that only such laws as were not inconsistent with the concessions, such as those relating to the good government of the territory and the like, were binding on the plaintiffs. The particulars in which these laws are asked to be declared as not binding on the plaintiffs, however, are limited to a reference to the mineral rights in grants of land made, or to be made by the Government. His Lordship, without referring in detail to the several proclamations which embody the laws and regulations of the territory, says that they are wholly inconsistent with the declaration the Court was asked to make. His Lordship remarks further that there can be no possibility of a doubt that the Concession Court intended by its judgment to subject the rights of the guarantees under the concession to all laws and regulations relating to mines and minerals then in existence and which had been enacted by the competent legislature of the territory. As abatement from the instance was given, these remarks may have the force only of *obiter dicta*, but it seems to me that the reasons of His Lordship have not been shaken in argument. I think for the reasons stated by His Lordship that this appeal must be dismissed, with costs.

Maasdorp and Hopley, J.J., concurred.

[Appellants' Attorneys: Syfret, God-linton and Low; Respondents' Attorneys: Reid and Nephew.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

Savage and Sons v. Keun. { 1905.
June 20th.

This was an action brought by Wm. Savage and Sons, merchants, Port Elizabeth, against Izak Johannes Keun, storekeeper, Coleberg, to recover a sum of £270 10s. 8d., for goods sold and delivered, and disbursements made on behalf of the defendant.

Plaintiff's declaration set out that £270 10s. 8d. was due from defendant for goods sold and delivered, and dis-

bursements made on his behalf during November and December. Detailed accounts had been sent to defendant, but he had failed and neglected to pay the amount due. Plaintiffs prayed for judgment for £270 10s. 8d., with costs of suit.

Defendant, in his plea, admitted having received certain goods from plaintiffs, but he did not admit the amount alleged. He said it was arranged that he was to pay the net amount either at the expiration of six months from date of purchase or to pay the amount at the expiration of four months, less 5 per cent. commission. He said that the payments were not due, and that plaintiffs were not now entitled to sue him for any part of the purchase price.

Mr. P. Jones was for plaintiffs; defendant did not appear, his attorneys having withdrawn from the case.

John H. Barrett, a traveller in plaintiff's employ, said that, in response to a letter from the defendant, he called at his store in October last, defendant having just opened a store. Witness called on the 24th October, and received a large order, covering nearly the whole of the account now sued upon. Witness denied that there was any arrangement to give defendant six months' credit, or four months' credit, less 5 per cent. Defendant gave a cheque for £20, when the order was taken, and he afterwards made a small payment on arrival of the goods, and he was to pass promissory notes for the balance. It was also arranged that for any future business defendant should pass a second mortgage on his property. Defendant had refused to carry out his promises. He paid £10 in November, and he was also credited with £19 7s. 5d. for produce, which he sent down for sale on his behalf. Plaintiffs agreed to allow defendant £2 8s. for damaged boot polish, leaving a balance owing of £268 2s. 8d.

Judgment was given for plaintiffs for £268 2s. 8d., with costs.

MALCOMES AND CO. AND
INSOLVENT ESTATE H. B. { 1905.
CARY v. THOMAS B. CARY. { June 20th.
INSOLVENT ESTATE H. B. { " 21st.
CARY v. THOMAS B. CARY.

These actions were consolidated for the purpose of the hearing. The plaintiffs in the first case were Malcomes and Co., merchants, East London, and Peter August Reimers, in his capacity as sole trustee in the insolvent estate of H. B. Cary, of Tarkastad, while in the second case the trustee sued alone. Defendant was Thomas Bovey Cary, merchant, Tarkastad, brother of one of the partners in the insolvent firm of H. B. Cary.

The declaration in the first case set out that the first plaintiff carried on business at East London and elsewhere under the style of Malcomes and Company,

and the second plaintiff joined in the action in order to complete the record and assist the plaintiff, as far as need be, but he did not advance any claim on behalf of creditors in such insolvent estate, other than that of the said Malcomess and Co. in the proceeds of two promissory notes, in respect of which the defendant was sued in this matter. The two promissory notes in question were made by the defendant in February, 1903, for amounts of £265 and £149 2s. respectively, in favour of the firm of H. B. Cary, or their order, at the Standard Bank, Tarkastad. The said notes were due and payable on the 9th May, 1903, but before their maturity, they were endorsed by the firm of Cary to the Standard Bank, who took the said notes with others to hold for and on account of Malcomess and Co., the said firm of Cary having ceded, assigned, and pledged the said notes to Malcomess and Co. by way of security in respect of the liability of the latter under a guarantee to the extent of £8,000, given by Malcomess and Co. to the said bank for the amount of any overdraft of the firm of Cary. The amount of the overdraft of the firm of Cary at the said bank was £2,447, and Malcomess and Co. had been called upon to meet the said notes, which had been dishonoured. Plaintiffs were now the legal holders of the notes; defendant had not paid the said notes, or any part thereof. Plaintiffs prayed for judgment for £414 2s., with interest from May, 1903, and costs.

Defendant, in his plea, said that in May, 1903, before the maturity of the said notes, the firm of H. B. Cary was indebted to him in a sum exceeding the amount of the said notes. The said debts were mutual debts, and on the defendant pressing the said firm for payment, an account was stated in which the firm of H. B. Cary was found to be indebted in the sum of £136, exclusive of the sum of £433 10s., claimed by defendant, which was left over for future adjustment. Malcomess had full knowledge of, and consented to this. The debts were capable of compensation within the meaning of the Insolvent Ordinance. He paid and discharged the notes before maturity, and said that neither of the plaintiffs was entitled to sue him upon the said notes.

Plaintiffs, in their replication, said that, as to the alleged settlement, they were not a party to and did not assent to the proposals. The said proposals were definitely rejected by the defendant. No statement or settlement of account was ever agreed to between the aforesaid parties or firms.

The declaration in the second case set out a long series of transactions between the firm of H. B. Cary and the defendant, both in the way of goods and merchandise supplied and promissory notes given by the defendant to the firm. Plaintiff allowed certain deductions

amounting to £213 12s. 9d., and prayed for judgment for £1,169 5s.

Defendant, in his plea, said that the debts were mutual debts, and capable of compensation, and that the plaintiff was not entitled to claim any amount from him. He said that a settlement was arrived at by which it was acknowledged that the said firm of H. B. Cary was indebted to him in the sum of £136. At the date of the insolvency H. B. Cary was also indebted to him in the following sums: £200, due upon a good-for; £183, due upon an I.O.U.; and £50, amount of overcharge for certain hamels or sheep.

Mr. McGregor (with him Mr. Burton) for plaintiffs. Sir H. Juta, K.C. (with him Mr. Gardiner) for defendant.

Mr. McGregor submitted that the onus was upon defendant to prove that these sums were not due, seeing that defendant practically admitted the debts alleged to have been contracted by him with H. B. Cary.

Hopley, J., said that he had been considering whether this was not a case which should go before an accountant.

Sir H. Juta said he thought that, in the first instance, they should come to some arrangement as to what they were going to do. The defence was, first of all, that a settlement was come to, and it would be well if the Court decided whether such a settlement was made. Then came the defence that these were mutual debts which were capable of compensation. The settlement which he proposed to prove was that in May, 1904, a clerk in the employ of Malcomess came to Tarkastad, and the correspondence would throw most lurid light upon some of the affidavits made by Malcomess and Co. and their officials as to their knowledge of the settlement. This clerk, Conrad, was sent up to look into the firm of Cary's business, and the troublesome account was that of T. B. Cary. Conrad and the bookkeepers went into the matter, and eventually Conrad came to what he considered to be a proper settlement, which formed the basis of what was known as the Conrad agreement. According to that agreement, the firm of Cary owed £136 to T. B. Cary, exclusive of £433, left over for future adjustment. Upon the definite instructions of Malcomess and Co., to the effect that there was nothing else left for them but to pay, they tendered, through the firm of Le Roux and Garlick, this amount of £136 on the ground that there had been a definite agreement, and that he (Tom Cary) was bound by it. It would take days to go into these accounts. It seemed to him (counsel) that it would be best, in the first instance to try the question as to whether a settlement had been come to, and, if there had been no settlement, then to send the accounts to a referee.

Mr. McGregor said that his clients did not think that would do. There were

certain matters on which they would prefer to have the judgment of his lordship concerning a counter-claim by defendant for large items of skins and meat, and also the sum of £435. Were these amounts due from H. B. Cary to T. B. Cary? The items of the skins and meat were not entered in any book of the defendant or of H. B. Cary.

Hopley, J., after hearing counsel further, said that the matter would be sent to a referee. There had been a most complicated series of transactions, and it seemed to him that the best person to elucidate and come to a common-sense conclusion about the matter would be some good qualified accountant.

Sir H. Juta suggested that the Court should try the question of whether a settlement of accounts between H. B. Cary and T. B. Cary had been come to before committing the matter.

Mr. McGregor assented, and

Evidence was called by Sir H. Juta.

Halbers Glendinning Hannaford, a partner in the insolvent firm since 1900, said that in 1904 their largest creditors were Malcomess and Co., who were their supporting firm. In 1903 Malcomess sent up to Tarkastad one Mr. Williams as manager, saying that he should be treated virtually as a partner. On the 12th May, 1904, a letter was received from Malcomess and Co. saying that they were sending up Mr. Conrad to make a thorough inquiry into the position of the business of H. B. Cary. In April a balance-sheet had been drawn up, showing a revenue loss account of £10,000, in which was included a sum of £800 due to T. B. Cary. Mr. Conrad was a competent accountant, and he went into the accounts very thoroughly. A general account was drawn up of credits and debits showing a balance due by T. B. Cary of £572 *fs.* 11d. Then there was a statement showing the amounts due by H. B. Cary to T. B. Cary, viz., £200 good for, £183 good for, and £50 for hamels. The final statement drawn up by Mr. Conrad showed a balance due to T. B. Cary of £136.

Sir H. Juta put in letters from Malcomess and Co. authorising a settlement of the T. B. Cary claim on the basis of Mr. Conrad's suggestion.

Witness was cross-examined at considerable length by Mr. McGregor. He denied that he was trying to help Tom Cary against the interests of the insolvent estate. Witness's private estate was insolvent. His wife had three house properties in Tarkastad, but they all belonged to her before her marriage. He had been threatened with all sorts of lawsuits by Malcomess, and in consequence his wife and Mr. Cary of Bulawayo had given them a bond for his protection.

Joshua James le Roux, attorney, Tarkastad, of the firm of Le Roux and Garlick, said that he acted for the firm of

H. B. Cary last year. He remembered Mr. Conrad coming up in May from East London as a representative of Malcomess and Co. to go into the accounts between T. B. and H. B. Cary. He recollected a meeting in the book-keeper's office in H. B. Cary's store, when Conrad, T. B. Cary, and others were present. They were discussing a final statement of accounts; attempts were being made to induce T. B. Cary to agree to the same. Witness advised Tom Cary to accept the settlement, and then the latter said that he would accept provided Malcomess and Co. would sign. He also said that he thought the firm of H. B. Cary owed him more money than was shown in the statement. On the 14th June witness's firm, on the instructions of Mr. Williams, acting on behalf of H. B. Cary, sent a letter to the defendant, tendering the money shown to be due to him. There was not the slightest doubt that the arrangement was finally come to. He had never heard either Williams or Hannaford repudiate the agreement.

Cross-examined by Mr. Burton: He was acting as attorney of H. B. Cary at that time; he had been acting as attorney of T. B. Cary, since Malcomess and Co. had taken the papers from him and handed them to Mr. Burton.

Mr. Burton: You don't think it unsatisfactory that you should act on the opposite side after having been in the Conference of the other side?

Witness: Not after I have been absolutely released, as I have been, by Reimers.

Further cross-examined: H. B. Cary confided to witness nothing about his insolvency. T. B. Cary was in his (witness's) debt to the extent of about £800. At the interview in May, T. B. Cary took up the position that he was not satisfied with receiving only £136, from the firm of H. B. Cary. He (defendant) seemed to be of opinion that the promissory notes which had been left over for further debate would be paid, seeing that Malcomess and Co. appeared to be anxious to make a settlement of H. B. Cary's affairs.

Thomas Bovey Cary (defendant) said that he remembered the accounts between himself and H. B. Cary being gone into before Mr. Conrad towards the end of May, 1904. He remembered the meeting at Williams's office, at which Mr. Le Roux and others were present: they were discussing the Conrad agreement. Conrad wanted witness to sign it; witness demurred, because he considered that H. B. Cary owed him more than £136. After Mr. Le Roux had arrived, there was further discussion, and witness eventually said that he would accept the agreement if Malcomess sanctioned it. Subsequently, he was informed that Malcomess had signed the agreement, and he received a letter from Messrs. Le Roux and Garlick

tendering him the money. Mr. Stanley replied on his behalf, repudiating the agreement; his reason for doing that was because he knew that Malcomess and Co. were anxious to settle the whole matter, and he wanted them to pay the good-fors which H. B. Cary had given him. He knew at the same time that he was bound by his agreement. Upon H. B. Cary becoming insolvent, he drew up a proof of debt for £169, but he did not prove against the estate, because he did not think there would be anything in the £ for concurrent creditors. He thought that the bond would sweep all the assets.

Mr. Burton: Do you know how much the bond is going to get?

Witness: No.

Mr. Burton: The bond is going to lose £25,000?

Witness: I have no idea.

In further cross-examination, witness said that he could not remember a cheque (produced), dated August, 1902, for £179 8s. 3d., payable to him from H. B. Cary. The cheque might have referred to skins for which he charged in his counter-claim; he had forgotten the payment altogether. There was another cheque in a similar position. The amount represented by the cheques was £287.

Mr. Burton: So that that would wipe out your claim, and leave you indebted to the estate of H. B. Cary?

Witness: I can't say. In further cross-examination, witness denied that he had put in any but *bona fide* claims against H. B. Cary. He admitted having been convicted in 1902 at the Circuit Court, Queen's Town, of receiving stolen property in connection with the Army stores. He was fined £75, and paid the fine himself. There were writs now out against him for about £180.

Re-examined by Sir H. Juta: Since the case was commenced, he had found certain cheques, which he had given, and for which he had not been credited by H. B. Cary.

Sir H. Juta closed his case.

Peter August Reimers, trustee in the insolvent estate, said that until January of this year he was a member of the firm of Malcomess and Co. Malcomess and Co. were never asked to sign a formal agreement concerning what had been described as the Conraed agreement. The agreement purported to be between H. B. Cary and T. B. Cary and Malcomess and Co. were not a party to it. All that they had directly to do with the matter was in regard to a certain erf of which they had the deeds as the holders of the bond given to them by H. B. Cary. Malcomess and Co. were the supporting firm of H. B. Cary; they had not control of the business, otherwise they would not have lost £20,000 or £25,000 by it. Malcomess and Co. were to receive cash for

the erf. He had done all he could to bring about a settlement in this matter.

Cross-examined by Sir H. Juta: Conraed was a clerk in the employ of Malcomess and Co. Conraed placed that settlement before him, and he agreed to it so far as he had anything to do with it. They were indirectly interested in the settlement, because Conraed was in their employ, and because they were large creditors. He objected to the settlement at first. It was quite possible that he thought at the time that Malcomess and Co. were affected by it. He admitted having sent a telegram on June 14 to Williams at Tarkastad, asking him to close with the Conraed agreement, but if safe to wait for his (Receiver's) letter. By "if safe" he meant that if there was any danger of losing a settlement to close up at once. He had been anxious not to offend Williams, fearing that he might throw up the whole business.

Robert Hartshorn Williams, manager of Malcomess and Co.'s branch at Tarkastad, and formerly in H. B. Cary's employ as manager under Hannaford, said that one of the first things he went into after entering H. B. Cary's service was the account with T. B. Cary. He found amounts due to H. B. Cary, and spoke to T. B. Cary, who said that he had a contra account, and subsequently sent in a statement. Witness went on to speak of the investigation made by Mr. Conraed.

Cross-examined by Sir H. Juta: He was of opinion that, strictly speaking, the only direct interest Malcomess had in the settlement between the Carys was in regard to the transfer of the erf. He referred the matter to Malcomess and Co., because he wanted to avoid unpleasantness between H. B. Cary and Malcomess. He admitted that at that time Malcomess could have forced H. B. Cary into insolvency in a week. There had been no completed agreement on the basis of the Conraed document. He admitted having written a letter on June 21 to Malcomess saying that T. B. Cary had entered into an agreement on the basis of the Conraed document.

Benjamin William Jandrell, of Tarkastad, formerly a bookkeeper in defendant's employ, said that he made up a contra account against H. B. Cary. When he came to the items of £178 and £108, defendant said that both those items had been paid, but he should include them in the account all the same. There was also an item of £183 10s., relating to a good-for; defendant told him that this had been settled.

Hopley, J., asked witness whether he did not think it was fraudulent to include in an account items which had already been settled for?

Witness said that he regarded the statement as simply preliminary. Proceeding, witness said that when he was

going through the books, defendant told him to get all he could from H. B. Cary, and give nothing away. He told defendant that the items would be found out. Defendant, when in drink, insulted witness, and he left his service. He had not been paid his wages. Defendant, after the meeting, told witness that he would not agree to the settlement.

Cross-examined by Sir H. Juta: He had not said that the skins account was fraudulent.

Hopley, J., warned the witness that he was not compelled to answer questions relating to fraudulent accounts if he were afraid of being sent to the Breakwater.

Witness said that he did not think there was any need to have such a fear.

Sir H. Juta: I would not be too sure, Mr. Jandrell.

Hopley, J., remarked that witness had acknowledged that he had been concerned in the perpetration of frauds.

Sir H. Juta (to witness): Do you want us to believe that in this statement there had been fraudulent entries made by yourself of £775, and that defendant was quite willing to risk £775 for the sake of £383?

Witness: I did not have any interest in the matter. I merely wrote what I was told to write.

Hopley, J., pointed out that the fraudulent items admitted by witness amounted to £702 Os. 6d., and that he said these notes were treated as accommodation notes.

In further reply to Sir H. Juta, witness said that he did not know why, in his affidavit, he made no reference to the items of £179 and £109, which had already been paid, to defendant's knowledge.

[Hopley, J.; Could you lose sight of a thing which was so flagrant and so gross.]

Witness: I don't know.

John Henry Hughes, manager of the Tarkastad branch of the Standard Bank, said that the notes of £265 and £149 were deposited in the bank against H. B. Cary's overdraft, and were not released at any time.

Mr. McGregor closed his case.

Counsel having been heard in argument on the facts,

Hopley, J., said he found that T. B. Cary did agree at first to the Conrad settlement, and that a final and binding contract was entered into between the parties. Cary subsequently repudiated it, and the money was tendered to him. Then, on the 8th October, the contract was rescinded by a letter from plaintiffs, agreeing to a cancellation. He, therefore, found that there was no legal contract in existence, and the parties must go into the whole matter before a referee, unbound by any such contract.

The matter would be referred to Mr. Maynard Nash.

MALCOMESS V. FRANK.

Mr. Alexander moved, as a matter of urgency, for a commission to take the evidence of the plaintiff, Hermann Wilhelm Malcomess, of East London, in view of his projected departure from Cape Town by to-morrow's mail steamer to Europe. Plaintiff was suing Arnold Frank, veterinary surgeon, Cape Town, who was stated to be residing at the Royal Hotel, for £30 10s., expenses in and about sending back to Cape Town from East London a certain mare sold to him by Frank under certain representations which had wholly failed.

Order granted as prayed, Mr. Advocate Giddy, K.C., to be commissioner, failing him, Mr. Advocate M. Bisset, question of costs to stand over.

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

TROLLIP V. STEVENSON. { 1905.
June 21st.

This was an action to recover an amount of taxed costs with interest in a case brought by the defendant against Stableford and Co.

The declaration set out that the plaintiff was an attorney of Cape Town. Between September, 1903, and March, 1904, the plaintiff rendered professional services to the defendant, and disbursed monies on behalf of the defendant in the action instituted against Stableford and Co. Judgment was given for the (then) plaintiff for £500, and costs, and plaintiff now claimed £58 13s. 1d., £6 6s. for professional services, and £7 15s. 9d. interest.

The defendant in reconvention claimed £624 2s. 9d., by reason of the plaintiff's negligence in not prosecuting a writ.

Mr. P. S. T. Jones was for the plaintiff, and Dr. Greer for the defendant.

Herbert Payne, attorney, in the service of the plaintiff, stated when Stevenson brought the action he was acting for the defendant, representing Mr. Trollip. Witness took steps in February to have the judgment satisfied by Stableford and Co., and wrote a letter at the defendant's

instructions. There were no definite instructions given to him to issue a writ of execution. Witness advised the defendant that to issue a writ would be a waste of money.

Cross-examined by Dr. Greer: The plaintiff suggested to witness to issue a writ of execution, but he did not give any definite instructions. There was an offer of compromise by the liquidators before the trial. He wrote to the defendant that it was "impracticable" to issue a writ of execution, and witness meant that there was nothing to gain by it. The defendant, witness believed, understood the position very clearly that "impracticable" meant there "inadvisable." In February, 1904, it was stated by the liquidators that the company could pay 15s. in the £. It took the liquidators a considerable time to get at the true state of the company. At present there was no prospect of anything being paid to concurrent creditors. Witness did not consider that the estate had been "frittered" away.

Mr. G. E. Orpen was called, and deposed that he was a partner in the firm of Syfret and Co. Mr. Syfret, who acted as liquidator in Stableford and Co., said that the company had never been in a position to pay concurrent creditors anything. There was no prospect at present of the concurrent creditors getting anything unless they obtained the same price for the building as Stableford had paid for it.

Oliver Lamb gave evidence as to the proceedings of the meeting of the creditors of Stableford and Co., on March creditors of Stableford and Co., on March 31, 1904, at which defendant was present.

Wm. J. Legg deposed that he was chairman at the meeting referred to, and gave corroborative evidence.

Mr. Jones closed his case.

Leonard Stevenson, the defendant, stated that when he obtained judgment against Stableford and Co. he gave instructions to plaintiff to levy a writ of attachment. Subsequently, the plaintiff wrote to him a letter, from which he gathered that it would be impossible to issue the writ. He did not think that every effort had been made to get the judgment satisfied, and he considered that he would have got the bulk of the £500 if proper steps had been taken at once.

Cross-examined by Mr. Jones: He attended the meeting in March. He did so in order to receive the report of the liquidators. He did not recollect sending the resolution at that meeting; he had no distinct recollection of the proceedings there. Mr. Payne advised him that it was impracticable to issue a writ. Witness considered that he had lost money because of that advice. He took Mr. Payne to mean, when he said it was impracticable to proceed, that it was impossible to proceed. If he had under-

stood that it was possible to have proceeded with the execution, he would have insisted on doing so.

Re-examined: Witness understood that the voluntary liquidators made an offer of 10s. in the pound. He would have accepted that if he had not thought he could press them further.

Counsel having been heard in argument on the facts,

Maasdorp, J., said the plaintiffs sought to recover from the defendant a certain sum of money for services rendered, which were specified in two bills of costs. These services were rendered in a case in which the present defendant was the plaintiff and Stableford and Co., were defendants. His Lordship reviewed the circumstances of the case, and said that he found that the liquidators were guilty of no act which damaged the estate, and there was no evidence which would justify the Court in finding that there was any negligence on the part of the plaintiffs. Judgment would be entered for the plaintiff in convention for £58 13s. 1d., with costs, and for the defendant in reconvention (plaintiff in convention), with costs.

RATNER AND TIMAN V. RECARDE.

This was an action in which plaintiff claimed £60, in respect of services rendered to the defendant by the sale of certain property.

The declaration stated that the first plaintiff resided at Wynberg, and the second at Kalk Bay, whilst defendant was a landed proprietor, residing at Cape Town. The plaintiffs were in partnership, and were employed by the defendant to find a purchaser for certain property, for which service it was agreed that plaintiffs should receive £60. Plaintiffs introduced one Moscovitz to the defendant, and eventually the property was sold to Moscovitz for £4,000, the sale being brought about through the agency of plaintiffs. The conditions by which the plaintiffs were to receive the £60 had been fulfilled.

The plea denied that there was a partnership between the plaintiffs, and denied that plaintiffs had been employed to find a purchaser for the property, although defendant admitted that the property had been sold. The sale was not effected through plaintiff's agency.

Mr. Lewis appeared for the plaintiff, and Mr. Sutton for the defendant.

Jacob Timan, one of the plaintiffs, having detailed the arrangements that led up to the defendant incurring the debt to them, which arose out of the sale of a property, for which plaintiffs were alleged to have obtained a purchaser, and for which services he promised to pay them £60. The witness was subjected to a lengthy cross-examination, in which he admitted that he was not a

broker, and that this was the first venture of this kind he had gone in for.

Max Ratner stated that the last witness asked him to look out for a purchaser for the property, and promised him £60 for doing so. He obtained a purchaser, but had not received the amount promised to him.

William Moscovitz stated he had a farm at Diep River. Ratner suggested to witness that he should exchange the farm for a property in Cape Town. The deal did not go through. He purchased the property for £4,350.

In cross-examination, the witness admitted that he had been engaged in an action in which the Chief Justice (Sir Henry de Villiers) stated he was guilty of a scandalous fraud.

[Maasdorp, J.: What has that to do with the case?]

Mr. Sutton: It is brought forward to prove incredibility.

The defendant, examined, stated he was a land dealer and speculator. He denied having promised either of the plaintiffs any commission. In fact, he did not recollect having seen them prior to the time this action was commenced.

In cross-examination, witness denied that he intended leaving the country. He had his wife and nine children in Cape Town, and why should he leave it. Moscovitz was introduced to witness by a man named Pelonus.

Counsel having been heard in argument on the facts,

Maasdorp, J., reviewed the evidence, and in conclusion said he saw no reason as between two business men why one should work for the other for nothing. It was undoubtedly proved that the defendant agreed to pay the plaintiffs the sum of £60 if they succeeded in disposing of his property for him. They had done so, and there would be judgment for the plaintiffs for the amount claimed.

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

In re MALAY MOSQUE, { 1905.
TRUSTEES OF. { June 22nd.

Buchanan, A.C.J., said that among the reports made by the Master that morning was one concerning a sale of

the Malay Mosque in Buitenkant-street. The sale was a judicial one, at the instance of the mortgagees, and had been conducted, and there was a surplus of several hundreds of pounds. He mentioned this publicly, so that anybody who was interested in the surplus might appear before the Master before it was paid over by him to the trustees.

ADMISSIONS.

{ 1905.
{ June 22nd.

Mr. P. S. T. Jones moved for the admission of G. P. Kotze as an attorney and notary.

Application granted, and oaths administered.

Mr. P. S. T. Jones moved for the admission of Johannes B. Bekker as an attorney.

Application granted, oaths to be administered before the Resident Magistrate of Aliwal North.

Mr. Gardiner moved for the admission of Archibald Henderson as an attorney.

Application granted, oaths to be taken before the Resident Magistrate of Griqua Town.

PROVISIONAL ROLL.

GARLICK V. STEVENS.

Mr. P. S. T. Jones moved for confirmation of a writ of arrest, upon a debt of £78 16s. 9d.

Judgment granted as prayed.

KAHN AND LEVIN V. SMUTS.

Mr. P. S. T. Jones moved for provisional sentence on a mortgage bond for £1,250, due, without notice being given, in accordance with the terms of the bond; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

DEMPERS AND VAN RYNEVELD V. BULL.

Mr. J. E. R. de Villiers moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court for £10 17s. 2d. and £6 19s. 1d. costs. Counsel read an affidavit by the defendant, who said that he had entered into a practice at Uitenhage, and that he hoped, if allowed time, to discharge the debt. He had lost heavily by a law suit, and had paid a sum of £50 already.

Decree of civil imprisonment granted, with costs, to be suspended on payment of £3 per month.

BERRANGE V. SHAW.

Mr. Gardiner moved for provisional sentence for £95 10s. 8d., interest reckoned from June 5, 1903, to December 31, 1904, at 6 per cent., upon a capital sum of £1,050, amount of certain mortgage bond.

Mr. Burton (for the defendant) read an affidavit by Mr. Shaw, denying liability. The matter, he said, arose out of the purchase by the defendant of certain ground at Sea Point for £1,450. Certain difficulties occurred in regard to the payment of rates on the land, in the course of which defendant threw over the sale, and claimed refund of £400 which he had paid. Transfer had not been passed. Deponent went on to say that the plaintiff had passed the bond against his wishes, and in spite of the power he had given having been revoked. He submitted that the plaintiff should not be granted provisional sentence, but should be ordered to go into the principal case.

Mr. Gardiner said that it was on record that the defendant had commenced an action in January last against Mr. Berrange for cancellation of the sale and refund of the sum of £400, but Mr. Shaw was barred through having failed to file his declaration, and the action was withdrawn on the 8th inst. If that record were admitted he should apply for a postponement until two o'clock to enable plaintiff to reply to the defendants affidavit.

Mr. Burton submitted that the plaintiff was not entitled to provisional sentence.

Provisional sentence granted as prayed, with leave to the defendant to go into the principal case.

MILLS AND SONS V. BLOCK.

Mr. Douglas Buchanan moved for a provisional order of sequestration to be made final.

Final order granted.

FEDERAL SUPPLY AND COLD STORAGE
CO. V. KARRO.

Dr. Rainsford moved for judgment, under Rule 329d, for £115, goods sold and delivered, for £89 14s. 4d., balance of further account, and also for £8 10s., goods sold and delivered, and costs; counsel also applied for provisional sentence on a mortgage bond for £200, with interest, due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Judgment granted on illiquid claim and provisional sentence on the bond as prayed.

MCNAUGHTON V. ROWE AND WELSH.

Mr. P. S. T. Jones moved for the final adjudication of the defendants' estate, as insolvent.

Order granted.

SIPPELL AND SALBER V. KOTZEN.

Dr. Greer moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

ILLIQUID ROLL.

FERGUSON V. ROWE. { 1905.
 { June 22nd.

Mr. Lewis moved for judgment, under Rule 329d, for £33 6s. 3d., work and labour done.

Order granted.

COOK V. SCARR.

Mr. P. S. T. Jones moved for judgment, under Rule 329d, for £72 17s. 5d., balance of account for goods sold and delivered, with interest *a tempore morae* and costs of suit.

Order granted.

JOHNSON AND CO. V. ROYAL HOTEL CO.,
LTD.

Mr. Van Zyl moved for judgment, under Rule 319, for £207 5s. 4d., with interest and costs of suit, affidavit of service of bar being produced.

Order granted.

SIMKINS AND ADAMS V. BARNETT.

Mr. Gutsche moved for judgment, under Rule 329d, for £56 18s., services rendered and costs of suit.

Buchanan (A.C.J.) said that judgment would be granted, but he would point out that the summons was not sufficiently explicit to show the cause of action.

VAN DER BYL AND CO. V. MORITZ.

Mr. Sutton moved for judgment, under Rule 329d, for £163, goods sold and delivered.

Order granted.

WIENER AND CO. V. FUCHS.

Dr. Rainsford moved for judgment. Mr. Rainsford moved for judgment, under Rule 329d, for £100 10s. 7d., goods sold and delivered, with interest *a tempore morae*, and costs of suit.

Order granted.

GENERAL MOTIONS.

RICHARDS AND OTHERS V. { 1905.
SIMONS AND OTHERS. { June 22nd.

Dr. Rainsford moved for the rule nisi, restraining the respondents from paying over certain money, to be made absolute. Rule made absolute, action to be instituted forthwith.

ATLAS INSURANCE CO. V. RODRIQUES.

Fire insurance — Conditions of policy — Arbitration.

R. had taken out a policy in a certain Fire Insurance Company. His stock and books having been subsequently burned during the currency of this policy, he made his claim and agreed with the company to have his loss assessed by arbitration. The company now sought to have him interdicted from proceeding with the arbitration, on the ground that he had violated one of the conditions of his policy by not having given accounts of his losses as full as could be given.

Held, that as the sufficiency of the accounts was a question for the arbitrator to decide, the interdict must be refused, with costs.

This was an application upon notice of motion calling upon the respondent to show cause why he should not be interdicted from continuing certain arbitration proceedings, commenced by him on the 19th May last, in respect of loss by fire on the 7th June, 1904.

From the affidavits, it appeared that on the 2nd June, 1904, respondent insured with the company for £700 his stock-in-trade, consisting of wicker chairs and other Madeira work, at his store, 129 Bree-street, Cape Town. On the 7th June a fire broke out on his premises, and on the 17th June he sent in a claim to the applicant company for £700. Arbitration proceedings had been commenced. The ground of the present application was the respondent's non-compliance with condition 12 of the policy, inasmuch as no proper books and vouchers and other evidence of value had been produced.

Mr. McGregor was for the applicant; Mr. Gardiner was for the respondent.

Having heard Mr. McGregor in argument,

Buchanan (A.C.J.): On the 2nd June last year the respondent insured his property with the applicant company, and shortly afterwards a fire took place. At this fire, it is alleged, the whole of the stock, the books, and the papers were destroyed. There is no allegation setting out that there was any fraud in this matter, which would vitiate the contract, and consequently prevent the respondent from suing upon it, but it is admitted that if certain conditions are complied with the respondent would be entitled to go to arbitration under the conditions of the policy, and have the amount of his loss assessed by the arbitrators. The applicant company now wish to prevent the respondent from going to arbitration, because, they say, they have not been supplied with sufficient accounts to the satisfaction of the directors under the 12th clause of the conditions of the policy. This 12th clause requires certain things, which, it might well be argued, on the case of Hollander, are conditions precedent. One is that accounts of the loss, as fully as can be given, shall be lodged within 14 days of the fire. This was done. Then this 12th clause goes on to say that these accounts must be sufficient and satisfactory before the claim for amount of loss or damage is payable. Now, whether these accounts which have been furnished are sufficient and satisfactory is a question which the Court which has to try the claim will have to determine. As was pointed out in the case of *Hollander v. the Royal Insurance Company*, cited by Mr. McGregor, it is a question which comes up in the trial of the case, and, as his lordship, the Chief Justice pointed out, it is a question of fact and not of law. It is not a condition precedent in the sense that it must be complied with before the trial takes place; if accounts are furnished, whether they are sufficient or not, is one of the points that should be heard at the trial. The parties have chosen the tribunal which shall try this matter to be a Court of Arbitration, and consequently the person who was insured having furnished his claim within the time specified, and having furnished accounts, the present application will be refused. The application is not justified, and, having failed, the applicant company must pay the costs.

RENEKE AND OTHERS V. VAN DER VYVER.

Mr. Van Zyl moved, as a matter of urgency, for a commission to take the evidence of certain two witnesses at Riversdale, an application being made on the petition of the plaintiffs' attorney, Mr. J. S. de Villiers.

Order granted as prayed, the R.M. of Riversdale to be commissioner.

In re LANSDOWNE HOUSE ESTATE CO., LTD.

Mr. P. S. T. Jones presented the first report of the liquidators, and applied for the usual order.

Usual order granted, publication once in the "Government Gazette" and once in the "Cape Times."

ROHLAND V. ROHLAND'S CURATOR.

This was an application calling upon the respondent, the curator of the property of the lunatic, Heinrich Rohland, to show cause why he should not be ordered to pay over to the applicant, Christian Rohland, fish dealer, Faure Siding (father of the lunatic), a sum of £200 ordered by this Court to be raised on the 14th March, 1905, by mortgage on a farm belonging to the said Heinrich Rohland.

The affidavit of the applicant stated that the money had been raised on mortgage, but that Mr. Steytler declined to pay it over on account of certain charges for disbursements and a claim by the Government for the keep of the lunatic. Petitioner was in reduced circumstances, and the money was raised as against certain improvements made by him on his son's property.

The answering affidavit of Mr. Steytler, stated that he raised no objection to the application for the bond, so long as his disbursements in the administration of the property were satisfied and a *pro rata* contribution was made to the Government. Deponent contended that, this farm being the only asset in the estate, he was entitled to a preferent claim on the amount raised. He had received a claim from the Colonial Government for £353 15s. for keep of the lunatic.

The replying affidavit of the applicant denied that he entered into any conditions with the respondent, and said that if such conditions were entered into between his legal representatives and Mr. Steytler, it was entirely without his knowledge and consent. Had he known of such conditions he would not have proceeded with his application. Deponent went on to say that the farm when originally granted to his son was bare veld, and that he (deponent) had expended at least £100 on the improvement of the property. He said, further, that his son had been treated by the Government as a free patient. Counsel also read an affidavit by the applicant's wife, who denied that any conditions were agreed to in the interview with Mr. Steytler before the application was granted by the Court.

Mr. Gardiner for applicant; Mr. Burton for respondent.

Mr. Gardiner submitted that it was too late for the curator to come and claim any portion of this money.

Mr. Burton said he admitted that his client should have appeared at the time of the application, and brought these facts before the Court. He submitted, however, that Mr. Steytler was clearly entitled to have his disbursements satisfied, because those disbursements had been made in order to preserve the farm to the applicant's estate, such as title deeds, and so forth. Mr. Steytler was making no charge whatever for his own work of administration. As to the charges of the Government, section 69 of the Lunacy Act clearly showed that although the patient may be received as a free patient at first, in the case of any property accruing to the lunatic, the Government could recover.

Buchanan (A.C.J.): The curator has raised on mortgage a sum of £200, the amount authorised by the Court being £250. The curator claims that he has been subjected to an outlay of £67 17s. 8d. on behalf of the estate. I think it would have been far better if the curator had brought this fact to the notice of the Court at the time the original order was made, because it is clear that the original order was intended to be a payment of £250 to the applicant in satisfaction of the outlay which he had incurred in improving the estate. The reason why the curator has only raised £200 is not stated, but there certainly is, under the previous order of the Court, £50 more still to be raised, which will have to be paid to the applicant when raised. The curator now says that there is a claim sent in for the maintenance of this lunatic in the asylum. The applicant says that for a considerable time he himself paid for the maintenance of the lunatic, but as he could no longer continue it was agreed then by the parties that the lunatic should be received as a non-paying patient. Under these circumstances there is absolutely no reason why the amount which the applicant has expended in improving the property should not be paid to him. The curator will be ordered to pay the sum of £200 to the applicant, less his outlay of £67 17s. 8d., which he is entitled to deduct from this amount, only pending the realisation of the other assets of the estate, when the amount is to be paid to the applicant; costs to be paid by the respondent, N.O.

EBRAHIM V. DEHNING.

This was an application to make absolute a rule *nisi* calling on the respondent to show cause why he should not be ordered to restore to applicant possession of two shops at Diep River, and to deliver up certain goods. Mr. Alexander was for the applicant, an Indian general dealer, and Mr. J. E. R. de

Villiers was for the respondent, Carl Dehning.

Mr. Alexander said that the application was now narrowed down simply to one of costs, the respondent having restored possession of the shops and goods to the applicant. Counsel read affidavits to the effect that the applicant was deprived of the possession of the shops by the respondent without any reason, and that his assistant was ejected by the back door.

Mr. De Villiers read an affidavit by the respondent, who said that he would not think of letting his shops to such persons as applicant unless the rent were paid in advance. Applicant got into arrears with his rent for April and May, and upon pressing he gave deponent a cheque, which was crossed. The bank refused payment of the cheque. Deponent denied that he forcibly dispossessed the applicant, and said that he had kept the keys at the disposal of the applicant. The keys had been voluntarily given to him by the applicant's assistant.

Mr. Alexander read a replying affidavit by the applicant, who denied that he had ever agreed to pay the rent in advance, or that the keys had been lying at his disposal. The keys were handed to him by the respondent when he tendered his affidavit.

Counsel having been heard in argument, on the facts,

Buchanan (A.C.J.) said there was no reason why the rent, not having been paid, the respondent should not be allowed to exercise his landlord's lien.

The application was dismissed, with costs.

COOK V. COOK.

This was application upon notice of motion, calling upon the respondent, Frank Cook, to show cause why he should not pay applicant a sum of money to enable her to institute proceedings against him to have a certain deed of separation entered into between the parties on May 13, made an order of Court, and to have the allowance of £6 a month made by him declared insufficient, and respondent ordered to pay to applicant such sum as may seem to the Court to be fair and reasonable. Mr. Upington was for the applicant, Florence Emily Cook; respondent appeared in person.

Mr. Upington read an affidavit by the applicant, who stated that she desired to sue the respondent for a judicial separation on the ground of cruelty. She said the present allowance was wholly inadequate for the support of herself and daughter.

Respondent read an affidavit, in which he said that he was unable to contribute to the applicant more than £6 a month,

and pointed out that he had to provide for the education of his son.

Mr. Upington said that an action was instituted by the applicant over a year ago, but it was compromised.

Buchanan (A.C.J.) said that there was absolutely no ground shown on which this application could be granted. It would therefore be refused.

INSOLVENT ESTATE VINK V. NEW ZEALAND INSURANCE COMPANY.

Mr. Douglas Buchanan moved for a commission to take the evidence of Frank William Wilson, of Cape Town, who was about to leave for Australia.

Mr. Alexander, for the respondent, consented.

Commission granted by consent, Advocate Giddy, K.C., to be commissioner.

VAN AARDE V. HIND.

Mr. Van Zyl moved for an order for the attachment of certain property at Aliwal North *ad fundandam jurisdictionem*, and for leave to sue by edictal citation upon a claim for £37 10s. rent. It was stated that respondent left Aliwal North for East London, and had since gone to Johannesburg.

Order granted, petitioner to attach a sum of £60, pending an action to be instituted forthwith, and leave granted to sue by edictal citation, to be returnable on August 1, personal service to be effected.

PLATE WALL SYNDICATE, LTD. V. CAPE TIMES, LTD.

Summons — Service on a non-existent company.

Certain goods said to be the property of a company (B.) had been attached for debt. Another company (A.) now asked for their release, on the ground that the goods were their property, and no summons had ever been served on them. It appeared that the company A. had, since the summons was served, changed its name to B., and that at that very time the change was in contemplation.

Held, that as the two companies were virtually the same and did not appear to have any defence on the merits, leave must be granted to amend the

summons by the insertion of A. instead of B.

This was an application upon notice of motion calling upon the respondents to show cause why the goods attached by the Deputy Sheriff at the suit of the "Cape Times," Limited, against the Plate Wall Builders' and Supply Company should not be released, as being the property of the applicants, the Plate Wall Syndicate, Limited. Mr. Gardiner was for the applicant; Mr. M. Bisset was for the respondents.

Mr. Gardiner said that the Plate Wall Syndicate, Limited, tried to form a company called the Plate Wall Builders' and Supply Company, and ordered prospectuses to be printed by the respondents. The respondents charged £72 7s. 6d. The respondents sued the company, which was about to be formed, for this amount, but which was not, as a matter of fact, formed, and obtained judgment against a non-existent company, viz., the Plate Wall Builders' and Supply Company. Then the respondents attached the goods of the present applicants, the Plate Wall Syndicate, who were the people who were going to form the company. The Plate Wall Syndicate were perfectly willing to pay the account; no summons had been served upon them. They had tendered the amount and wanted their goods released.

Mr. M. Bisset said that the respondents had not filed any affidavits, but he produced a copy of the service, which set out that the summons was served upon Mr. Von Witt personally, and not, as had been stated in the affidavits of the other side, upon a clerk in the office.

Mr. Gardiner submitted that the proceedings taken by the respondents had been quite irregular, and that it was such a breach of practice as should not be allowed by the Court.

Without calling upon Mr. Bisset, Buchanan (A.C.J.): There is no doubt in this case that the defendants owe the money, and their goods have been attached. They have changed the name of the company once or twice. It would have been more correct if the summons had been taken out against the Plate Wall Syndicate, Limited, and, as the parties are before the Court, the Court will order that the summons and proceedings there, in be amended by inserting the words, "Plate Wall Syndicate," instead of "Plate Wall Builders' and Supply Company." The application will be refused with costs.

HALVOESEN V. ANDERSON.

Mr. Gardiner moved for the attachment of defendant's goods in the hands of W. J. Smith, *ad fundandam juris-*

dictionem. Petitioner said that she entered into a contract with the defendant, who was at Johannesburg, in which she undertook to push and develop the sale of certain preparations called Viavi, but had suffered loss through the failure of the defendant, who was of Johannesburg, to supply her with goods. She said that she had suffered damages in a sum of more than £75. Counsel also applied for leave to sue by edictal citation.

Order granted attaching the goods of defendant in the possession of W. Smith, and giving leave to applicant to sue by edictal citation, citation to be returnable on the 14th July, personal service to be effected.

Ex parte STEYN.

Mr. De Waal moved for an order authorising the transfer of certain property at Hopetown belonging to the petitioner, a minor.

Order granted, purchase price to be paid into the Master's Fund.

GREENBERG V. MILLIN.

Mr. Sutton was for the applicant, and Mr. McGregor was for the respondent.

Mr. McGregor applied for a postponement to enable the respondent to file answering affidavits.

Mr. Sutton opposed the application, and moved for the release of a certain sum of £505 4s. 8d. attached by the Sheriff by way of security for costs. Applicant said that he had a good defence to the action, and that he was being prejudiced by the attachment of this money and the failure of the plaintiff to go to trial.

Matter postponed on condition that the respondent show cause on Thursday next why the respondent should not be ordered to go to trial this term.

Ex parte CARTWRIGHT AND CO.

Mr. P. S. T. Jones moved, as a matter of urgency, for an order to enable the petitioners to protect their landlords' lien on certain pictures, the property of John L. Irvin, a tenant of certain rooms at the Mansion House Chambers, pending an action to be forthwith instituted for rent. It was stated that Irvin now owed the petitioners £67 10s. for rent.

Rule *nisi* granted, restraining the removal from the premises of the goods in question, until the landlord's lien be satisfied, pending an action to be instituted forthwith.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

MALCOMESS AND CO. V. { 1905.
CARY. { June 22nd.
" 26th.

Interdict—Creditors—Disposal of property.

C.'s estate had been placed under inspection, certain disputed accounts between M. and himself had been referred to arbitration. It was alleged that C. was disposing of, or pledging his property, in such wise, that M. feared he would be unable to meet his liabilities, in respect of any award the arbitrator might give against him. M. now applied for an interdict, restraining him for parting with, mortgaging or pledging his property.

Held, that as the respondent was neither a peregrinus, nor one alleged to be in contemplation of flight, no such interdict could be granted.

This was an application, upon notice of motion, for an interdict restraining respondent from parting with his assets, pending the report of the referee to whom the matters in dispute in the actions have been referred. Mr. Burton appeared for the applicants (plaintiffs in the actions); Sir H. Juta, K.C., was for the respondent.

Mr. Burton moved for an interdict restraining the respondent, Thomas Bovey Carey, selling, transferring, mortgaging, pledging, or otherwise alienating any portion of his property, and the Registrar of Deeds from registering any deed or hypothecations thereof. The principal grounds of the application were set out in affidavits by one Mr. Reimers, who, from a communication that he had received from Mr. Bruton, of Tarkastad, said he had reason to believe that respondent was disposing or pledging his assets, and that there was a danger that he would not, unless restrained, be able to pay any sum which the referee in the matter of the action may possibly find to be due to plaintiffs.

Sir H. Juta, K.C. (with him Mr. Gardiner) appeared to oppose.

Sir H. Juta said there had been no time to get a replying affidavit from the

defendant, stating that he had no intention of disposing of his property.

Hopley (J.) said that he would like to have authorities on the point of whether the Court could grant the order asked for in the circumstances. It was unprecedented in his experience.

Mr. Burton asked that the matter should stand over until the following day.

The Court ordered the matter to stand over accordingly.

Postea (June 26).

[Before the Acting Chief Justice, the Hon Sir JOHN BUCHANAN.]

For respondent, affidavits were put in denying that he had had any transactions, except such as were in the legitimate course of his business. He admitted that his goods had been attached upon a writ, but said that on his return to Tarkastad, it was his intention to satisfy the amount of the writ.

Mr. Burton said that the application was a somewhat unusual one, and the learned judge before whom it came in the first instance gave leave for it to stand over, to look into the authorities. He submitted that there was authority for the course which was now taken by the applicant. Counsel quoted from Van Zyl's Judicial Practice (2nd Edition, p. 168), from Voet (2, 4, 18, 19), and from Kotze's translation of Van Loeuwen's Roman-Dutch Law (Vol. 2, Book 5, cap. 7, secs. 2 and 6).

Without calling upon Sir H. Juta, Buchanan (A.C.J.) said that in special circumstances as, for instance, where it was shown that defendant contemplated flight, the Court interfered, but no such special circumstances appeared in the present case. He could see no legal ground upon which this interdict should be granted. The application would, therefore, be refused, with costs.

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

DUNCAN V. DUNCAN. { 1905.
{ June 23rd.

This was an action brought by Archibald Duncan, railway shunter, Cape Town, against his wife, Christina Dun-

can (born Daniels), of Salt River, for restitution of conjugal rights, failing which a decree of divorce, with division of the joint property and forfeiture of the defendant's half share. Dr. Greer was for the plaintiff; defendant was in default.

Wm. Thomas Birch, clerk in charge of the marriage register, Colonial Office, produced the register of the marriage.

The plaintiff said he was married to the defendant at the Dutch Reformed Church, Woodstock, on the 26th January, 1902. They lived unhappily together in consequence of a boarder whom his wife received, one James Guttery. Witness had to speak to his wife regarding her relations with Guttery, and this led to frequent quarrelling. On April 1st, 1905, he was living at 44, Kingsley-road, Salt River; his wife came back at night from the country and ordered him out of the house as she had got "another gentleman." Witness slept in the passage. Next morning she told him to clear out. Witness went to his work and returned in the evening, and there was further quarrelling. He went out about 9 o'clock and returned home at eleven, when he found the door locked and the place in darkness. His wife's brother threatened to kill him if he went into the house. His wife went from the house and took all the furniture; she was now living with her father and James Guttery.

By the Court: He had not asked his wife to return to him. She was living with her father at 27, Kingsley-road. Witness was now in lodgings in Loop-street, Cape Town.

Dr. Greer, in answer to the Court, said that he was prepared to abandon the prayer (c) in the declaration for forfeiture of the benefits of the marriage in community.

Decree of restitution granted, defendant to return or receive the plaintiff on or before the 14th July, failing which rule to issue calling upon the defendant to show cause on the 1st August why an order should not be granted in terms of the declaration, with the exception of prayer (c).

Postea (August 1).

Rule made absolute.

GABIER V. AJAM.

This was an action brought by Omar Abdol Gabier, builder and contractor, Cape Town, against Gadoja Ajam, widow, Cape Town, for an order requiring her to take transfer of certain property, or to pay £300 damages for breach of contract.

The plaintiff, in his declaration, said that defendant bought from him a certain piece of land with buildings thereon, situate at No. 328, Hanover-street, Cape Town, for £1400, transfer to be

taken immediately, and cash to be paid against transfer. The said contract was embodied in a broker's note. Although plaintiff had carried out all the conditions of the said agreement to be performed by him, and had tendered, and again hereby tendered, transfer of the said property against the fulfilment of the conditions of the agreement by defendant, defendant had failed to take transfer or pay the purchase price. Plaintiff claimed an order calling upon the defendant (a) to take transfer forthwith of the said property and pay the purchase price, plaintiff tendering transfer, or, in the alternative (b) the cancellation of the said contract and payment of £300 as damages for breach thereof (c) alternative relief and (d) costs of suit.

Mr. Douglas Buchanan was for the plaintiff; defendant was in default.

Johannes Jacobus Swanepoel, formerly employed by Steyn and Serrurier, spoke as to the broker's note which he had drawn up, and to the signature of the defendant thereon. The broker's note was dated December last. He first heard about the beginning of April that defendant was not going to complete the sale. Witness considered the value of the property at the present day to be £1000 to £1100.

By the Court: The defendant asked him not to proceed with the sale of the property to her. She proposed to make an application to the Court for leave to mortgage certain other property of herself and children, but decided not to proceed with the application.

Omar Abdol Gabier (the plaintiff), gave evidence as to the sale of the property to the defendant on the 21st December. The property, he said, was bonded to the amount of £1000. The defendant made certain alterations in the buildings, and then wanted to be let off the sale. Witness estimated the present value of the house and stables at £1000.

G. H. Moller, sworn appraiser, said that he estimated the present value of the house at £750, and of the stables at £250. He did not think that the property would fetch above £1000 in the market to-day.

Maasdorp, J.: The property was sold by plaintiff to the defendant for £1,400, and to all appearances it was a very good bargain. Plaintiff is entitled to the benefit of his bargain, and there is sufficient evidence to prove that he suffered £300 damages. An order will be granted in terms of prayer (a) of the declaration, transfer to be taken by the 6th July, or that the contract be declared cancelled, and defendant be ordered to pay £300 damages, with costs.

GROENEWALD V. ESTATE BOTHMA.

Mr. Close (for the defendant in the action) moved, upon notice for a post-

ponement of the hearing *sine die* in consequence of the illness of Mr. Willmot, executor in the estate of J. A. C. Bothma. Mr. Gardiner (for the plaintiff), opposed the application. The matter arose out of an action brought by Groenewald for transfer of certain property which he said he bought in 1902 from the late Mr. Bothma.

Mr. Close read affidavits and correspondence in support of the application, from which it appeared that the defendant, who was undergoing treatment at a farm in the district of Prince Albert was unfit to travel. For the applicant it was urged that sufficient notice of the illness of the defendant and the impossibility of his attending the hearing to-day, was given to the plaintiff. Applicant asked for an order for costs of the day against the respondent.

Mr. Gardiner submitted that the applicant should be bound down to a day for the hearing, and that the case should be set down for the 12th July. Plaintiff resided in the district of Sutherland, about 66 miles from Laingsburg station, and he came to Cape Town for the trial. Two other witnesses had also come down.

Maasdorp, J., asked what the present difficulty between the parties was?

Mr. Gardiner said that the defendant admitted plaintiff's right to obtain transfer, but said that the delay in giving transfer had been occasioned by circumstances for which he (defendant) was not responsible. One of the points was whether Greef and Walter were the agents employed by defendant or plaintiff. The present difficulty, he understood, that this property was registered in the name of the late Mr. Bothma's parents, and that transfer could not pass from the parents of the estate held by Mr. Willmot, without the payment of certain transfer duty, which Mr. Willmot had not yet paid.

Maasdorp, J.: It seems that this case was set down on the 9th for the 23rd inst., and that the first formal communication that passed between the parties, indicating that there was a desire to obtain a postponement of the case was only given on the 21st. If that notice could have stopped the witnesses from leaving to attend at this trial, I think it would have been the duty of the respondent in this case to have seen that no expense was caused in that respect. But it appears that the notice was given too late, and that when the notice was telegraphed to the country agents of the plaintiff the witnesses had already left. I think that the expenses that have been incurred through the witnesses being brought down are due to the delay on the part of the defendant in giving notice that he desired this postponement. It is suggested that some conversation had previously taken place between the parties, but the Court

should not encourage communications between parties passing by verbal means, and this is an instance showing the awkwardness of such proceedings, because we have got a dispute as to what did take place between the parties. The costs having been incurred through the fault of the defendant, I think that the order must necessarily be granted that the case be postponed, but the costs of the day must be paid by the applicant in this matter. It may be possible to stop all the costs which will be incurred by going to trial; the matter seems to be one merely of delay, and if a postponement be granted, a settlement may be arrived at.

After hearing counsel further, Maasdorp, J., ordered the case to stand over until the 2nd August.

	1905.
COWLING V. ESTATE OF STABLEFORD AND CO.	{ June 23rd.
	{ July 11th.
	{ " 12th.
	{ " 17th.
	" 18th.

Principal — Agent — Company —
Managing director—Fraud—
Agent making a profit at the
expense of his principal.

The managing director of a company having obtained for the company an option to purchase a house at a certain price, subsequently purchased it for himself at that price, and resold and transferred it to the company at a higher price.

Held, that the company was entitled to recover the excess from the director.

The managing director of a company being aware that the company required for their business a building adjoining their premises, bought the building for himself, and resold and transferred it to the company at a higher price.

Held, that the company was entitled to recover the excess from the director.

This was an action brought by John Frederick Cowling, of Cape Town, against Wm. Stableford and Co. (in liquidation), for judgment upon a mortgage bond for £750, with interest from the 1st July, 1905.

Plaintiff, in his declaration, said that he claimed final judgment for £750, with interest at 8 per cent., from the 1st July, 1903, upon a certain mortgage bond passed by the defendant company in favour of one W. L. Kidney, and by him duly ceded to the plaintiff for value, by cession dated the 29th October, 1903, endorsed upon the bond. On the 16th September 1903, the defendant company was voluntarily wound up, and thereafter, on the 23rd June, 1904, was wound up by order of this Honourable Court, Messrs. J. E. P. Close, E. R. Syfret, and W. J. Laite being duly appointed official liquidators. The defendant company was indebted to the plaintiff in the said sum of £750, due and payable by reason of the non-payment of interest. On the 9th June, 1904, this Court granted provisional sentence for the said amount, with interest, and the landed property was declared executable, with taxed costs £13 17s. The landed property was thereafter attached, but the defendant company was then wound up by order of this Court, and the landed property became released from attachment.

Defendants had filed two pleas. The first plea was as follows:

For a plea to the plaintiff's declaration defendants say:

1. They admit paragraphs 1, 2, 5, and 6, thereof, save that they say that the property attached as in paragraph 6 set forth was movable and not landed property; and they admit that appearance was entered as in paragraph 7 thereof set forth; but save as above and save as in hereinafter admitted they deny the allegations in paragraphs 3, 4 and 7.

2. As to paragraph 3 thereof, they admit that a bond of £750 is now held by the plaintiff, who obtained the same by an alleged cession from the said Kidney; but they put the plaintiff to proof of the circumstances under which the said cession was made and of the value alleged to have been given for the said bond by plaintiff. The defendants say that the said bond was on October 29, 1903, deposited as security with plaintiff by the said Kidney for a personal loan of £300, and was not ceded to plaintiff till after March 31, 1904, after disputes as to the said bond had arisen between the defendants and the said Kidney. The writing of cession on the bond was at the time of such writing antedated to October 29, 1903. The cession of the bond was not registered in the Deeds Office, nor was any notice of such cession given to the company or the defendants till April 7, 1904.

3. The bond was passed, as is hereinafter set forth, as part of a certain transaction fraudulently and collusively entered into between the said Kidney, then secretary of the said company, and one Stableford, its managing director, in fraud of and to the prejudice of the said company,

the circumstances of the said transaction being such that the said Kidney is not and never has been in law entitled to sue the said company or the defendants on the said bond.

4. The plaintiff as cessionary of the said bond has acquired no greater rights as against the company or the defendants than the said Kidney, and is subject to all the equities of the said bond in the hands of the said Kidney.

5. The said bond was passed on January 31, 1903, and certain landed property then registered in the name of the company and styled lot D and La. E, in Strand-street (and hereinafter called the front property) was specially hypothecated thereunder.

6. The said bond was passed under the following circumstances: (a) On August 22, 1902, the said Stableford, who was then and thereafter at all times material to this suit the managing director of the said company, purported to purchase from Messrs. Hand and Honikman the said front property for £4,500. (b) At the said date the said company had already acquired, and then held, the option of purchasing the said property for £4,500, as was well known to Stableford and Kidney. (c) On October 10, 1902, the said Stableford, with the assistance and collusion of the said Kidney, sold the said front property, without alteration or improvement, to the company for £6,500, the said Stableford and Kidney falsely and fraudulently concealing from the company the facts as to the company's option and otherwise in this paragraph afore set forth. (d) Thereafter the said Stableford arranged for transfer from the vendors to himself: whereupon the vendors pointed out that the option to purchase the said property was, and had been held in the name of the company. For the purpose of obtaining transfer of the property in his own name the said Stableford purporting to act as managing director and doing so with the connivance, collusion, and assistance of the said Kidney as secretary, wrongfully, unlawfully, falsely, and fraudulently caused the said Kidney to write on the 20th November, 1902, to the vendors aforesaid or their agents, a letter pretending on behalf of the company that the company had waived its option and had allowed the said Stableford to purchase the property personally and had bought the property from Stableford with a full knowledge of all the circumstances; and the said Stableford thereby succeeded in obtaining the consent of the vendors to the transfer to himself of the property aforesaid. (e) On January 31, 1903, the said Stableford took transfer in his own name of the said front property and on the same day transferred the property to the company, payment of the purchase price being provided for mainly by means of a loan of £4,000 made by the Master to the company on mortgage; the balance of the

purchase price and the expenses of transfer and bonds purport to have been met by raising a loan of £750 from the said Kidney to the company on mortgage of the said property which mortgage bond for £750 is the bond now sued upon.

7. The said Kidney acted throughout in concert and collusion with the said Stableford, and in fraud of the said company, whereof they were throughout respectively secretary and managing director; and the said bond was by reason of the premises fraudulently obtained by the said Kidney, and is not and never was of any validity as against the company, either in the hands of the said Kidney, or of any cessionary thereof from the said Kidney.

Wherefore the defendants pray the plaintiff's claim may be dismissed with costs.

SECOND PLEA.

And should this honourable Court not hold in favour of the defendants on the above plea (but not otherwise) the defendants for a further plea say:

8. They crave leave to refer to the foregoing.

9. The transactions referred to in the foregoing formed part of a series of transactions fraudulently and collusively entered into between the said Kidney and Stableford in their capacity aforesaid, in fraud of and to the prejudice of the said company.

10. On the date on which the said Stableford purported to purchase the front property as aforesaid, to wit, 22nd August, 1902, the said Stableford, nominally in his own name, purchased for £2,500 from the said Hands with a view to re-selling the same to the company at a profit certain other property (hereinafter called the back property) adjoining the front property aforesaid.

11. The said Stableford thereupon on 12th January, 1903, passed a bond on the back property for £1,500 in favour of Kidney, but the said Kidney has at no time actually advanced or undertaken liability for more than the sum of £549 in respect of the said bond. The said bond was passed by collusive arrangement between the said Stableford and Kidney, with a view to the said Kidney getting payment of the whole sum of £1,500 on the resale of the property to the company, in addition to a share of the profit to be made out of the whole transaction.

12. The said Kidney paid certain moneys in connection with the front property transaction, amounting to £676 3s. 6d. and no more, for which he received as security the bond for £750 now in suit.

13. On the 17th March, 1903, Stableford, with the assistance and connivance of Kidney, sold the back property to the company for £6,500, and, thereafter, passed transfer of this property to the

company. The Master advanced as a loan to the company, upon mortgage of the said property, and of the said front property the sum of £4,500, which sum the said Kidney received as secretary of the company; and out of this loan the said Kidney paid himself the full sum of £1,500, with all interest thereon purporting to do so in discharge of the bond of £1,500, though he was only entitled to payment in the sum of £549 aforesaid.

14. The said Kidney and Stableford acted throughout in the matters set forth in paragraphs 10, 11, 12, and 13 hereof in concert and in collusion, and in fraud of the said company, whereof they were respectively secretary and managing director, and as a result of the transactions above set out, they made a large profit, which they agreed to share, and did share, to the great prejudice of the company.

15. The defendant liquidators contend that the purchases of the front and back properties on the 22nd August, 1902, and the subsequent dealing with the properties by Kidney and Stableford, as regards the company and themselves, form one fraudulent plan and transaction in prejudice of the company; that the said original purchases must in effect and in law be taken and deemed to be by reason of the premises purchased on behalf of the company; that the said Kidney is bound in law to account to the defendants for any profits made and unnecessary extra expenses incurred in the said transaction; that the payment to Kidney of the £1,500, with interest, as aforesaid, must be taken and deemed to be a payment by the company to the said Kidney, subject to his accounting to the company for the balance left over and above the sum of £549 aforesaid, which balance, to wit, £861, they are entitled to take in account, as against the sum of £676 3s. 6d. aforesaid; and that the said Kidney has received from the company such payment more than he had or has in all advanced to or on behalf of the company in respect of the bonds aforesaid.

16. The defendants crave leave to refer this Honourable Court to the annexure hereto marked A (which they pray may be considered as inserted herein), as setting forth the true state of accounts as between the company and Kidney upon the completion of the transfer of the back property to the company—the said Kidney being at that date and now indebted to the company in the sum of £700 4s. 3d.

17. The defendants further crave leave to refer this Honourable Court to annexure B hereto (praying it may be considered as inserted herein), which shows that, even if moneys paid by Kidney for the improper transfers to Stableford be allowed for, the said Kidney was at the date of the completion of transfer of the back property to the company in-

debted to the company in the sum of £395 17s. 8d.

18. By reason of the premises there was not on the 29th October, 1904, nor is there now any indebtedness of the company or the defendants on the said bond to the said Kidney, or to the plaintiff or any other person.

Wherefore defendants pray that plaintiff's claim may be dismissed with costs.

Plaintiff, in his replication, said that, in regard to the first plea, the plaintiff knew nothing of the allegations as to the transactions between Kidney and Stableford, and put the defendants to proof thereof, and otherwise joined issue. As a replication to the further plea, he said that he knew nothing of the allegations as to the transactions between Kidney and Stableford, and did not admit them, and put defendants to proof thereof.

Mr. Upington (with him Mr. P. S. T. Jones) for the plaintiff. Mr. Close (with him Mr. Bisset) for respondent.

In answer to the Court, counsel stated that Stableford had left the Colony, but that Kidney was in court.

Mr. Upington submitted that *prima facie* there was a liability on the bond, and that the onus was upon the defendants to prove their allegations of fraud and so on.

Mr. Close submitted that the ordinary course should be followed, and that the plaintiff should prove his case. The whole facts of the cession to the plaintiff were in dispute.

Mr. Upington having replied,

Maasdorp, J., decided that plaintiff must lead his evidence as to the cession.

Mr. Upington said that he could formally prove the cession, but he was bound to admit that the cession was ante-dated, as alleged by the defendants.

Gilbert Percival Kotze, attorney, employed by Messrs. Van Zyl and Buissinne, said that the cession was written on the bond on the 7th April, 1904. Kidney's signature was on the bond at the time.

Cross-examined by Mr. Close: Kidney came and saw witness and asked him whether he knew the wording of a cession of a bond. Witness filled in the usual form of cession. Witness was about to put on the current date, but Kidney said that he must not put on the current date, because the cession took place on the 29th October, 1903, and he (Kidney) put his signature on the bond on that date. Kidney produced a letter which he had sent to Cowling acknowledging a loan of £300. The cession was not stamped when Kidney took it away. It had not been registered. Kidney gave the firm of Van Zyl and Buissinne the warrant to sue the liquidators on the bond, the warrant was

signed by Cowling, but the verbal instructions were given by Kidney.

Mr. Upington closed his case, subject to the right to call rebutting evidence on the question of fraud.

Mr. Close then applied for absolution from the instance, on the ground that the plaintiff claimed payment as out-and-out cessionary, whereas he had only made out a case of pledgee.

Mr. Upington contended that the plaintiff had proved that this mortgage bond was ceded as security, and that thereafter the debtor handed over his security to the creditor to realise. The rights under the bond had been only handed over to Cowling, and surely Cowling was entitled to sue the mortgagors, reserving to them any defence they might have on the merits.

His Lordship held that there was some evidence that Kidney had parted with his right in this bond to Cowling.

John Edwin Paul Close, incorporated accountant, Cape Town (one of the official liquidators) was then called for the defence. He said that in 1901 he was asked to become a director by certain English shareholders; the first meeting of directors that he attended was in December, 1901. At the second meeting witness discovered that Stableford, the managing director had been buying large quantities of machinery. Witness insisted on Stableford's powers being cut down under threat of withdrawing from the Board. Stableford's powers were curtailed to indents up to £350 a month; all expenditure above that amount to be submitted to the directors for approval. At that time witness thought the company was involved. Witness was not aware during 1902 of the existence of a broker's note (produced) for lease of the front portion of the premises with the option of a sale. The note was between Stableford and Co. and Honikman and Hand. The business seemed at that time to be large and increasing. Witness found, soon after he had joined the Board, that Stableford had overbought machinery in excess of capital. In July, 1902, there were overdrafts to be met, and Mr. Hennessy (who was secretary at that time) and witness gave their guarantees to the bank for £5,000. On the 18th July, 1902, Mr. Hennessy was summarily dismissed from the position of secretary by Stableford, whom witness considered to have very arbitrary powers. Subsequently witness found that Kidney had been appointed secretary. Up to about April, 1903, witness did not suspect the bona fides of either Stableford or Kidney. In 1903 he was called upon by Stableford and Kidney to report to Mr. Veep, one of the largest creditors and the English buyer, with the object of his putting the finances of the company on a sound basis and relieving witness and Mr. Hennessy of their liability to the bank. Witness made his report, with the result

that Mr. Veep was thrown off the business entirely, and that witness suffered to the extent of £2,500, plus 8 per cent. interest, being his share of the liability to the bank as guarantor. Witness found on enquiry at the Deeds Office that two transfers relating to the front property occupied by the company had gone through, one from Honikman and Hand to Stableford for £4,500, and the other from Stableford to the Company for £6,500, showing a difference of £2,000 in favour of Stableford. In April, 1903, witness heard about a lease, but was unable to obtain it from the managing director or secretary. In October, 1902, an extraordinary general meeting had been held, at which it was resolved to purchase the front property occupied by the company for £6,500. Stableford was in the chair, but he did not disclose to the meeting that he was going to purchase the property and resell it to the company. Witness proposed the resolutions; had he known of Stableford's interest in the transaction he should certainly not have proposed such a resolution, involving him, as it did, in loss. He was not aware at the time they decided to buy, that the broker's note was in existence. He was not aware until later of a letter dated 20th November, 1902, from Kidney, as secretary to the company, to Messrs. Reid and Nephew. There was no notice given of the letter to the Board of Directors. Up to April, 1903, witness had seen no documents of the company. In July, 1903, the company was placed under inspection of witness, Mr. Syfret, and, later on, of Mr. Laite. Kidney commenced as secretary of the company in October, 1902. Witness and Mr. Laite saw Kidney and asked him how he came to waive the option of the company and allow Stableford to buy the property and sell it to the company at a profit of £2,000. Kidney afterwards produced a press copy of a letter which he and Stableford had sent to Messrs. Reid and Nephew containing the waiver. Witness was unable to produce the press copy but could speak as to the general purport of the letter.

Mr. Upington objected to verbal evidence being led if the press copy could be produced.

Mr. Lambert Kidney was called and produced his press letter book. He said that he could not find a copy of the letter in his books.

His Lordship ruled that verbal evidence could be given as to the contents of the letter from Kidney to Reid and Nephew.

Mr. Upington entered a formal objection to the ruling.

Mr. J. E. P. Close (continuing his evidence) said that he saw a letter from Kidney formally abandoning the option. All efforts to find the original letter had been unsuccessful. The letter was signed

by Kidney and, he believed, by Stableford, the managing director. On the passing of the transfers in question, a second bond to Kidney for £250, now in dispute, was passed on the same date. The documents were dated 31st January, 1903. Coming to what was known as the back property, witness said that he was not aware in August, 1902, that Stableford had bought the back property from Hand for £2,500. On the 20th April, 1903, transfer of the back property was passed by Stableford to Stableford and Co. for £6,500. This purported to be in pursuance of a resolution of a director's meeting of the 17th March, 1903. Witness was not present at the meeting. There were present, he found from the minutes, Messrs. Stableford (in the chair), Pritchard, Druit (by proxy), and Kidney (secretary). In the course of their investigations in August, 1903, witness went and asked Kidney how property could have been bought by the managing director for £2,500 and sold by him to the company for £6,500. He asked Kidney what he had done with the money from the bond of £4,500 which had been passed in favour of the master. The differences of prices thus shown in favour of Stableford were: On the front property, £2,000; and on the back property, £4,000. On this property, bonds of £4,000 had been passed, including one of £1,500 in favour of W. L. Kidney. When they made their inquiries they found that the three bonds had been extinguished and their place was taken by the master's bond of £4,500. His position was that the company were entitled to buy the property at the same price as Stableford, the managing director, had bought it for. Kidney, in reply to witness, said that the difference of £2,000 had gone in repairs, improvements and expenses. Witness went in detail into the relations of Kidney with the company. A third bond of £1,500 was passed on the company's back property. There was an item of £700, of which Kidney could give no explanation whatever. Witness received no accounts from Kidney until about September, 1903. In Kidney's account they noticed that a bond of £750 had been credited. Kidney commenced to claim interest on the bond. Then, on the 29th February, he claimed payment of the capital, because the interest had not been paid. The first intimation that the liquidators had of any alleged cession to Cowling was contained in a letter of the 7th April, calling up the bond on account of Cowling.

Mr. R. W. Close: I suppose that Stableford abandoned the profits from these transactions?

Witness: The shares that he had, we knew, were valueless, so it was not worth fighting over. He had got a large number of shares at the celebrated meeting in May, 1903. I read a report in the

"Cape Times" the following day, and I wrote and asked whether the report was substantially correct. I was told by Stableford that it was.

Mr. R. W. Close: At that meeting 13,000 shares had been voted to Stableford as "gratitude shares" for his services to the company during the past four years?

Witness: Yes, although the company had only been registered two years. Witness went on to say that it was further resolved at the meeting that the pay to Stableford should be increased from £600 to £1,000, and that it should be retrospective for six months. Furthermore, a dividend of 100 per cent. was declared. The meeting was a most extraordinary one. The shareholders who were present did not represent one per cent. of the shares. Witness at that time represented English shareholders, and he received no notice of the meeting. A few months before witness had come into conflict with Stableford and the others. The whole of the resolutions were passed with the object of getting fresh capital; it was all part and parcel of a big scheme to get a lot of money into the company. Witness had found among the papers a letter by Kidney, showing that the company was in a very bad condition. Within six weeks of the meeting, the company was placed under inspection. At that time it was not able to meet its bills. Stableford and Kidney resorted to various devices to raise money about that time.

Mr. R. W. Close: Kidney and Stableford were working together to the detriment of the company. I propose to put in letters that passed between Kidney and Stableford at that time.

Mr. Upington took exception to the introduction of matters that did not concern his client. Mr. Cowling was absolutely unconnected in every way with these property transactions.

Maasdorp, J., said that, of course, where a question of fraud was raised, the matter was one that must be left largely to the discretion of counsel.

Mr. R. W. Close: My object was to show that these two worked hand in hand.

Witness gave evidence as to finding a certain letter dated the 11th June, 1903, addressed by Kidney to Stableford.

Cross-examined by Mr. Upington: There was a considerable amount of trouble towards the end of Mr. Hennessy's secretaryship of the company. Witness had no knowledge of how the books had been kept. Stableford had complained of the way in which the books were kept.

Mr. Upington: You took Mr. Hennessy's part very warmly?

Witness: Because I thought he had been very unjustly dealt with by Mr. Stableford.

Further cross-examined: There was a meeting of the Board on the 18th of

July, 1902, at which recriminations were indulged in. Hennessy was dismissed from the secretaryship by Stableford, under his extraordinary powers as managing director. Witness criticised Stableford severely in regard to an interview that the latter had had with Mr. Carmichael, Mr. Hennessy's clerk, in regard to the accounts. Stableford, it was found, had had a shorthand writer, taking notes. The shorthand writer was concealed, and Carmichael was not made aware that notes were being taken of the interview. Witness told Stableford that he thought it was — cowardly. He also said that such a thing would not be done with a convict. The purchase of the premises was entered into while Kidney was in England. The lease of the premises had been entered into before Kidney became secretary of the company. Kidney was appointed secretary by a letter of July, 1902, the appointment to date from November, 1902. At the time of the purchase of the premises, witness did not inquire who was the vendor, because he had no suspicions at that time.

Mr. Upington: How do you say that Kidney was a party to any fraud in connection with the purchase of the property by the company from Stableford?

Witness: He was an accessory after the fact, and as such he is as guilty as the other. He signed a solemn waiver of the option of purchase in favour of the company for £4,500.

In further cross-examination, the witness said he took up the position that the three bonds should have been the company's, and that whatever Kidney put into repairs should have been a charge against the company. Kidney received £4,500 from the Master, and with that he paid off the three bonds. He got a bond for £1,500 on this property, and did not spend more than £500. His account of the disbursements included the item of £700, which witness regarded as fraudulent. Witness took exception to a sum of £60, included in an account for £460, in respect of repairs, this £60 having been paid by cheque by the company the same day. Witness contended that the bond for £750 was obtained by fraud. He accused Kidney in September, 1903, in the presence of Mr. Syfret of misappropriating this amount. Kidney wrote on the 7th January stating that he had pledged the bond, but witness took no steps to find out who it was pledged to. In reply to a demand for interest, by the cessionary, the company's attorneys wrote stating that the interest had been set off in account with Mr. Kidney before notice of cession was given. Witness did not think it necessary to take proceedings to have the bond set aside before Stableford left the country. It did not occur to him that the bond might be transferred to an innocent third party.

Mr. Upington asked witness whether it was not usual for brokers, who might be secretaries for one or more companies, to charge a commission on any loans that they might raise for those companies?

Witness: I do not know whether it is usual or not usual but I consider that it is an improper thing to do.

Mr. Upington: Do you know from your business relations that it is a common practice?

Witness: Not unless it is specially authorised.

Further cross-examined: He had in his account disallowed Mr. Kidney's charge for commission. Mr. Kidney had charged 2½ per cent.

Mr. Upington: In those halcyon days of 1902 this company was supposed to be a very good thing?

Witness: Yes; we had every hope, as I said in my examination-in-chief, that it would be a very good thing, but they had overbought stock and plant. I thought there was a very promising business.

I see that you actually were a director of the company at the time when they recommended a dividend of 50 per cent. on the ordinary shares?—Yes.

So you must have thought then that it was a very good thing?—What date was that?

This is the balance-sheet (produced) as at March 31, 1902, which was passed and approved, and so forth, at a meeting in July?—What was the capital of the company then?

I don't know what the capital was.—You see the capital was increased on that date by £14,000.

Meanwhile the business was increasing?—It was increasing.

Answering further questions, witness said he was present at the meeting where the increase of the capital was authorised. He had every justification then for supporting that. They had had Mr. Syfret's balance-sheet, and the company was well satisfied with the position.

In the course of further cross-examination,

Mr. Upington asked witness if he knew where Stableford was.

Witness: I may tell you that we have made every inquiry to find him.

Did you make every effort to get his evidence taken on commission?—We did not know he was leaving.

Do you mean to infer that we did know?

No, no?—Then why do you repeat that question?

You didn't know he was leaving, you say?—I did not know he was leaving; I have said that twice.

He has left?—I do not know whether he has left. I am told he has left. I am not his keeper.

Now, have you, in the course of your

investigations, come across any evidence of collusion between these two men, prior to the date of signing that letter of November 20?—There was a certain broker's note, but it is after that date.

What was there to arouse Kidney's suspicions at the time he was asked to sign that letter?—That I cannot answer.

Why?—It is clear to anybody else that it is useless for me to attempt to tell you.

But I want to see as well?—If you don't see, it is no use my telling you.

Cross-examination continued: Kidney did not explain to him how he came to write to Reid and Nephew, waiving the option on the back property. He expressed his regrets. Kidney seemed to be very penitent, and he saw that the game was up. Witness admitted that he was not very charitable when he made such discoveries as this, but he denied that he was vindictive.

Mr. Upington: Very likely you are misinterpreting what the man's real feelings were?

Witness: No; his regret was unmistakable.

His regret at what?—At what we had shown him up as having done.

Witness was also cross-examined in regard to other features of the accounts.

Re-examined: The liquidators had given credit for any amounts beneficially expended for the company. Kidney had actually charged 2½ per cent for commission on the advance of £750 that he said he had given to the company.

Postea (July 12th).

Mr. Close intimated that the search for certain letters at the offices of Messrs. Reid and Nephew had been successful. The letter containing the waiver of the option in favour of the company in November, 1902, had been found.

Further evidence was called for the defendants.

Richard Hugh Pritchard, manufacturers' agent, Cape Town, said that he joined the Board of Stableford and Co., Limited, in October, 1902. He remembered attending a special meeting of shareholders in October, 1902, at which a resolution was passed authorising the purchase of the front property. Mr. Stableford, who was in the chair, made some statement, but witness could not remember exactly what it was. He did not remember Stableford having said that he was taking over an option in favour of the company, and that he was proposing to sell to the limited company. Subsequently a meeting was held at Mr. J. E. P. Close's office, at which the resolution was formally confirmed. Witness presided on that occasion. He signed certain documents brought to him by Kidney, including a declaration of purchase and a power of attorney to pass the bond for £750 in favour of Kidney, now in suit. Witness raised some objection at the time,

because he was not familiar with the position and affairs of the company. Kidney pressed him to sign, and told him that it was his duty as a director to sign. Eventually witness, rather than cause any friction, consented to sign. He desired to save any further trouble to Mr. Kidney. Kidney told him that the money that he (Kidney) had advanced to the company was his own risk. Witness wished to explain to the Court that he was pressed to become a director by William Stableford. He knew nothing as to the duties of a director, but Stableford asked him to represent Keep Bros., of Birmingham, who were the buying agents of the company, and who were personally known to witness. He was afraid that he did not go into the financial part of the company as he ought to have done. Witness had every faith in Mr. Kidney at that time. He objected to Stableford appointing Kidney as secretary, and said that he thought the appointment should be made by the Board, but Stableford pooh-poohed the objection. Witness went on to speak of the resolutions adopted at the meeting on the 17th March, 1903, in regard to the purchase of the back property. When the meeting resolved to purchase the property witness was not aware that Stableford had already secured it for £2,500. Stableford said that he had bought a paper called "The Veld," and that he was developing the business. He made a statement at the meeting that it was absolutely necessary to purchase the property, otherwise some other party who was after the adjoining premises might get that property also.

Mr. Upington (interposing) objected to evidence being led to vary the minutes of a meeting. Those minutes said that the purchase by Stableford and re-sale to the company was disclosed. The resolution read that a certain property recently acquired and re-built by William Stableford should be purchased for £6,500.

Maasdorp, J., said that counsel might submit that the minutes were better evidence, but he did not see how he could object to parole-evidence being given as to the proceedings at the meeting. He would, however, make a note of the objection.

Witness (continuing his evidence) said that the information in the minutes as to the purchase by Stableford for £2,500 was new to him. He remembered no disclosure having been made by Stableford as to his having himself purchased the property in the first instance. Witness saw two cases of valuable machinery lying outside in the lane, and made a complaint to Stableford that the machinery was suffering damage. He threatened to employ coolies on his own account unless the machinery were put under cover. Later in the day he found that steps were being taken to protect

the machinery. Witness signed the declaration of the purchaser for the back property. It was not until May, 1903, that witness heard the true history of the property transactions. Mr. Close met him in the street, and told him a few things which opened his eyes considerably. He saw Stableford frequently, but he had lost all faith in the man, because he had found him out to be a deliberate liar. He once saw Kidney, who told him that Stableford was not treating him fairly, and that his wife (Kidney's) had said that he would rue the day when he knew Stableford.

Cross-examined by Mr. Upington: Stableford said that he could have made something by the sale of the property if he had been selling to another party, but that he would make nothing, as he was selling to the company. When witness signed the declaration of purchaser, he did not notice that the seller was Wm. Stableford. He had seen that since, to his sorrow. He was not familiar with such documents. He took it that Stableford had been acting as intermediary in the purchase on behalf of the company. He had not seen a declaration of purchaser before he signed the one in question. It might be called stupidity, but it was a fact.

Mr. Upington: I don't call it stupid, but you are a business man, you know?

Witness: I call myself stupid now in the light of later facts. I may say that I had not the slightest suspicion of the character of the man.

I will put it to you that the minute of the meeting of the 17th March, as it appears in the book, is accurate?—I don't think so.

Will you swear that?—I am not going to swear it. The matter is so old, and it has escaped my memory to some extent. Since that time, I have been to England, and have been all over South Africa twice.

Further cross-examined: He considered that £6,500 was a fair price for the property. Small properties were at that time fetching bigger prices.

Joseph Honikman, broker and estate agent, Cape Town, said that he passed the broker's note for the original lease of the front property. Wm. Stableford came to see him in answer to an advertisement, and the contract was made in favour of Stableford, acting on behalf of the company. On the 22nd August, 1902, communications took place between witness and Stableford, acting on behalf of the company, in regard to the exercise of the option on the front property. He passed a broker's note on the same date for the purchase by W. Stableford personally of the back property. Some delay took place, and he was subsequently informed that the transfer should go through in the name of Wm. Stableford. Witness spoke to certain negotiations which followed for the purpose of transferring the front property to Stableford

personally, an indemnity being given by the company. Transfer of the back property was given to Stableford on the 12th January, possession having been given to him some time in December to enable him to carry out certain alterations.

Cross-examined by Mr. Upington: Kidney said he was informed that the difficulty was that the document was in the company's name, instead of in Stableford's name. Stableford did not point out at that time that this was a mistake. Shortly after he exercised the option, Stableford said it was a mistake for the company's name to appear, instead of his own.

Re-examined: Witness did not hear of any personal right to the lease on the part of Stableford until after August 22, 1902. As to the giving of the lease, the transaction was distinctly between witness and the company.

By the Court: The sale of the back property was to Stableford himself.

Cecil Hand, broker, Cape Town, gave evidence substantially corroborating that of his partner, Honikman. Witness said that he held out for the price of £2,500, as he knew the company would have to buy the property. He did not regard Stableford as being in flourishing financial circumstances. The company had to waive its option of purchase before it was possible for transfer to be made to Stableford. Kidney was quite conversant with the state of affairs. Stableford offered witness £50 for the broker's note which the liquidators were looking for, or offered him that sum if he would put the note in a box in the bank, each of them to have a key. Witness showed him out of the office. Stableford once tried to snatch the broker's note out of witness's hand. Kidney tried to persuade witness to give up the note to Stableford.

Morris J. Hopper, attorney, deposed that Honikman put the matter of the transfer of the property in his hands. There were negotiations between witness and Kidney and Stableford. Witness gave Kidney to understand that he would not pass transfer unless he had an indemnity in respect of Messrs. Hand and Honikman from Stableford personally. Witness got a letter of indemnity.

Alfred J. Erxleben, builder, said that in December, 1902, he was in negotiation with Stableford in regard to the rebuilding of the back property, and an agreement (produced) was drawn up. The agreement was signed by Stableford as managing director, the contract being with the company. The witness specified the alterations, and said he received money on account of the work from Stableford and Kidney. Stableford paid in cash; Kidney gave him cheques. Altogether he received

£660. Witness paid £15 commission for getting the job.

Cross-examined by Mr. Upington: He did not know whether he had been paid the whole amount due under the contract. He did not think so; there were, he believed, some short payments. Witness did not know who drew up the contract. Stableford did not tell him the work was for the company; witness assumed it was. The only person whom he dealt with in connection with the contracts was Stableford. He began work in December, 1902.

Wm. James Laite, one of the liquidators of the company, said that he went with Mr. Close, and interviewed Mr. Kidney relative to the property transactions. Mr. Close questioned Kidney in reference to the cancellation of the broker's note, and eventually Kidney produced a letter, which was read by Mr. Close, and which stated that the company were prepared to waive their option. Undoubtedly there was in the letter information which would lead one to believe that the company had authorised the waiving of their right. Kidney understood that the thing was not altogether straight, and he was sorry for the position he was placed in. Witness was present at a subsequent interview between Mr. Close and Mr. Kidney at Mr. Syfret's office. There was some straight talk, and Mr. Close made use of some strong language in the matter. Kidney said that he had no idea that an interpretation of that kind would be put upon his conduct. Mr. Close rejoined that, in law, such conduct was called by a very harsh name. Kidney did not defend himself in any shape or form; he simply sat still and hung his head.

Cross-examined by Mr. Upington: After the statements that he had heard, his first impression was that Stableford was the sole delinquent. He would not say that Mr. Close was, figuratively speaking, seeking Stableford's blood. He certainly seemed surprised and indignant at the conduct of Stableford. At the first interview with Kidney, Mr. Close said to him: "Have you any idea where this thing leads you to?" Kidney said: "I did not, but I do now," or words to that effect. Kidney, at the interviews, took up the position that a wrong construction was being put on what he had done. Kidney seemed to be very much upset, and he took no measures to defend himself. Witness thought that if he had been attacked as Kidney was, he would have protected himself.

Further cross-examined: Kidney took up the position, in the presence of witness, that, with regard to the whole of the company's affairs, he had been misled by Stableford. At first witness thought that view was not improbable.

Re-examined: Before the first inter-

view he considered that Kidney was a tool, but afterwards he did not think so. Witness meant by "strong language" on the part of Mr. Close, strong accusations of dishonest conduct.

Gerald Orpen, acting as co-liquidator on behalf of Mr. Syfret, said that he had had conversations with Kidney, who asked in regard to the interest on his bond. He said he wanted the interest so as to enable him to pay the interest on a loan from a friend of his. This would be about January, 1904. Kidney repeated that the bond was genuine. Later on, Kidney told him that he had pledged the bond.

Cross-examined by Mr. Upington: Witness told Kidney that the reason why the liquidators would not pay the interest was on account of the property transactions.

Oliver Lumb, in the employ of Mr. J. E. P. Close, produced the company's cash-book, showing two payments of £35 and £60 to Erxleben, for making alterations to the back property. Erxleben was debited and not Wm. Stableford. They found a lot of invoices which had not been entered up from Erxleben for work done. These were entered up by the liquidators.

Cross-examined by Mr. Upington: Erxleben had a running account with the company at the time.

M. E. Frederick Oettle, clerk in the Master's Office, gave evidence as to applications having been made for loans by the company on the 10th January, 1903, for £4,000, and on the 17th March, 1903, for £4,500. The applications were signed by Kidney, as secretary of Wm. Stableford and Co., Ltd. The form of declaration in regard to the March application was filled up. It stated that the property had been re-built at a cost of £1,700.

John Edwin Paul Close (recalled) said that the letter (produced) of the 20th November, 1902, cancelling the option in favour of the company, coincided with his recollection of the letter that he saw at the office of Messrs. Reid and Nephew. He would not say that the letter produced was the one that he saw.

This concluded the evidence.

Mr. W. R. Close said that he proposed to call evidence showing that Kidney assented to the liquidation of the company, and that he was, therefore, estopped from ceding his rights as against the company.

Mr. Upington said that he must object to evidence being led upon a point which had not been raised in the pleadings. The point now taken apparently was that Kidney was estopped from ceding the bond upon the ground that prior to that he had consented to the voluntary liquidation of the company. That raised a very interesting question, which he was not prepared to go into at all, a question that had not been raised in pleadings.

Maasdorp, J., said that the evidence might be led, and he would make a note of the objection taken by counsel for the plaintiff.

Mr. J. E. P. Close (recalled) said that the company went into liquidation on the 16th September, 1903. Kidney was then secretary of the company, and he was a creditor and shareholder. The resolution to go into liquidation was signed by Kidney as secretary of the company.

This concluded the evidence, and counsel were heard in argument.

Mr. Upington, after reviewing the evidence in the case, submitted that no testimony had been adduced to show what Kidney had done to enable the company to call upon him to account to them for the profit made by Stableford in connection with the property transaction. After all, that was the bedrock and the gist of the case. He did not think the decision of these points would be assisted by any vague or general allegations of fraud, but they would have to be decided upon the facts, so far as they had been brought out before the Court, and bearing in mind that after all practically a criminal charge was brought against both Kidney and Stableford in connection with this matter. All the evidence went to show that when Kidney was in England, Stableford purchased two properties, and the attempt to prove that Kidney was aware of that transaction had absolutely failed. There was no evidence to connect Kidney, either by communication or otherwise with the properties until they came to somewhere in November. Counsel was simply concerned to show that the sale of the front property was concluded from Hand to Stableford, and Stableford to the company before Kidney took over his duties as secretary. It was recorded in the minutes of the 10th October that that purchase had been confirmed by a meeting of shareholders. Anyone approaching the case with an unbiased mind would see that it did not lie upon the secretary, who saw that a sale had been confirmed in due form of this property to the company, to be diligent and studious to go round ferretting out whether there was not something wrong about it. There was not a single word of evidence to show that Kidney ever saw the broker's note, that the contents of the note were ever explained to him, or that he was aware what the purchase price was—all three things absolutely necessary to be proved in order to establish in a charge of fraud against him. To go into vague generalities and conjectures was very unsafe in what was practically a criminal charge. There would have been force in the contention of the liquidators if they had shown, before the letter deciding to purchase the property was written, that Kidney had seen the broker's note, and was aware

of the option. Dealing with the back property, Mr. Upington contended that it was clear from the minutes of the meeting of March 17 that Stableford was disclosed as the seller of that property, and urged that there was nothing to prevent him from making a profit out of that transaction. The resolution spoke of the "premises recently acquired and rebuilt by William Stableford." He submitted that the minutes were the best evidence of what took place at the meeting, the recollections of Mr. Pritchard (one of the directors) notwithstanding. His learned friend, it was true, had pointed out in the course of the case that the minutes of the meeting had not, according to the record, been confirmed. That might be so, but if they looked through the minute-book they would find that in very few cases indeed was it recorded that the minutes had been confirmed. The fact that Kidney had furnished the details to the liquidators was sure evidence of his *bona-fides* in the matter. The company had retained both the properties, and their right was at most limited to the right of calling upon their officers as agents to account to them for profits improperly obtained. It was clear that there was no liability on the part of Kidney to the company, but, on the other hand, a liability of the company to him. Now, what profit did Kidney obtain from these property transactions? On the front property he received no profit whatever. On the back property there was a profit represented by 700 preferent shares. He (counsel) did not suppose those shares had much value to-day; the evidence, such as it was, showed that the shares were valueless. Mr. Upington went on to say that the account prepared by the liquidators, which showed an indebtedness by Kidney to the company to the amount of about £300, debited Kidney with the whole of the profit on both the property transactions. Kidney's account showed £1,900 indebtedness by the company to him. It was quite evident that they must have a debate of these accounts. There were also substantial sums for salary, debited against Kidney; counsel contended that that was an unfair course to adopt. He submitted that the onus rested upon the liquidators of showing fraud, and that the evidence, although it might raise a certain amount of suspicion with regard to one of the actors, did not associate Kidney with any fraud.

Mr. Close argued that the so-called cession was a ratification of the pledge, and was, in effect, therefore a pledge.

Maasdorp, J., said that if it were the case that the cession in April was good, the point was, unless something took place in the meantime to alter the position of the parties, what was the plaintiff entitled to under the cession?

Mr. Close said that the plaintiff's claim was based upon the allegations of fraud and on the accounts. Proceeding, counsel urged that it was in the mind of Stableford to deal with the two properties together for his own benefit. If it were shown that there was fraud on the part of Stableford, that Stableford was dealing with these properties as one in a fraudulent manner, and that he was assisted in that by Kidney, it was, he contended, immaterial whether Kidney was in that transaction from the beginning or not. He submitted that in the accounts Kidney had not really been debited with the profits made by Stableford on the property transactions. He contended that Kidney had abused his position of trust, and had lent himself to a fraudulent scheme, and that whatever consideration he might have given for the bond, that bond was fraudulently obtained, and the company was not liable on it. Whatever remedy the plaintiff had against Kidney himself was purely a matter between those two.

Mr. Upington was heard in reply.

Maasdorp, J.: In order to ascertain the facts upon which the defendants' plea is contended to be based, it is necessary to go into a number of transactions which preceded the execution of this bond. It would appear that the company entered into a lease of the property upon which this bond was subsequently passed on the 8th November, 1901, and that one of the clauses of the lease gives the company the option of purchasing this property within six months of the execution of the lease for £4,200; if that option is not exercised within six months, then for the following six months an option is given to the company to purchase the property at £4,500. It appears that at the time this lease was entered into the business of the company was mainly transacted through its manager, Mr. Stableford, and the company seems to have had so much confidence in him that the directors left the conduct of the business almost entirely in his hands. On the 22nd August, 1902, just before the twelve months had expired, it is stated by Mr. Honikman that Stableford exercised the option which the company was entitled to under the lease in favour of the company. He has positively said so, and his statement is uncontradicted, and I take it, notwithstanding some lapses of memory in minor respects, on the part of Mr. Honikman, as a matter of fact, on August 22, the option was exercised in favour of the company for the purchase of this property for £4,500 by Stableford. A meeting was held on 10th October, 1902, at which the purchase of this property from the owner was authorised. A question arose both before and after the meeting was held as to the declarations of purchaser and seller that were

to be executed. When that question arose Stableford informed the owners, Messrs. Honikman and Hand, that he really exercised the option in his own favour, and that he personally was entitled to the option and not the company, as appeared on the broker's note. Thereupon, having received certain communications from Stableford, the owners consented to make the necessary declarations for passing the transfer to Stableford. The transfer to Stableford took place on January 31, 1903, and upon the same day a transfer was also passed from Stableford to the company. Now, as far as Stableford himself is concerned, it is most clearly proved that the company was entitled to purchase this property for £4,500, and he, as a director, if he had done his duty, would have purchased the property for that sum for the company, but, in disregard of his duty, he alleged that such an option did not belong to the company, and he proceeded to dispose of the rights of the company under the broker's note by inducing the owners of the property to pass transfer to him. Now, there is not the slightest doubt that the whole of this, so far as Stableford is concerned, was a fraudulent transaction, a fraud by which he gained the sum of £2,500. It was not a case of a director purchasing a property in his own name and subsequently selling at a profit to his company, but it is a case in which the company were defrauded of a right which they themselves had of purchasing the property in the first instance. It is necessary now also to refer to the transaction in respect to what is called the back property before considering what connection Kidney had with these matters. It was quite clear in August, 1902, when the front property was purchased, that the company would also require the back property. It was then known to Stableford, and mentioned by him to Hand, who was the owner, that the company would certainly require that property, and they would be obliged to buy it. With that knowledge, and undoubtedly with the object of afterwards selling it to the company, Stableford on August 22, 1902, purchased this property which was transferred to him on January 12. On March 17 there was a meeting of the directors of the company, and it was then decided to purchase this property. The transfer to the company took place on April 20, 1903. Stableford purchased the property for £2,500, and he sold it to the company for £6,500. Here again he made a profit of £4,000. Now, this is a case which in the first instance the company itself were not entitled to buy this property. It is a case which falls under many of the authorities which have been cited of an agent whose duties it was to secure for his principal upon the best terms certain properties

required by his principal, and he himself, knowingly and without divulging the facts to his principal, makes a profit out of his principal. Mr. Pritchard said he rather looked upon Stableford as an intermediary. However, the main point on which this part of the case turns is this: Was the company aware that Stableford was making a profit? Mr. Pritchard tells us that Stableford told him positively that he was making nothing out of the transaction. On the only point on which he might have set himself right by declaring that he was the owner, and that he did make a profit, in which case the company would have considered their position, on that important point, he concealed the truth from the company. This transaction also was a transaction in fraud of the company, but, as far as Stableford is concerned, the whole of these transactions could have been set aside by the company, or the company could have demanded from Stableford a return of all such profits as he made at the expense of the company. The question arises: What connection had Kidney with these transactions? It seems that when Stableford made the statement that the option with respect to the first property belonged to him, and that he had exercised it in his own favour, and that he himself was entitled to receive transfer of the property as purchaser, that statement was questioned by the sellers, and the sellers intimated that as far as they were concerned they had been dealing with the company and not with Stableford, and they refused, in view of the option which they had given to the company, to pass transfer to Stableford, unless the company intimated to them that they no longer availed themselves of their right under the broker's note. It was necessary, therefore, to satisfy the sellers that the company had renounced their benefits under the broker's note, and to do so it was necessary to obtain a document which, under ordinary circumstances, would have to be signed by a director and by the secretary. Without it, it would not be in proper form. It became necessary, therefore, to obtain the assistance of Kidney to give the necessary assurance to the sellers. Now, Kidney was perfectly well aware what the question was which was raised, that there was a dispute between the sellers and Stableford, that the sellers insisted that there was a certain document under which the company had certain rights, and they intimated to Kidney that they had a document in their possession, and that it was available for his inspection. Under these circumstances, Kidney and Stableford wrote this letter to Reid and Nephew, who are the solicitors for the sellers.

Cape Town, November 20, 1902. Gentlemen,—Transfer, Honikman to Stable-

ford. With reference to the letter addressed to you on 13th inst., and signed by Mr. William Stableford, regarding the purchase of property known as 57, Strand-street, Cape Town, we beg to state that this letter represents the correct facts. This property was bought in the first place by Mr. Stableford for his own account and benefit, and the company has now decided to purchase the property from Mr. Stableford, notwithstanding the wording of the broker's note, which was signed some twelve months ago. We hereby indemnify Messrs. Honikman and Hand from all possible consequences of transferring that property to Mr. Wm. Stableford, and admit that we have a full knowledge of the whole of the facts and circumstances surrounding the case. Please, therefore, arrange the necessary papers required for the transfer as instructed by Mr. Stableford in his letter above referred to. Yours faithfully, W. L. Kidney, secretary, Wm. Stableford and Co., Ltd." (with seal of the company). Here are most positive statements made by Kidney in conflict with the truth. Now, it has been contended on behalf of the plaintiff in this case that that letter was innocently written by Kidney, and does not implicate him in fraud. We have clear evidence that where statements are made recklessly and wrongly when the means of arriving at the truth are available, such statements are proof of gross neglect, and may even be proof of fraud. Now, the statements here made are that Kidney is in full possession of all the facts of the case. If that is a false statement it is a fraudulent statement, and if he was in full possession of all the facts of the case, then he must have known without any doubt that the company had the right to purchase this property for £4,500, and that, in writing this letter, he was sacrificing the property of the company, and the transaction then entered into was, under all the circumstances of the case, a fraudulent representation to the sellers by means of which he was enabled to bring about a sale to the company, a result of which was the defrauding of the company of the sum of £2,000. We have the clearest evidence that Kidney had frequent interviews with the parties to the negotiations that took place during November, and during the negotiations it was made quite clear to him what position the sellers took up, and, in spite of that, he took upon himself to state that there was a mistake, and without his instrumentality this transaction could not have gone through. Before I refer to the bond, I would refer to Kidney's connection with the other property. It seems that at the time when Stableford purchased the other property he was not in a position to pay the purchase price, and it was necessary to enter into more than one bond, but one of these bonds was made in favour of Kidney, in

which it appears that Kidney did pay certain expenses, and did make certain advances in respect of which he got this bond of £1,500. But there is an item which is to the following effect: "Interest agreed to be given me in this property against the sale of the property, and repayment of this bond, provided that in the event of such repayment at least £700 be put into preference shares." This item is put at £700; consequently, Kidney is credited in this bond with £700, not the company, and it went into his pocket, and he is to receive that £700 at the time of the re-sale of the property, and that re-sale was certainly contemplated by Stableford to be to the company. Upon reference to the evidence of Mr. Pritchard, we find that he said that Kidney told him that it was his duty to sign as a director. I refer to this evidence to show the interest that Kidney took in both these transactions in order to get them through, and how he was interested in putting the company in funds for the purpose of getting these transactions through. One effect of these transactions going through would be that Kidney would be the gainer by £700 either in cash or in shares. Then on the 31st January steps were taken to pass transfer of what was called the front property to the company. It then appeared that the company required some assistance to get the transactions through, and they obtained assistance from others, but also from Kidney. Kidney came forward to facilitate matters for the company. The result of his assistance was this, that a certain property would be transferred to the company, and the company would pay for it a certain amount of money. Now, as I have said before, the sum that the company was going to pay was the result of a fraudulent transaction on the part of Stableford. Stableford was to obtain from his fraud the sum of £6,500. Kidney comes forward, and, as appears on the face of the bond, enables the company to put in the possession of Stableford the sum of £750. He himself would be fully secured for the repayment of the money, and, on the other hand, this money would go into the pocket of Stableford. Now, when one traces the connection of Kidney with Stableford in all these transactions and the representations he made to the sellers, Honikman and Hand, and to Pritchard (the director), it appears to me that he had full knowledge of all the transactions that had been entered into by Stableford, and with the objects with which those transactions had been entered into. Consequently the bond amounts in effect to this, that by means of it the company was enabled to have funds put into its possession by Kidney which might be appropriated by Stableford, and the company would in that respect be defrauded of that amount. Now, I cannot come to any other con-

clusion than that this bond is simply a part of all these unlawful transactions between Stableford and Kidney on the one part and the company on the other, by which certain advantages would accrue to Stableford and some indirect advantages would go to Kidney, among others the substantial advantage of £700. Then the question is whether any further light is thrown upon Kidney's actual knowledge of what was being done by Stableford by a letter which has been put in, which was written at the time when Mr. Close, having become suspicious of the position of the parties, and having discovered that the company had had a right at one time which seemed to have disappeared with respect to the purchase of this property, had begun to question Kidney. After the interview, Kidney writes to Stableford: "I had to see Mr. Close, and on the afternoon he said, 'Where is that lease; have you found it?' I smoothed him over as much as I could, and I left him." The question that was raised was as to the existence of this broker's note, upon which an option was given to the company. Kidney does not make any effort to put Mr. Close in possession of the facts; he "smooths him over" and leaves him. He signifies by this, I take it, that he left him in the dark as to the real state of the case. He must have known that the matter in respect of which he left him in the dark was a matter involving fraud. Upon the finding that this bond is merely a part of a number of transactions which were entered into for the purpose of defrauding the company of their money, it must necessarily follow that this bond must be declared invalid, and, if it is declared invalid upon that ground, it will be unnecessary to go further and inquire whether, as a matter of fact, there is any sum of money still due upon a question of account between the parties. Whether Kidney advanced the £700 or not does not matter, because the money was advanced for a fraudulent purpose, not to benefit the company, from which the bond was obtained, but to benefit Stableford, who was committing the fraud upon the company. Upon the second plea, the question was raised as to whether upon the accounts there was anything due by the company to Kidney. Voluminous accounts were gone into, but the results were not clear, and I think we may say that even in the mind of the accountant there is no certainty as to the general state of accounts between the company and Kidney. Supposing there is an indebtedness on the part of the company to Kidney in matters which are not involved in this fraud, that question will remain open as between the company and Kidney. If the indebtedness is such that it is also affected by the fraud, then, of course, Kidney cannot take advantage of it, but if it is found on the state of

accounts that there are sums due which have no reference to this particular transaction, then the question arises as to whether Kidney is entitled to recover the money from the company. Whether the company will then raise the general question as to their losses of £4,000 which was the consequence of Stableford's conduct, aided by Kidney, is another question which is not now to be decided. I have only now to deal with the indebtedness on the bond itself, and the validity of the bond, and upon all the circumstances of the case I come to the conclusion that the bond is invalid, and that consequently no benefit can be taken by Cowling under the said bond. Judgment must be given for the defendants, with costs.

After hearing counsel on the question of the costs in the provisional case, Maasdorp, J., said the order as to costs must include the costs incurred in the provisional case.

[Plaintiff's Attorneys: Van Zyl and Buissinné. Defendant's: Tredgold, McIntyre and Bisset.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

REVIEW.

REX V. CLOETE.

{ 1905.
June 23rd.

Hopley, J., said that a case had come before him for review, in which a man named Cloete was convicted by the A.R.M. of Calvinia of stock theft, and sentenced to six months' imprisonment. He considered that under all the circumstances of the case there was room for a bona-fide mistake on the part of the accused as to the ownership of the donkey he was alleged to have stolen. Since the conviction the man had been in gaol, but the Court would now order that the conviction be quashed, and would direct that a telegram be sent to Calvinia ordering the immediate liberation of the accused.

SUPREME COURT

[Before the Acting Chief Justice (the Hon. Sir JOHN BUCHANAN), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice HOPLEY.]

FREEMANTLE V. PAMA. } 1905.
 { June 26th.

Letting and hiring — Duties of hirer.

P. F. had hired certain wagons and oxen from P. and others, with the object of sub-letting them to the Military. He took them up to the front and handed them over to the Military on certain terms. He was afterwards succeeded by his brother F. F. as conductor. P. F. was duly paid for their use, and in turn settled with P. and others. After some months the wagons, &c., were discharged by the Military. F. F. and P. F. failed to return them to their owners, as they held that their responsibility for them ceased on their discharge. P. subsequently sued F. F. and P. F. in the Magistrate's Court for their return, or their value, and for damages for illegal detention. P. F. claimed in reconvention for certain moneys which he had disbursed on behalf of P. The Magistrate gave judgment for the defendants in convention and for P. F. in reconvention. On appeal, the E. D. Court reversed this judgment as to F. F. and gave judgment for P., but upheld the claim of P. F. Against that judgment F. F. now appealed.

Held, affirming the judgment of the E. D. Court, that F. F. was bound to return the wagons and oxen to P., or pay value.

This was an appeal from a judgment of the Eastern Districts Court brought by the plaintiff, in the original action, in the Magistrate's Court, Matatiele.

The matter arose out of a transaction in connection with a wagon, 16 oxen, and gear. The defendants were Percy Wm. Freemantle and Frederick Charles Free-

mantle. In February the second named defendant engaged transport wagons for service with the Forces in Natal, and he got one wagon, 16 oxen, and gear from the plaintiff, a native, named Maclean Pama. The wagon and so forth had been used by the military, and had not been returned to the plaintiff. He sued the two defendants in the Magistrate's Court, his claim being made up as follows: (1) For the return of a certain wagon and oxen, etc., or payment of the value thereof, £373 16s.; (2) for £200, being damages sustained by plaintiff through illegal detention of the said wagon, etc.; and (3) for a full and true account of all moneys received by defendants on account of plaintiff for the hire of the said wagon and oxen, and of all moneys disbursed by them on behalf of plaintiff, supported by proper vouchers, debate of such account, and payment of such sum of money as shall be found to be due by them to the plaintiff in respect of this account. Defendants, in their plea, denied that they were in any way responsible for the wagon after it had left the Government service. They also said that accounts were rendered to the said plaintiff of all moneys received and disbursed by them in respect of the said wagon monthly as up to the end of August, 1900, that from that date to the date of discharge on November 23, 1900, on account of disbursements, and stoppages, which will appear on reference to the account already referred to, and which defendants hereby tender, no money was due to the plaintiff, but on the other hand there remained a balance of £90 11s. 6d., due by the said plaintiff to the said defendants. Defendants pleaded not indebted, and prayed that plaintiff's claim may be dismissed, with costs, and in reconvention prayed that the plaintiff may be adjudged to pay them the sum of £90 11s. 6d., as and being the balance due to them as per account referred to, and costs of suit.

The Magistrate's judgment was as follows: In convention that the Court considers that the account rendered by defendant is satisfactory except as far as the item of £9 is concerned, which is claimed in reconvention, otherwise judgment is for the defendants. In reconvention judgment is entered for plaintiffs in reconvention (defendants in case) in the sum of £81 11s. 6d. Absolution from the instance being granted as regards the £9 above referred to. Each party to pay their own costs.

The plaintiff thereupon took the case on appeal to the Eastern Districts Court, where the appeal was allowed, with costs, against Fred Freemantle, the judgment of the Court below was reversed, judgment was given for plaintiff for the value of 16 oxen at £16 16s. each, with costs, as against Fred Freemantle, the judgment for £81 11s. 6d. in favour of Percy Freemantle to stand.

Against this judgment, the defendant, Fred Freemantle, now appealed.

Mr. Searle, K.C., with him Mr. P. S. T. Jones, was for the appellant; Mr. McGregor (with him Mr. D. Buchanan) was for the respondent.

Mr. Searle said it would appear from the evidence that the Freemantles acted together in the matter, and arranged for a number of wagons belonging to certain natives to go to the front. Counsel then proceeded to read the terms of the contract under which the wagon went off, and said it would appear that wagons started in February, 1900. Percy Freemantle went off first, and then Fred Freemantle followed. In September and October certain oxen were supplied by the Government because some of these particular oxen died. Where the military were responsible for an animal that died, it was the practice to give a certificate to the driver. When the wagon arrived in Dundee with 16 or 12 oxen, eight were taken out at Dundee and put into a wagon of McCanda's. That left either four or eight, and of the eight five came back to McCanda's kraal. The military paid compensation for three oxen, but whether the three were out of McCanda's team was not quite clear. The plaintiff saw the oxen, but took no action, and McCanda sold them to McKenzie. Freemantle got compensation for three of the oxen, and handed it to the plaintiff.

[Maasdoorp, J.: The nine oxen died. They were replaced at the expense of Pama, and no compensation was given?]

Mr. Searle: No, unless it be said that the three oxen were in respect of the nine. Continuing, counsel said it was clear from the contract if any oxen died or became inefficient the contractor replaced them at his own expense, and no compensation would be allowed, unless the oxen were disabled or died through the exigencies of the war. The E.D. Court did not hold the defendant responsible for bringing the oxen back to Pama, and it was clear there was nothing in the contract to that effect. It was a strong point in favour of the defendant that the driver, who was the person who knew everything that took place, and who was the important person in the case, was not called. The only ground upon which the E.D. Court found that Freemantle was liable was because these things happened before the discharge of the wagon, and the Court took up the position that the giving of the cattle to the military at Dundee took place before the discharge of the wagon, though it was very obscure, upon the evidence, when that actually happened. By the exercise of ordinary care, by remaining with the wagon, the driver and leader could have prevented the loss.

Mr. McGregor was not called upon.

Buchanan, A. J. C.: A native named Maclean Pama sued the defendant in the Magistrate's Court at Matatiele in an action to recover a wagon, 16 oxen, and gear, damages and an account. During the war, about February, 1900, the plaintiff and a number of other natives were approached by the defendant, Percy Freemantle, with the object of getting wagons for the use of the military in Natal. Altogether Percy Freemantle acquired 11 wagons from different natives, these were taken to Natal by the other defendant, Frederick Freemantle, and were by him contracted or hired to the Imperial Government. The contract entered into was between Freemantle and the Imperial Government, the natives not appearing at all. In the Magistrate's Court, some difference arose, as the contract was verbal, as to the exact terms of the contract between the natives and Freemantles, and the Magistrate held that the version or account given by Freemantle was the more correct. The Magistrate, in his reasons for judgment, says that the defendant's contention, which he upheld, was that his responsibility should cease when the wagons were discharged, and that he was to get £3 a month for each wagon while so engaged, and that the wagon was to be entered on behalf of the plaintiff under the military form of contract. The Magistrate says that plaintiff's evidence was not so reliable in many details, whereas that of defendant's was straightforward and supported by documents. Part of his version, it appears, was that the brother of defendant, Percy Freemantle, went out as the conductor of these wagons, and afterwards Fred Freemantle himself, and that these wagons were hired to the Imperial Government, and were used for some months. During this time the money paid for the hire of these wagons was sent to Percy Freemantle, who settled with the natives. In the action Percy Freemantle made out an account against the plaintiff, on which the Magistrate gives judgment for £81 against the plaintiff in the action on a claim in reconvention. But on the plaintiff's claim for the wagon and oxen, the Magistrate gave judgment for the defendant, holding that the plaintiff was not entitled to recover. The main issue on which the Magistrate found for the defendant was that Freemantle's responsibility ceased for these wagons and oxen as soon as the wagons and oxen were discharged, and he held that Freemantle could not be held responsible for any loss that plaintiff should sustain, and that defendant would not be responsible for losses which were not subject to compensation. The first part of this inference drawn by the Magistrate seems to be altogether untenable. Freemantle was the conductor of the wagons he took from the natives. He hired them with the Imperial Gov-

ernment, and he certainly was responsible to account to the owners of the wagons as long as they were hired by him to the Government. The Magistrate said that when the wagons were discharged, Freemantle was no longer liable. At this stage I am not prepared to differ from the Magistrate, but at the time of the discharge of the wagons, it was Freemantle's duty to account to the natives for their wagons and oxen, and he did not do so. As a fact, he did not seem to know where the wagons were. He received notice from Messrs. Raw and Co., on behalf of the Government, that the wagons were discharged. After he (Freemantle) returned to the Transkei, the native naturally inquired about his wagon, but he could get no information from Freemantle, and some considerable time—nearly two years—elapsed before anything was done, and the native was forced into bringing his action against defendant. The case having been decided against him in the Magistrate's Court, plaintiff appealed to the Eastern Districts Court, and the Eastern Districts Court did not interfere with the Magistrate's finding on the question of the account nor as regards the wagon itself. The wagon was left, it appears, at Maritzburg, and it seems now that notification was given by Raw and Co. that the wagon was there. Some two years after the wagon was left there, Raw and Co. offered £30 for it, but afterwards it became very much the worse for exposure, and Raw and Co. sold it, and they hold the proceeds, amounting to £16, at the disposal of the person who may be found to be entitled to the same. The Magistrate held that when the wagon was discharged, Freemantle was no longer answerable for it. The E.D. Court, I think, very properly held that it was Freemantle's duty as conductor to account for the whole of the property entrusted to him. He has not accounted for the wagon, and he gave no account of the 16 oxen. I do not say that Freemantle was absolutely responsible for these oxen, and had he been able to show, to the satisfaction of the Court, that through no fault of his, through no negligence on his part, and through no carelessness at all, these oxen had become absolutely lost to the plaintiff, it is quite possible that the plaintiff might have had no cause of action, but, instead of that, Freemantle gives no explanation of any kind, he knows nothing at all about them. The E.D. Court, upon this evidence, accepted the finding of the Magistrate, and took the view of the witnesses, which the Magistrate took, but, on Freemantle's own evidence, the Court found that Freemantle had not attempted to account for these oxen, and consequently, as agent of the plaintiff, he was liable for their value. There is no cross-appeal, and

thus the only question we have now to decide is whether the E.D. Court was correct in giving judgment for the plaintiff for these 16 oxen. Mr. Searle has argued the case very fully, and, during the course of his argument, has removed any doubt. I had in my mind as to the number of oxen to be accounted for. In my opinion, the judgment of the E.D. Court must be sustained, and the appeal will, therefore, be dismissed, with costs.

Maasdorp, J., and Hopley, J., concurred.

[Appellant's attorneys: Dold and Van Breda. Respondent's: Syfret, Godlonton, and Low.]

[Before the Acting Chief Justice (the Hon. Sir JOHN BUCHANAN) and the Hon. Mr. Justice HOPLEY.]

GENERAL MOTIONS.

ESTATE VORSTER V. VAN { 1905.
DEN HEEVER. { June 26th.

Mr. M. Bisset moved on behalf of applicant (defendant in an action brought by the respondent in respect of £222, amount of a legacy) for leave to sign judgment by reason of the plaintiff's default in filing her declaration. Mr. Searle, K.C. (for the respondent), opposed the application.

Affidavits having been read on both sides,

Mr. Searle urged that the delay was due to one John Hamilton Diepraem, an attorney of this Court, having left the Colony. There was no dispute as to the inheritance, but the defendant pleaded that there was a set-off.

Mr. Bisset contended that the plaintiff had been extremely negligent throughout, and she ought not now to be allowed to remove bar.

The Court granted an order for the removal of bar, and directed plaintiff to file her declaration on or before the 10th July, and to go to trial on 15th August, unless a further order of Court be made, respondent to pay costs of bar and removal of bar, and of this application.

BLACKER V. CARTER.

Nuisance—Interdict.

The close proximity of a blacksmith's shop to a family private residence is not per se a nuisance.

Mr. Searle, K.C., moved on behalf of W. R. Blacker, of Umtata, for an interdict restraining the respondent,

Frank Carter, from carrying on his business of a farrier and blacksmith in the immediate neighbourhood of the applicant's house by reason of the same being a nuisance. Mr. Gardiner appeared for the respondent.

The affidavit of the petitioner said that some years ago he acquired a property in a quiet residential neighbourhood, which he estimated now to be worth £1,700 to £2,000. Respondent formerly carried on his business in another part of the town, but on the change of ownership of that property he removed his business to within a few yards of petitioner's residence, on an erf belonging to Mr. C. C. Silberbauer. Petitioner said that the business of respondent was removed to its present position maliciously, in consequence of the petitioner having arranged to carry on a similar business where respondent had formerly traded, the latter having declined to pay an increased rent which had been demanded by the new owner. The petitioner further said that respondent, by his operations, rendered his house almost uninhabitable on account of the noise and smell from the shoeing. His wife's health was, as a consequence, suffering. Other supporting affidavits were also read.

The answering affidavit of the respondent denied that he was actuated by malice. He said that the premises he now occupied were not nearer dwelling-houses than those that he had previously occupied. He had done all he could to render the carrying on of his business harmless to his neighbours. Since the completion of his premises no nuisance had been caused; if any nuisance had been caused it was only while the building was incomplete, and was only temporary. He admitted that on one occasion he had worked beyond hours, but said that this was necessitated by imperative reasons. He denied that the notice in the "Territorial News" was malicious, or was intended to injure the applicant, and said he was obliged to insert the notice owing to an advertisement by the applicant that he (respondent) had left the place. F. T. Quinn, land agent, deposed that Blacker approached him to purchase the erven in question, and when told that Carter had obtained a lease asked whether the lease could not be cancelled, so as "to dust Carter down." Afterwards he said he would spend £300 to ruin Carter, and drive him out of the town. Dr. Robert Welsh, district surgeon, stated that he had visited Carter's place while the work was in operation, and had failed to notice any nuisance caused to the applicant. He did not consider that the smoke or the hammering could be hurtful, even to a person of delicate health. Other affidavits were read to the effect that there was no nuisance.

After hearing Mr. Searle in argument,

Buchanan, A.C.J., said that as to the law applicable to the case there was no doubt—the question had been fully thrashed out in *Holland v. Scott*, quoted by Mr. Searle, and were the facts established there would be no difficulty in giving an order in this case. But there was not one material allegation with the exception of the locality of the smithy's shop, which was not in dispute, and the fact of the locality of the shop was not a sufficient ground upon which to grant an order. The applicant had alleged certain facts, but those facts must be established. Had the allegations on affidavit been made by witnesses, so that the Court could see which set of witnesses were speaking the truth, there would be no difficulty in granting an order. Under the circumstances no order could be made, and the parties must go into the principal action. Costs of the application would abide the result.

Hopley, J., concurred.

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

GREEF AND WALTER V. { 1905.
DU PLESSIS. { June 27th.
" 28th.

Surety and co-principal debtor—
Consideration — Conditional
settlement.

P. had signed a promissory note for £700 as surety and co-principal debtor in favour of O. and K. Various payments reduced this debt owing to plaintiffs to £335. Subsequently O. paid off £150. One D., who owed £75 to O. and K., paid it by special agreement to W. on their behalf. A further note was given for the balance of £85. Plaintiffs now sued defendant for an outstanding balance alleged to be still due on one of the notes given to meet a portion of the original note.

P. pleaded want of consideration.

Held, that inasmuch as the plaintiffs had advanced the money to the principal debtors on the faith of P.'s suretyship, he had received full consideration.

Held further, that his obligation in respect of the original note had been fully discharged by the note for £85, inasmuch as by that note a provisional settlement was effected, notwithstanding that the respective rights of K. and W. as between themselves were left undetermined.

This was an action brought by Greeff and Walter, formerly agents and auctioneers, carrying on business at Laingsburg, against Johannes Petrus Francois du Plessis, farmer, Sutherland district, and formerly of Laingsburg, for judgment for £125, balance owing on a promissory note for £300, with interest at the rate of 8 per cent. and costs of suit.

From the pleadings, it appeared that the defendant had signed certain promissory notes as surety and co-principal debtor. There were three notes signed by the defendant on different dates. The first was for £700; this was subsequently renewed for an amount of £385 10s., and then a note for £300 was given on the 31st December, 1903.

Plaintiffs, in their declaration, said that the note for £300 was not redeemed at due date, and that they were the legal holders thereof for value. There had been paid by or on behalf of the defendant sums amounting to £174, but the balance of £125 was still due and owing by defendant to the plaintiffs. Notwithstanding demands made upon him, the defendant failed and neglected to pay the sum of £125, wherefore plaintiffs prayed for judgment with costs.

Defendant, in his plea, said that he signed a note for £700 for Odendal and Krige, but he intended to sign only as surety, and he was ignorant of the meaning and effect of the writing on the document, and had since ascertained that he had signed as surety and co-principal debtor. Thereafter, by renewals, the note was reduced to £300, and he said that he signed that note on the distinct agreement with the plaintiff Walter that he should receive the money from the debtors, Odendal and Krige. He received no consideration for signing the note. Thereafter

the debt was reduced to £85 10s. by the debtors. Defendant signed a note for the balance of £85 10s., which had become null and void on the 7th January, 1904. He admitted having refused to pay the amount of the note, and prayed that the claim should be dismissed, with costs.

Plaintiffs, in their replication, denied that there had been any reduction of the indebtedness of £300 beyond the amount stated in their declaration, and said that the note of £85 10s. was signed by the defendant as the difference between the note of £300 and the amount of the debt at that time, viz., £385 10s.

Mr. Close (with him Mr. P. S. T. Jones) was for the defendant; Mr. Gardiner (with him Mr. Bayly) was for the plaintiffs.

Mr. Close applied for leave to amend the plea, by altering the figure of £385 10s. to £345 10s.

Mr. Gardiner consented, and the amendment of the plea was allowed by the Court.

Mr. Gardiner submitted that it lay upon the defendant to open the case.

Mr. Close said that the defence was that no consideration was given to defendant for signing the notes, and that there was now no amount due thereon.

Maasdorp, J., said that the defendant should open his case.

Johannes Petrus Francois du Plessis (the defendant) said that in July, 1903, he signed a promissory note for £700. Krige and Odendal came to him and asked him to sign the note as surety, saying that they came from Greeff and Walter, that they (Krige and Odendal) wanted to buy sheep through Greeff and Walter, and that they wanted him to be surety and co-debtor. Witness had to sign as surety to get the money. He was told that the three together would be sureties, and that he need not be afraid. Witness afterwards called at the plaintiffs' office, and saw Mr. Walter and Mr. Krige. He signed the note at the point indicated by Mr. Walter. Witness did not stay long in the office, but just signed and returned to his butcher's shop. The document was not read out to him. Witness could not read English. It was not explained to him that he was signing as surety and co-principal debtor. In August he paid Greeff and Walter £122 10s. He bought from Odendal and Krige some sheep at some distance from Laingsburg, and the former asked him to pay Mr. Walter on his account. Levonson gave him a cheque for £200 for sheep he had bought from Odendal and Krige. On the 28th November witness signed a further note for £385 10s., which fell due on the 31st December. No explanation of the note was given to him. On the 31st December Odendal and Krige had left Laings-

burg. When the note became due, the local bank manager saw witness, and said that the Odendal and Krige's bill was due. Witness said that Odendal and Krige were not at home. He saw Mr. Walter, and told him that he could not do anything for the bill. Mr. Walter said that he must make a new bill until Odendal and Krige returned, when they could either pay it off or make some other arrangement. Witness signed a further note as debtor for £300. Krige returned on the afternoon of next day, and witness spoke to him about the note. He afterwards saw Odendal. They all went on the 7th January, 1904, to see Mr. Walter, to make the thing right, either to pay or to adopt some other plan. Prior to that time, he had been to see Mr. Walter in reference to a cheque to Krige for £250 from Mr. Van Reenen. Krige asked witness to endorse the cheque, as the manager of the bank wanted another signature. Witness and Mr. Walter went to the bank; Mr. Walter told Krige, who was at the bank, that he would wire to Van Reenen. Mr. Walter wanted Krige to pay off the £385 10s. On the 7th January Krige, Odendal, Walter, and witness met at Mr. Walter's office. Walter spoke about the balance due on the bill that witness had signed. He said that Dicker had paid £75. Odendal said that if Krige would pay £75, he (Odendal) would pay £175. Krige was to make his payment out of the proceeds of the Van Reenen cheque. Krige consented. Witness signed a further note for the balance of £85 10s. Odendal had arranged to obtain £150 from Groenewald. The Van Reenen cheque for £250 was taken over by Walter, who gave back to Krige a cheque for £175. As far as witness knew, there was nothing owing on the other bill. Witness signed the final bill as surety only; Krige also signed as surety. Witness told Mr. Walter that he did not know that he had been cheated into signing as co-principal debtor, and that he would only sign as surety on the final bill.

Mr. Close (answering the Court) said that Odendal's estate had been sequestrated. No demand had been made on defendant for the £85 10s.

Witness (continuing his evidence) said that after the interview on the 7th January they all went to Groenewald's shop. The note for £385 10s. was taken across by Mr. Walter, who said that the payment of £150 would finish the old bill, because a new bill had been made for £85 10s. Groenewald was Odendal's brother-in-law, and was anxious to release him. Odendal received the money from Groenewald, and paid it over to Walter, and, the note being handed to him, he (Odendal) tore it up. Witness did not receive the note for £300; he left that part of the country

in August, 1904, and went to district Sutherland, and the note for £300 escaped his notice. He saw Walter frequently up to August, but received no demand from him for the £100 note. He received letters in December, 1904, and January, 1905, from Mr. Van Niekerk. The first referred to an account for £61, but no specific mention was made of the promissory note until he received a letter on the 18th January, 1905. In February he received a summons from the plaintiffs for £300, no allowance being made bringing down the claim to £126. Witness came down to Cape Town, and went with his attorney to the attorney on the other side, who said that a mistake had been made, and they had made an allowance of £124. Witness also disputed items on the general account. This claim on the general account had been settled for £97.

Cross-examined by Mr. Gardiner: When he signed the note for £300 on the 31st December, 1903, he did not remember signing a note for £85 10s.

Hendrik J. Odendal said that in July, 1903, Krige and he were in partnership in regard to certain sheep speculations. They were in want of money, and saw Mr. Walter. The latter said the bank wanted another good name as surety, and told witness to go and see Mr. Plessis, and to ask him to act as surety. He did so, and Plessis said he would see about it. Mr. Walter drew up the note produced for £700 in his office shortly afterwards, and Krige subsequently came to the office with Plessis. The latter asked how he must sign the note, and Walter directed him, saying he was to sign as surety. Afterwards that note was reduced by Levoson's £200 and by Plessis paying £122 10s. Plessis bought sheep from witness, but had no share in their speculations. Witness paid a further £50. On the 23rd November the balance stood at £327, and on that date a new note was made out for £385, which comprised the £327 10s. and interest charges and commission to the amount of £57 10s. This note was made payable on the 31st December. In January, 1904, Plessis spoke to witness about the note, being anxious that it should be settled up. Witness went on the 7th January with Plessis and Krige to see Walter. Krige said his cheque had been stopped, and that Walter wanted him to pay £150 off the note. He (Krige) said he could not do it, as the money was not his. Walter said the cheque was in Krige's favour, and that he could pay. In the result, witness offered to pay his half if Krige paid his, and Krige thereupon agreed to pay £75. Walter agreed to take this off the cheque, and witness said he would pay £150. The promissory note for £85 10s. was drawn up on that occasion. This sum was arrived at after deducting from the previous note £75

paid by Krige, £150 to be paid by witness and £75 paid by a man named Dicker, in payment of the purchase price of certain sheep. This left £85 10s., for which a note was then drawn up. Witness said he would take the balance (the £85) on his own shoulders, and he signed the note for that amount, Krige and Plessis signing as sureties. Witness went to Groenewald's office with Walter and Plessis. Groenewald asked "if Odendal pays this £150, is he finished with this Bill (the bill for £385)?" and Walter replied, "Yes." Groenewald thereupon paid the money, and Walter gave the note to witness. He (witness) tore it up. On the 18th January witness got a demand for the £85. By that time he had become insolvent.

William George Dicker, formerly a general dealer at Laingsburg, said that in 1903 he bought 100 sheep from Odendal at £1 4s. 6d. each, and he made payments amounting to £75 to Walter on the sheep account of Odendal and Krige. Walter said that it was on account of the bill of £700. Witness tried before his insolvency to get a statement of his account from Walter, but he had not succeeded.

Johannes Stephanus Krige, partner in the sheep transaction; Jacobus Groenewald, of Laingsburg; and Hendrick Groenewald (brother of the previous witness), also gave evidence for the defence.

Mr. Close closed his case.

John Orlando Walter, formerly a member of the firm of Greeff and Walter, now dissolved, was then called by Mr. Gardiner. He said that Du Plessis was fully aware when he signed the bill for £700 that he was signing as surety and co-principal debtor. Witness translated the note to Du Plessis into Dutch. He received cheques from Odendal and others and then there was a balance owing of £385 10s. Defendant brought Krige and Odendal to his office on the 28th November, and he (defendant) signed a bill for £385 10s. That bill fell due on the 31st December. Witness received from Dicker a payment of £40 on the 14th December on account of sheep, but this had nothing at all to do with the bill in question. He was authorised to place the cheque to the credit of Odendal. The £40 payment should not go off against the bill. Mr. Pope, manager of the bank, took up the position that he would not renew the note unless a substantial portion were paid up. Witness paid a cheque of £385 10s. into the bank, and the bank gave him a credit for £300, £85 10s. thus being paid off the bill. Du Plessis had in the meantime given a bill for £300. As to Dicker's payment of £24, that amount was credited as part of the £174 allowed by plaintiffs as a credit against the bill of £300. On the 7th January Groenewald paid £150 on be-

half of Odendal. This was credited in the declaration. As to the Van Reenen cheque for £250, the cheque was deposited in the plaintiffs' account, with a stipulation that it should not be operated on pending inquiries to be made from Van Reenen as to whether this was his money. Krige, to whom the cheque was made payable, agreed to this. Van Reenen wrote saying that the money was his. Witness drew a cheque in favour of Krige for £175, it being understood that the balance of £75 should be held until Van Reenen came up. Krige declined to let them have £75 towards the discharge of the bill. Van Reenen subsequently came and demanded his money, and eventually it was arranged that he should lend witness the amount of £75. Witness gave Van Reenen a promissory note for £75, and he then went and told Du Plessis that he had had to give Van Reenen a promissory note. Witness had since paid the sum of £75 to Van Reenen.

Mr. Close cross-examined the witness at some length.

Re-examined: He said that on the note for £385 10s. there did not appear a sum of £75, as having been paid. There was only the £300 duly written off.

Herbert J. R. Pope, manager of the Standard Bank, Laingsburg, put in a statement as to the bills of Greeff and Walter, discounted by the Bank. He stated that he explained to Du Plessis, when he signed the £700 note, what his liability would be. The sum of £75 remaining in the bank from the Van Reenen cheque to Krige for £250 was treated as being in trust until Mr. Van Reenen came up and gave directions. Witness gave Mr. Van Reenen a guarantee that the money would be safe, and, although standing in the account of Greeff and Walter, would not be operated upon.

John Adrian van Reenen, of Laingsburg, said that at the beginning of 1904 he lived at Beaufort. Witness endorsed a cheque drawn by Moore in favour of Krige. The cheque was sent to Krige in order to buy stock, but Krige had no authority to use the money to pay off any promissory note. Witness advanced to Greeff and Walter the sum of £75, which had been left in the bank to their credit, as portion of the cheque. The money had been repaid to him. In regard to the sum of £175, which Krige drew, witness had since received stock from Krige to the value of £175.

Rufus G. R. MacLeod, Cape Town, plaintiffs' attorney, was also called.

Mr. Gardiner closed his case, and having been heard in argument, without calling on Mr. Close,

Maasdorp, J., said there seemed to be a good deal of conflict of evidence in this case, but I have come to the conclusion that there is not so much a conflict of evidence upon the

facts as a difference of opinion on the legal rights of the parties. The agreement to become surety and co-principal debtor endorsed upon this note of £700, was signed by the defendant, and he consequently is liable both as surety and co-principal debtor. His contention that he was liable as surety and nothing more is based upon a mistaken view of his responsibility. Then there is a further defence set up, that he received no consideration. That, again, is a *bona fide* view taken by the defendant in the case, but it is not a correct legal view. There is abundant consideration given, and the fact that, upon his becoming surety, the money was advanced by the plaintiffs to the principal debtors was sufficient consideration to the defendant in this case. These two defences are, therefore disposed of. The defendant further pleads that, whatever his indebtedness to the plaintiff, it has been fully settled. Here, again, I think, on the part of the defendant, he has taken a mistaken view of certain of the transactions which took place between the parties. The defence set up is that on the 7th January the parties to the transaction met and a full settlement of the indebtedness took place. Now, it would appear that upon the 31st December a sum of £385 was due by Du Pleasis, Krige, and Odendal as co-principal debtors, each *in solidum* upon the documents that passed between them. That indebtedness continued to exist on the 7th January. For the moment I will leave out of consideration the question upon what particular document that is due. On the 7th January the parties met to settle the indebtedness, and it is admitted that Odendal paid in cash £150 off that amount, and the defendant says that at that time they had already, through Dicker, paid £75 to the plaintiff, and that that was treated as a further set-off. As to that amount, a conflict of opinion again arose. There is no doubt that the money that was paid by Dicker to the plaintiffs was the money of Krige and Odendal; it was not Odendal's money alone. It was agreed that the £75, instead of being paid over to Krige and Odendal, should be paid to Walter. It, therefore, constituted a payment of the moneys of Krige and Odendal into the hands of Walter. I am quite satisfied, whether Walter knew it or not, that Dicker's instructions were that it was to go to pay Krige and Odendal's debts. That will dispose of that item, without charging either of the parties with having been guilty of fraud. The money was obtained by Walter, and it should have gone to the account of Krige and Odendal; the only joint account they had was upon this promissory note. A sum of £75 still remains due. Upon that particular point of the case there may be some difficulty in ascertaining what exactly the position of Krige and Walter may be, but

there is no difficulty in ascertaining what the result of their agreement was upon the promissory note. It appears that Krige held a cheque for a certain amount for a special purpose. Walter, who at one time, seemed to be under the impression that it was really Krige's own money, thought he should have it, but Krige was unwilling that it should go into Walter's hands. However, at that meeting, whatever the doubts in the parties' minds may be, Walter did insist that he ought to have a portion of that money, and he seemed to press Krige to get him to come over to his view, that he might let him have it, I won't say to defraud somebody, but really to find the position of the parties. Ultimately, this arrangement was come to: "This money is standing in my account now in the bank; let me have it, and if a question afterwards arises with Van Reenen the question will be set right." The conclusion I have come to is that it was to that extent a conditional settlement of the note for that amount, only leaving open the question between Krige and Walter and closing the liability of all the parties so far as the note is concerned. There was, therefore, a settlement made of £300, leaving £85 due, and a promissory note was given for that amount. There was consequently a full settlement of £385. It does not matter whether it is upon the £300 note or the £385 note, to make the legal position quite clear that the £300 note was simply given to tide over the period of absence, and that the bank properly insisted upon getting further securities because the note was overdue. The bank got the £300, and as far as Walter was concerned it was merely to tide over the period till Odendal and Krige returned, when the £385 would be fully settled irrespective of this additional security, and that is how the £300 note came into existence. Whatever view we take of this case, if it be once held that £150 and two amounts of £75 were appropriated to the payment of this debt to Walter on the 7th January, the question is disposed of. My finding, therefore, upon the plea of settlement is that a settlement was effected of this amount in the way contended for by the defendant in this case, and judgment will be entered for the defendant with costs.

On the application of Mr. Close, His Lordship allowed the defendant's expenses as a necessary witness.

[Plaintiff's Attorney: R. G. McLeod.
Defendant's: Wahl and Fuller.]

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

COOMER V. COOMER. { 1905.
June 28th.

This was an action brought by Charles James Coomer, of Cape Town, against his wife, Gertrude Coomer, of Woodstock, for restitution of conjugal rights, failing which a divorce and forfeiture of the benefits under the ante-nuptial contract, on the ground of defendant's malicious desertion. Mr. Sutton was for the plaintiff; defendant had been barred from pleading.

William Thomas Birch, clerk in charge of the Marriage Register, Colonial Office, gave formal evidence as to the registration of the marriage.

Charles James Coomer (the plaintiff) said he was married to the defendant on the 8th February, 1905, at St. Mary's Church, Woodstock. The marriage was by ante-nuptial contract, under which he agreed to settle a life policy upon defendant for £300. He had not ceded the policy. They lived happily together for a month. Then a row took place over some stout which his wife's mother had sent down to the house. Another row took place a fortnight afterwards. His wife then left, and had not since returned to him. She was now living with her parents, and had declared to witness that she would not return to him although he had asked her to do so. He had received a letter from his wife's attorneys, Messrs. W. E. Moore and Son, in which she alleged that he had treated her cruelly, and that she did not intend to return to him. Witness denied the charge of cruelty. Witness had returned to his wife her wedding presents.

Decree of restitution granted, defendant to return to the plaintiff on or before the 15th July, failing which to show cause on the 1st August in terms of the declaration.

Postea (August 1).

Rule made absolute.

COLONIAL GOVERNMENT V. SILVER.

Lunatic—Husband's liability for maintenance of wife in an asylum—Act 1 of 1897, sec. 69.

S. had engaged to pay at the rate of 4s. 6d. a day for the maintenance of his wife in a lunatic asylum, but subsequently finding himself unable

to pay that sum he wished to vary his contract by paying less.

Held, that as his contract was not for any definite time, he could not be sued thereon.

Held further, that by Sec. 69 of Act 1 of 1897, he was liable for the actual cost of his wife's maintenance.

This was an action brought by the Colonial Government for the recovery of the sum of £92 7s. 6d., being the maintenance chargeable by the Valkenberg Asylum for the keep of Lizzio Silver, the wife of the defendant.

The declaration set out that on May 31, 1901, the defendant undertook, in consideration of the admission of his wife to the asylum, to pay the sum of 4s. 6d. per diem. Defendant had made certain payments, and a balance was left of £92 7s. 6d., for which the Government now asked judgment. This sum covered the payments due from January 14, 1902, to February 28, 1903.

The defendant, in his plea, stated that he paid the sum of 4s. 6d. per diem until January 13, 1902, on which date he notified the Government that the contract was terminated, and offered to leave his wife in the asylum, if the Government would agree to accept her at the rate of 1s. per diem, which was all he could afford to pay. The Government declined to accept the offer, and kept his wife in the asylum thereafter without his consent, and at their own risk and expense.

Mr. Nightingale appeared for the Government; defendant appeared in person.

A clerk at the Valkenberg Asylum deposed as to an agreement (produced), dated May 30, the terms of which were that defendant undertook to pay 4s. 6d. per diem for the maintenance of his wife. The woman was admitted on May 21, 1901, and was there still, an order of Court having been made certifying her to be a lunatic. Payments were duly made in terms of the agreement up to November, 1901, and a sum of £10 was subsequently paid in January, 1902. The contract had never been varied, though defendant had requested that the sum should be reduced to 1s. per day. He was, however, informed that the rate must remain as originally fixed. Witness produced letters to this effect.

Mr. Nightingale submitted that it was for the defendant to prove that the agreement had been varied.

In cross-examination by the defendant, the witness said he had written a demand to the defendant, addressed to his P.O. box, on three occasions last year.

By Mr. Nightingale: The letters addressed to the P.O. box were not returned.

By the Court: Defendant wrote asking that the payment should be reduced to 1s. per diem. Witness was not aware that defendant asked that his wife should be discharged if that order was not accepted.

[Maasdorp, J.: Was her condition such that she could go out at the time defendant offered to pay the 1s.? Was she sane at that time?]

Witness: No; she was not sane.

Maasdorp, J., said the question was whether the defendant had put an end to his contract or not. If not the Government were entitled to recover the charges incurred in her maintenance.

The witness (recalled) said that the sum of 4s. 6d. per day would only just cover the cost of maintenance.

Cross-examined by defendant: There were patients in the asylum who were paying 1s. per day. Defendant agreed to find the woman's clothing as well as to pay 4s. 6d. a day.

Maasdorp, J., said the Government could not sue upon the contract. The declaration would have to be amended so as to make the claim one for expenses incurred.

On the application of Mr. Nightingale, leave was given to amend the declaration accordingly.

Maasdorp, J., told defendant that he was liable for his wife's maintenance.

Defendant stated, on oath, that at the time he agreed to pay 4s. 6d. he was in prosperous circumstances, having two restaurants. He had no means at present. He offered, of his own free will, to pay the 4s. 6d. per day at the time his wife was taken to the asylum, and he had kept up the payments for as long as he was able. He had to maintain a child who was being educated in England. He was not in a position to pay more than 1s. per day.

Cross-examined by Mr. Nightingale: He had owned large properties in Cape Town, but at present had no means. He had been convicted in respect of the keeping of a brothel, from which he had received rents. He was not at present interested in any property in Cape Town. He was a partner in the Caledon-street baths, from which he received about £10 a month. He did not own property in Bloemfontein or Johannesburg.

Maasdorp, J., said that the plaintiff sued upon a contract entered into on the 31st May, 1901, whereby the defendant undertook to contribute towards the maintenance of his wife the sum of 4s. 6d. per day. In his opinion, it was quite within the power of the defendant to put an end to this contract, when he was no longer desirous of abiding by it, because the period during which the agreement should continue was not fixed.

But notwithstanding that the obligation under the contract ceased upon the defendant giving notice to terminate it, it appeared that under section 69 of Act 1 of 1897, it was provided that: "When any person shall be detained under the provisions of this Act in any Asylum, the maintenance of such person shall be defrayed out of the Colonial revenues, provided, always, that the sum so paid may be recovered from any person liable by law to contribute to the maintenance of such detained person." Now, in law there was an obligation upon the defendant to contribute towards the maintenance of his wife. The expenses of her maintenance at the asylum had been defrayed out of the Colonial revenues, and the clerk had stated in his evidence that the sum so defrayed by the Government amounted to not less than 4s. 6d. per day. The Government was, therefore, entitled now to recover this money from the husband of the lunatic. The husband said that he was not in a position to pay that amount, but that question did not arise for decision now. The money having been expended, and the defendant being liable, the Government had the right to sue him for the sums disbursed by them. The question of the defendant's ability to satisfy the judgment might arise at a later stage, if proceedings were further pressed against him, but at present he could only say that the Government was entitled to recover from the defendant the sum claimed in the declaration, which was at the rate of 4s. 6d. per day from the 14th January, 1902, to the 28th February, 1903. It seemed that subsequently to the last mentioned date, the Government seeing a difficulty in recovering this amount from the defendant, ceased for the time being to make the charges against him, and the question to be decided now had no reference to the expenses incurred after February, 1903. In his opinion, the Government was entitled to recover the amounts during the period stated in the declaration. Judgment must, therefore, be given for the plaintiff, with costs, upon the understanding that an amendment was made in the declaration to meet the 69th section of the Act.

Addressing the defendant, His Lordship remarked: You must make some effort to pay this.

HERRON V. TORQUE ELECTRICAL ENGINEERING COMPANY AND OTHERS.

Mr. Gardiner moved for an order directing the manager of the Standard Bank at Cape Town to produce copies of books, accounts, vouchers, etc., relative to accounts kept by the Torque Company, Herron and Neale, Herron, Limited. Counsel mentioned that the matter, in a somewhat different form,

had been before his lordship in Chambers, when no order was made.

Maasdorp, J., said that the difficulty he had when the matter originally came before him was that inasmuch as it was sought to go into the accounts of certain people at the bank, those people should have notice given them of the application, so that they should have an opportunity of stating to the Court any reasons they might have for opposing this examination of their accounts.

Mr. Gardiner said that the application in Chambers was made on behalf of the plaintiff in the action. He (Mr. Gardiner) now applied on behalf of one of the defendants, the trustee in the insolvent estate of the Torque Electrical Engineering Company.

Maasdorp, J., directed that notice of the application be served on Herron's attorneys, the application to be renewed to-morrow (Thursday).

Postea (June 29).

Sir H. Juta, K.C. (with him Mr. Gardiner), moved upon notice to Herron, for an order calling on the Standard Bank to produce books, accounts, vouchers, slips, and other documents in the possession of the bank relating to the accounts of the plaintiff, Neil Herron, Ltd., and the Torque Company.

Mr. Alexander (for the plaintiff in the action) said that he appeared to submit to such an order as the Court might be pleased to make.

His Lordship asked counsel for the applicant whether copies of the documents would be sufficient for the purposes of the trial.

Sir H. Juta acquiesced.

Order granted, calling upon the bank to produce copies of the accounts of Neil Herron, Limited, Herron (the plaintiff), and the Torque Company, with all necessary vouchers, the accounts to extend from the 1st September to the 10th January, 1905.

PALMER V. CAPE COLD STORAGE AND SUPPLY COMPANY.

This was an action brought by Charles Palmer, cartage contractor, of Observatory-road, against the Cape Cold Storage and Supply Company, for value of a horse, damages, and costs. Mr. Alexander was for the plaintiff; Mr. McGregor was for the defendant company. The matter narrowed itself down to a question of costs.

Mr. Alexander said that the plaintiff had already obtained judgment by default, but since then the defendant company had obtained leave to re-open the case.

Mr. McGregor submitted that the matter should now be gone into *de novo*, and that the plaintiff should prove his case.

Maasdorp, J., said that the Court at present had nothing before it, and the plaintiff must open his case.

Mr. Alexander said that the plaintiff brought an action for a sum of £50—£40, value of a horse illegally detained by the defendants, and £10 as damages, together with costs. Subsequent to the filing of the declaration the horse in question was delivered up by the company to the plaintiff on the 3rd February, and the only question that really arose now was a question of costs. The company did not tender, with the delivery of the horse, the costs. The company took up the position that the plaintiff did not give them a clear proof of ownership. Plaintiff had now got the horse, and he did not press the claim for damages, because certain amounts that had already been paid on this agreement (£9 10s.) by Robert Jenkins to whom plaintiff sold the horse on a hire purchase agreement, were sufficient to satisfy his claim. The horse, a dark bay mare, was sold to Jenkins under a hire purchase agreement, a condition of which was that the sale was not to take effect, and property in the said horse was not to pass until the last instalment had been paid. Jenkins paid a deposit of £5, and three other instalments of £1 10s. each, making £9 10s. in all. Jenkins fell into arrear with his payments, and witness allowed an extension of time subject to the horse being produced for his inspection each week. Subsequently it was discovered that the horse had been sold to the company by Jenkins for £23.

Charles Palmer (the plaintiff) gave evidence as to selling the mare to Robert Jenkins under a hire purchase agreement. On the 10th January he saw Mr. Crothers, a traveller in the company's employ, in the street driving the horse. Witness told him that the horse was his, and that he had let Jenkins have it under a hire purchase agreement. Crothers seemed to treat the matter as a joke. Witness afterwards produced the agreement in the presence of Mr. Mason, sub-manager of the defendant company, who said that it was not worth the paper it was written on, as it was not stamped. Witness replied that he did not know anything as to that, as he was not a lawyer. Witness produced the agreement again on the following day, but Mr. Mason said that the company could not recognise it. Witness subsequently went to Wynberg, a question having arisen about the defendants prosecuting Jenkins. Witness afterwards went to Jenkins's house on the Walmer Estate, and made inquiries. He then went to the Cold Storage Company and warned them that Jenkins was either going to Buenos Ayres on the Friday or Australia on Saturday. Witness had now been offered £35 for the horse.

Edward Isaac Sydney, plaintiff's attorney, and Wm. M. Needham, until recently clerk in the employ of W. B. Shaw, agent, also gave evidence in support of the plaintiff's case.

Harry Mason, assistant manager of defendant company, said that Jenkins brought the horse to him, and produced a note from Mr. Reece, the branch manager at Wynberg, for £23. He made inquiries from Jenkins as to how long he had had the horse, and why he was selling it. Witness had to get a cheque from the secretary and one of the directors. Jenkins called again, and witness paid over to him the £23 by cheque. Witness spoke as to an interview that he had with Palmer, who subsequently produced the agreement. The agreement at that time bore the signatures of Palmer and Jenkins, but no signatures of witnesses.

Plaintiff (in answer to the Court) said that the agreement bore the witnesses' signatures when he produced it for Mr. Mason's inspection.

Witness (Mr. Mason) went on to say that he asked Palmer when he called on the Friday to see the general manager (Mr. Elliott) or the secretary of the company. He did not see the plaintiff again until yesterday (Tuesday). They communicated with the C.I.D., who told them to retain the horse.

Cross-examined by Mr. Gardiner: He considered that £23 was a fair price for the horse for the purpose for which they wanted it. At the time of the purchase he would not have given £20 for the animal. The value to-day would be about £25 to £27. He thought that Palmer "had" Jenkins when he sold the horse to him for £40.

James Reece, manager of the company's branch at Wynberg, said that Jenkins, in the first instance, offered to sell the horse to him at Wynberg. A day or two afterwards he bought the animal for £23. Jenkins did not appear to be very anxious to sell.

Cross-examined: Witness made inquiries from one Welsted before he bought the mare, but the latter did not tell him anything as to an agreement between Palmer and Jenkins. He did not ask Jenkins where he had got the horse from. Jenkins told him that the horse was his property.

James W. Crothers, a traveller in the company's employ, and James David Low, of the firm of Thomas Masterton and Co., secretary of the company, also gave evidence.

Mr. McGregor read an affidavit by Harry Sanders, attorney, Graham's Town, formerly a clerk in the employ of Syfret, Godlonton and Low, the company's attorneys in Cape Town.

This concluded the evidence.

Mr. McGregor submitted that the plaintiff had not taken reasonable measures to avoid litigation, but had practically forced defendants into court.

Maasdorp, J., said he was of opinion that, if it had been clearly shown that the costs in this case could have been avoided by the plaintiff by his putting the defendants in possession of the contents of the document in question, and if it had been shown that he had unreasonably withheld the required information, the defendants would have been entitled to costs. It was clear that plaintiff showed the agreement in the first instance to Mr. Mason, the assistant manager. As to the attorneys of the defendants, it was clear that if this document had been the only thing that they (the attorneys) wanted, it would have been obtained through an order of discovery immediately after summons was served, but it was not asked for. He was satisfied, because the parties were perfectly well aware that it would not settle the case, and also because they knew pretty well what the contents were. Under all the circumstances, he had come to the conclusion that the grounds upon which the defendants claimed that costs should not be awarded in favour of the plaintiff had not been established. Judgment would be given for the plaintiff for all costs, except the costs of the day when the case was originally heard.

[Plaintiff's Attorney: E. I. Sydney.
Defendant's: Syfret, Godlonton and Low.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

ADMISSION. { 1905.
{ June 29th.

Mr. Van Zyl moved for the admission of Jan Frederick du Plessis as an attorney and notary.

Application granted and oaths administered.

PROVISIONAL ROLL.

STUSSER AND CO. V. UDWIN BROS.

Mr. P. S. T. Jones moved for the final adjudication of the defendants' estate as insolvent. The defendants, it appeared, had carried on business at Komgha. There had been considerable negotiations between petitioners and defendants in regard to taking over the estate of the insolvents, and pro-

ceedings had also been taken in the R.M.'s Court at Oudtshoorn. It was stated in the creditors' petition that there was a deficiency of £254 12s. 3d., and that it would be in the interests of the creditors if the partnership and private estates of Udwin Bros. were sequestrated.

Mr. Alexander opposed the application, and read an affidavit by Solomon Udwin.

Mr. Jones read a replying affidavit.

Mr. Alexander said that the applicants did not seek to make the defendants insolvent under the Insolvent Ordinance, but under the Act 38 of 1884. The Court had held that any applications under the Act of 1884 must be supported by the clearest proof, firstly, that the defendants were insolvent, and, secondly, that it would be for the benefit of the creditors that the estate should be finally adjudicated. It was not sufficient that there had been negotiations for a deed of assignment.

Maasdorp, J.: In this case the applicants move to have a provisional order of sequestration made absolute on the ground that the applicants have entered into a deed of assignment with the alleged insolvents. It appears that the respondent himself, through his breach of contract, has caused the attachment of the very property he has assigned, consequently he is not in a position to hand over the property that he agreed to hand over. If the stock is taken at the valuation of £500, the estate is insolvent, and there is abundant evidence that the stock is not worth more than £500. Consequently there is proof that the estate is insolvent, and the rule will be made absolute.

BUCHANAN V. MILLER.

Mr. Douglas Buchanan, moved for provisional sentence on a mortgage bond for £300, and for £4 12s. insurance premium, with interest at 6 per cent. from 1st July, 1904; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

ARDERNE V. DE HETON.

Mr. P. S. T. Jones moved for the final adjudication of the defendants' estate as insolvent.

Order granted.

COPPENHAGFN V. ARENDBE.

Mr. Alexander moved for provisional sentence on four mortgage bonds for £100, £25, £50, and £125 respectively, with interest and costs, and for the

property specially hypothecated to be declared executable.

Order granted, subject to an amendment of the summons.

HIDDINGH V. STEVENSON.

Mr. P. S. T. Jones moved for provisional sentence on certain mortgage bonds, amounting to £15,000, less £120 paid on account, for judgment for insurance premiums £114 3s., and for the property to be declared executable.

Order granted.

ALLAN AND SHAW V. BENNETT.

Mr. Close, for the plaintiff, moved for a decree of civil imprisonment against the defendant, on an unsatisfied judgment for £254 4s. 7d.

The defendant appeared, and offered monthly instalments of £5.

Decree granted, with costs, to be suspended upon payment by the defendant of £5 a month, first payment to be made on the 15th July.

ISRAELSOHN BROS. V. MEYER, ISIDORE AND BARNEY ISRAELSOHN.

Dr. Greer moved for the final adjudication of the defendant's private estate.

Order granted.

FEDERAL SUPPLY CO. V. WITTON AND SIPPEL.

Dr. Greer moved for the final order of adjudication of the defendant's estate as insolvent.

Order granted.

CANGO TOBACCO CO. V. THOMPSON.

Mr. Sutton, for the plaintiff, moved to have the provisional order of sequestration against the defendant's estate discharged.

Order granted.

GOLPAS V. WEDMARSH.

Mr. Douglas Buchanan moved for provisional sentence on a promissory note for £16 10s., with interest and costs.

Order granted.

ILLIQUID ROLL.

WARD AND FELIX V. LEVIN. { 1905.
June 29th.

Mr. P. S. T. Jones moved for judgment, under Rule 329d, for £22 14s. 5d.,

goods sold and delivered, with interest and costs.

Order granted.

ROCHESTER BRICK CO. V. METJE.

Mr. Douglas Buchanan moved, for judgment, under Rule 329d, for £160, goods sold and delivered, with interest and costs.

Order granted.

ESTATE FRIEDLANDER V. ROSE.

Mr. De Waal moved for judgment, under Rule 329d, for £30, balance due on an account, with costs.

Order granted.

BENDHEIM V. GOLDBERG.

Mr. Payne moved for judgment, under Rule 329d, for £235 19s. 3d., for goods sold and delivered, with interest and costs.

Order granted.

SCOTT V. KOLONGE.

Mr. Sutton moved for judgment, under Rule 329d, for £58 15s., goods sold and delivered.

Order granted.

BROWN V. TOWOEND.

Mr. De Waal moved for judgment, under Rule 329d, for £63 10s., balance of rent.

Order granted.

REHABILITATION.

Ex parte SYRKIN.

Mr. Alexander moved for the rehabilitation of Max Syrkín. The application was made originally in June of last year, and the Court then granted leave to have it renewed in twelve months.

Application granted.

GENERAL MOTIONS.

BOISON V. BOISON. { 1905.
 { June 29th.

Mr. Benjamin moved for a decree of divorce, the respondent (the wife) having failed to comply with an order to return to the plaintiff.

Decree granted.

Ex parte LIPSCHITZ AND TOOCH.

Mr. Searle, K.C., moved for an order for the appointment of a *curator ad litem* to represent a minor in an action to be brought against her for leave to partition certain property held in undivided shares by the applicants and the minor. It was asked that Mr. Gavin be appointed curator.

Mr. McGregor, for respondent, said his client took the position that another man—a Mr. P. J. Killer—should be appointed, and that his action was premature and unnecessary.

Maasdorp, J., said the opposition had been forced upon by the father of the minor, and the respondent would, therefore, have to pay the costs of opposition. It was necessary to have a curator appointed, and the necessary costs would, in any case, have to be paid by the minor. Mr. P. J. Keller would be appointed *curator ad litem*, and the Court would order the respondent minor to pay the necessary costs of the unopposed motion, and respecting the costs incurred on the respondent's side, the costs between attorney and client would be disallowed in taxation against the minor.

DUNLOP PNEUMATIC TYRE CO. UNION-CASTLE LINE.

This was an application calling upon the respondents to show cause why certain proceedings of the Taxing Officer of this Court in disallowing certain items in the bill of costs of plaintiffs' attorneys should not be set aside.

This matter arose out of an action instituted by the plaintiffs for damages in the sum of £75, by reason of the damaged condition in which a certain case containing motor-car framework, handed to the defendants in New York for transmission to Cape Town, was received by the Harbour Board and delivered to the plaintiffs. The plaintiffs filed their declaration, and the defendants, in their plea, set up the defence that the case was received by them in a damaged condition in New York. Thereupon, plaintiffs proposed to have certain evidence in New York taken on commission, and, upon notice being served on the defendants, it was arranged that the commission should be joint. The plaintiffs' attorneys then cabled certain directions with a view to having the evidence taken before the British Consul in New York, but, subsequently, on the 30th May, plaintiffs' attorneys received an intimation from defendants' attorneys that the plaintiffs' claim would be settled, with costs. These facts were set out in an affidavit by Mr. A. C. Fuller, of the firm of Messrs. Silberbauer, Wahl, and Fuller, plaintiffs' attorneys. The disallowances referred to the charges in connection with giving instructions to New York.

The Taxing Officer, in his report, stated that the items were disallowed on the ground that, being incurred previous to notice of trial having been given, they must be considered as premature. That had been the constant practice, which he did not feel justified in disturbing, though, no doubt, at times it entailed hardships.

Mr. Burton was for the applicants; there was no appearance for the respondents.

Maasdorp, J.: Under the special circumstances of this case, I think it was necessary that the proceedings should be taken in the form in which they were taken, and the costs were regularly and properly incurred, and consequently the items disallowed by the Master in this matter will be allowed, without the order of the Court being in any way considered to affect the general rule which seems to be laid down in the office of the Taxing Master. The items will be allowed.

Mr. Burton applied for costs.

Maasdorp, J.: Against whom?

Mr. Burton: Against the respondents. Notice was given of this part of the application.

Maasdorp, J., said that the items would be allowed, with costs against respondents.

Ex parte TRUSTEE UNITY LODGE.

Mr. P. S. T. Jones moved for an order on behalf of the surviving trustee of the Unity Lodge, authorising the Registrar to pass transfer of certain property. The Registrar of Deeds, to whom the matter had been referred, reported in favour of the application.

Order granted, in terms of the Registrar's report.

In re BUFFALO SUPPLY AND COLD STORAGE (IN LIQUIDATION).

Mr. Burton moved for confirmation of the official liquidators' report in the matter of the Buffalo Supply and Cold Storage Company and for directions to the liquidators on certain points. In his report, Mr. H. M. Fleming (one of the liquidators) said that he was being pressed for payment of the balance of certain legal expenses incurred in connection with the arbitration proceedings between the Federal Company and the Buffalo Company. As the greater part of these expenses was incurred in realising the assets of the company, Mr. Fleming asked for directions as to paying the accounts. The total amount of the costs so incurred would not exceed £1,000. The principal item was a balance of £520 due on an account to Messrs. Stone and Giddy, attorneys, East London. Their full bill of costs

amounted to £1,438 1s. 9d., but they had received from time to time certain payments to account, leaving a balance of £520. Part of the bill was made up of costs incurred before the voluntary liquidation amounting to £157 16s. 4d., against which a payment to Stone and Giddy of £7 3s. 9d. should be set off. There were also two other bills incurred previous to the voluntary liquidation, viz., Messrs. Shepstone, Wyllie and Binns, of Natal, who claimed £200 and £300, and Messrs. Norton and Co., of Sydney (Australia), who claimed about £7. Mr. Fleming also swore an affidavit, in which he said that for the purposes of the action instituted by the liquidators against Mr. Bergl, in London, which was presently proceeding, it was necessary that he should visit *inter alia* East London, Graham's Town, Durban, Bloemfontein, and Johannesburg, in order to obtain information. He asked for leave to draw from the funds a sum not exceeding £80. The liquidators also said that they had expended sums, Mr. Fleming, of £75, and, Mr. Powell, of £56 3s. 5d., for which they craved leave to reimburse themselves.

[Maasdorp, J.: How does this estate stand? Is it a large company?]

Mr. Burton: Your lordship will see from the report that practically everything depends upon the result of certain actions which the liquidators are instituting. If they succeed in those actions then there will be pretty well sufficient to pay everybody. If they don't—then, I am afraid they won't. At any rate, there won't be very much.

[Maasdorp, J.: The liquidation will take some time still?]

Mr. Burton: Yes.

Maasdorp, J., said that if the attorneys, whose accounts had been mentioned, had known of the present application, they might have appeared to oppose any proposal to treat their claims as concurrent. They might claim a preference on their accounts, though he knew that it was not likely.

Mr. Burton said that that question would still be open, and that all that was asked for now was a direction for the liquidators' guidance.

Maasdorp, J., said the Court would grant the usual order, and would direct the liquidators to regard the debt due to Stone and Giddy, amounting to £150 12s. 7d., merely as the debt of a concurrent creditor, and in respect of the balance of their account, which was incurred for services rendered to the liquidators, they were entitled to be paid now out of the available funds of the company; that the bills of costs of Norton and Co. and Shepstone, Wyllie and Binns were to be regarded merely as the debts of concurrent creditors and treated accordingly; that the liquidators were authorised to reimburse themselves in the sums of £75 and £56

3s. 5d. expended by them, and that they were also authorised to expend a sum of £80 in respect of expenses as set out in Mr. Fleming's affidavit.

Ex parte WOLFAARD AND OTHERS.

Mr. McGregor moved for an order authorising the Registrar of Deeds to register certain transfers. The matter was one involving a question of the payment of transfer duty. One of the petitioners purchased from one Frederick J. Wolfaard his rights under the will of his parents. F. J. Wolfaard had become insolvent. The transfer had not been made from the parents' estate to F. J. Wolfaard, and the petitioners now sought to have transfer made direct from the estate to the second petitioner. The Registrar, however, held that two transfers must be effected, and duty paid thereon. Another point arose as to whether certain payments could be arranged for by bond, but the Registrar contended there should be direct payment. The Registrar, in his report, stated that the property actually vested in the insolvent at the date of the sale to petitioner, and the estate was liable for duty.

The petition set forth that the first-named petitioner was one of the testators, and had sold his life interest in the property to the second petitioner, John Abraham Becker. The will stipulated that upon the death of one of the testators and renunciation of the usufruct by the survivor, and upon the legatee paying in a sum of £700 to the estate, the property should become the legatee's. Petitioners asked that there should be leave to make payment of the £700 by a bond. Becker had bought the life interest of the survivor and the interest of the legatee.

In the course of counsel's argument,

Maasdorp, J., pointed out that there were no translations of certain documents written in Dutch, and said that the documents must be translated for the Court. When copies were put in he would deal with the matter. The matter could be mentioned again.

Ex parte LEEUW.

Succession *ab intestato*—Wife and husband.

By the law of this Colony, wife and husband can under no circumstances succeed either to other ab intestato. Failing blood relations of the deceased, the property rests in the

Government 40 years after his or her decease.

Dr. Greer moved for an order authorising the executor dative in the estate of Jantje Leeuw to pay to the petitioner the remaining half-share of the joint estate, of herself and her deceased husband.

Mr. Nightingale appeared for the Government.

Dr. Greer said that the matter was before the Court on the 8th July, when the Acting Chief Justice ordered that it should stand over in order that notice should be given to the Government.

It was stated that the petitioner was aged, and required the money for her maintenance.

Mr. Nightingale said that the Crown took up the position that the petitioner, being the surviving spouse, could not take the property as heir. She was married in community, and was entitled only to half the estate, which she had taken already. If the woman could not succeed her deceased spouse as heir, the money must be paid to the Master, the man having died without next-of-kin.

Dr. Greer said the application was a novel one, and there was no direct authority on the point. There would, however, be certain grounds for considering that the wife might be entitled to take as her husband's heir. Counsel proceeded to quote from Burge, Van der Linden (book 1, chap. 10, section 2, sub-section 3), and other authorities, to show that in certain circumstances the wife could succeed as heir. Van der Linden said that a wife could not succeed as heir excepting, as under the law of North Holland where the next-of-kin of the intestate man could not be found.

Mr. Nightingale submitted that, although there was no direct case on the point, the common law was clear, that the wife could not take as heir. He contended that the law of South Holland and not of North Holland, was the law of inheritance *ab intestato* in this colony.

Maasdorp, J.: It appears that the husband of the applicant died some 25 years ago, and it was then found that the joint estate was worth £159 10s. It was duly liquidated, and half that amount was paid over to the applicant, the marriage having been in community of property. Since that date the remaining half of this estate seems to have been in the custody of an executor dative. The applicant now moves the Court for an order upon the executor dative to pay over the money to her upon the ground that this case may be taken as one in which there is a total failure of blood relations to succeed her husband. In the absence of such blood relations, she takes up the position that this inheritance should be regarded as a vacant inheritance, and that she should be entitled to succeed; but there

is clear authority and abundant authority that in cases of this kind the wife is not entitled to succeed. Several authorities have been quoted on the law of South Holland, which, with certain modifications, is the law of succession in this country, where it is very plainly held that the wife in these cases is not entitled to succeed. Upon a total failure of blood relations, the Crown is entitled to claim a vacant inheritance. But, as it is difficult to ascertain whether there may not still be blood relations, a provision is made that this right of the Crown shall not be exercised for a period of 40 years. Even if the Crown were now disposed to waive any right it might have in favour of the widow, it would not have the power to do so, because there is as yet no right vested in the Crown. Under all the circumstances of the case, I am of opinion that the Court has no power to make any order in favour of the applicant in this case, and the application must be refused.

Ex parte ARMESTER.

Mr. Roux moved, as a matter of urgency, on the petition of John James Armester, for leave to sue Johannes Beling, of Kroonstad, Orange River Colony, and formerly of East London, by edictal citation, in respect of a certain debt, and for the attachment of certain property at East London, belonging to the respondent, *ad fundandam jurisdictionem*. Petitioner stated that he resided at St. Paul's-road, East London, and that Beling was indebted to him in a sum of £26 1s.

Order granted as prayed, citation to be served personally, and to be returnable on the 1st August.

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

GENERAL MOTIONS.

Ex parte TRUSTEE SEA- (1905.
GUL'S ESTATE. (June 30th.

Mr. Gardiner moved for an order to examine certain witnesses on commission, under the Insolvent Ordinance, before the Resident Magistrate of Port Elizabeth.

Granted.

Ex parte HEYNES MATHEWS.

Mr. P. S. T. Jones moved as an urgent motion for an order restraining the removal of any goods from the office of Mr. Abraham Berlyn, dentist, who owed the petitioners £170 for rent to the end of June. The respondent had asked the petitioners to take over the fixtures in settlement of the debt, but there had been an attachment order of the Resident Magistrate's Court already granted.

Order as prayed.

STEVENS V. STEVENS.

Dr. Greer said this was an action for restitution of conjugal rights, failing which a decree of divorce. At 4 o'clock yesterday the defendant wrote that he was prepared to receive his wife at Woodstock, and Counsel was now instructed that the wife had actually returned to the husband and he had received her. Counsel now asked leave to withdraw the case.

Buchanan, A.C.J.: It is not often judicial proceedings in matrimonial cases end so happily. The case can be withdrawn.

ESTATE SNYMAN, JUN. V. ESTATE SNYMAN, SEN.

Mr. J. E. R. de Villiers moved for judgment against the defendant in terms of a consent paper. The action was originally brought against the defendant in his capacity as executor testamentary, and also in his capacity as tutor of the minor children. The claim against him in his capacity as tutor of the minor children had been withdrawn. Judgment in terms of the consent paper.

Mr. Searle pointed out that only yesterday the power of attorney was withdrawn and put in the hands of another attorney, and that was probably due to further proceedings by the heirs interested.

[Buchanan, A.C.J.: They are not bound by this judgment.]

SAMSON V. CAMP'S BAY EXTENSION ESTATES, LTD.

This was an action for a declaration of rights as to a certain supply of water on building lots purchased by the plaintiff from the defendants, and for an order compelling the defendant company to transfer the building lots to him.

The declaration set forth that the plaintiff was an architect, practising in Cape Town, and defendants a joint stock company registered in the Cape Colony. On the 24th March, 1904, the defendant company sold to the plaintiff certain building lots at Llandudno for £76. It

was further a condition of sale that the defendant company should give transfer of the building lots on payment of the whole of the purchase price in cash or, on payment of the first instalment, security being given for the balance. The auctioneers represented, promised and guaranteed that the defendant company would within six months of the sale cause water to be laid on to all the lots sold at a rate not exceeding £2 a year. The plaintiff was induced thereby to purchase the lots. Thereafter the defendant company confirmed in writing and ratified the said terms, and plaintiff thereupon paid the first instalment. The company did not cause water to be supplied through a 4-inch main pipe within six months of the date of sale, nor at all. On the 27th January plaintiff paid the second instalment under protest. The plaintiff on or about the said date called on the company to pass transfer, and duly tendered payment of the balance, and further called on the defendant company to carry out its obligation by laying on the water. The defendant company failed to pass transfer notwithstanding that the plaintiff was willing to pay the balance of the purchase price. The defendants contended that they were only bound to supply water in a 1-inch pipe. The lots had greatly deteriorated in value, and plaintiff had been prevented from using the same as building lots, and had sustained damages in £400, and claims an order declaring him a purchaser of the lots, entitled to a supply of water to each of the lots in a 4-inch pipe, and compelling the company to pass transfer to the plaintiff on his tendering the balance of the purchase price, otherwise £400 damages.

The plea admitted the formal allegations, but with regard to the conditions of the said sale it referred to the written conditions of sale signed by the plaintiff. It was denied that the auctioneers represented that 4-inch pipes would be laid within six months to all the lots. If the said auctioneers did so they had no authority and the defendants were not bound by any such representation or guarantee and denied that any such representation, promise or guarantee formed the conditions of sale. It was also denied that the plaintiff was induced to purchase by any such guarantee. The defendants' auctioneers were authorised to promise that a main pipe would be laid within six months from the date of the sale to a point on the road adjoining the said lots, and that water would be supplied at £2 per annum. If the auctioneers did purport to make any other promise, the defendant was not bound thereby. Defendants referred to clause 8 of the conditions of sale: "In case the auctioneers make any mistake in the sale such mistake shall be of no value, and not binding on

the seller or purchaser." The defendants denied that they ratified any such promise. It was admitted on the 7th April, 1904, the auctioneers did, in writing, purport to make such a promise, but that was without the authority of the defendants, and thereafter the defendants repudiated such promise. The defendants caused a main pipe to be constructed to the road adjoining the lots, and the plaintiff on his connecting could have water at £2 per annum. The defendant denied any obligation to lay water on to the lots sold, and had tendered transfer to the plaintiff on condition the balance of the purchase price was paid, which was refused.

Mr. Upington for plaintiff. Mr. Gardiner (with him Mr. P. S. T. Jones) for the defendants.

George Gordon Samson, plaintiff, an architect, of Cape Town, said he had had many transactions in land speculation, and had been successful in several deals. In March, 1904, he attended the sale in question. The water supply was undoubtedly an important matter in that district. When the conditions of sale were read out, witness and others made inquiries from Mr. Zoutendyk as to the water supply. On the 31st March witness wrote to the attorney of the company asking for a confirmation of the verbal promise made at the sale, and he was referred to the auctioneers, who put it in writing that the syndicate would lay water on in a 4-inch pipe within six months, at a charge not exceeding £2 per annum. Witness did not claim a 4-inch main to each lot. Witness would not have bid for the lots without the undertaking as to the water; otherwise, they would be useless for building purposes. The contracts were all signed in blank, the auctioneers being left to put in the conditions afterwards. Witness, on receipt of the undertaking for water supply, forwarded a cheque for one-fourth of the purchase price. Lengthy correspondence between the parties was then read, from which it appeared that plaintiff on August 24 wrote declining to pay the second instalment until the water was laid on in terms of the agreement. On October 31, the secretary of the company wrote saying that the directors of the company had decided to lay at an early date a service pipe to a point close to the ground sold the previous March. On December 19 the secretary of the company wrote again, and said that the service pipe had been laid, and the plaintiff could have it connected with his lots on payment of expenses.

Plaintiff (continuing) said the pipe referred to was a 1-inch pipe, 400 or 500 feet away, and that would be totally inadequate to supply water if the other lots were built upon. He paid the second instalment under protest. He had built a house upon the ground he had bought, but he was put to great inconvenience

owing to the distance he had to go to fetch water. He was entitled to have the water laid on in a 4-inch main. As he had been prevented from using the property through lack of water, the house he had built was useless. Through the same reason, he considered he had sustained £400 damages. He wanted, chiefly, however, a declaration of rights.

Cross-examined by Mr. Gardiner: Before bidding for the property he did not go to see the intake. He wanted a continuous domestic supply of 200 gallons per house per day. The 1-inch pipe would not give him sufficient water. If they had a 4-inch pipe it would more than double the supply of the present time.

James Loubser Petersen, a speculator in land, who attended the sale at Llandudno, stated he only arrived after the conditions of sale had been read. In the middle of the sale he interviewed Mr. Wakelin, who assured him that the water would be laid from the mountain in a 4-inch pipe. Witness bought the last lot put up for auction. Witness sold all the lots to Mr. Samson, who promised him £15 profit on the transaction.

Cross-examined by Mr. Gardiner: Witness did not remember Mr. Wakelin saying that he would begin with a 4-inch pipe.

Thomas W. Cairncross, M.I.C.E., said that a 1-inch pipe would be quite insufficient to supply all these lots. A 4-inch pipe would be satisfactory. Witness had been obliged to abandon the use of 3-inch pipes in Cape Town, owing to the amount of corrosion which took place in the pipes.

Cross-examined by Mr. Gardiner: The inch pipe would not carry more than about 9,000 gallons. Witness did not know that the Plumstead and Diep River supply was carried through a 1-inch pipe. If that were so, they would very soon find out their mistake. A 2-inch pipe would carry about 82,000 gallons a day. Starting with a 4-inch, and continuing with a 3-inch pipe, would not improve the "head."

By the Court: A plot of ground was worthless without water.

Mr. Upington closed his case.

Mr. Gardiner closed

James Wakelin, a director of the defendant company, who deposed that he was present at the sale. At that time an intake had been constructed, but the pipes had not been laid. Witness heard a question asked by Samson about the water, and he (witness) said they had already commenced with a 4-inch main, and that the water leading to the ground would be completed within six months, at a charge of £2. No promise was made to bring the water to the ground in a 4-inch pipe. To the best of his recollection, the auctioneer repeated what witness had said. Witness did not remember hav-

ing spoken to Mr. Petersen. On Wiener's Day witness met Samson, and they had a conversation. Samson said he was laying an inch galvanised pipe, and that he did not care what sort of a pipe he had, so long as he got water. Witness explained that there had been delay on account of the illness of the contractor. The inch pipe was satisfactory. Mr. Samson's house was a movable building.

Cross-examined by Mr. Upington: The method of bringing the water down had not been determined at the time of the sale.

William Thomas Oliver, M.I.C.E., said he considered the pipe was sufficient to convey the water.

Cross-examined by Mr. Upington: A 4-inch pipe was not necessary. He would not say that in two years' time the present pipe would deliver 14,000 gallons a day.

William Davis Lynne, mechanical engineer, said he helped in the laying of the 1-inch pipe. He was at the sale, but he did not remember hearing the auctioneer say anything about the size of the pipe. The pipe laid would take all the water required.

W. Troutman said he was at the sale, and bought some ground. The auctioneer said that water would be brought on to the ground, but he said nothing about the size of the pipe.

Evidence was also given by one Singh, contractor.

Henry Wrench, attorney, said he was present on the date of the sale, and bought five lots. A question was put to the auctioneer about the water, and the auctioneer replied that water would be laid on to the property. There was nothing said about the size of the pipe.

Mr. Gardiner closed his case, and counsel were then heard in argument on the facts.

Buchanan, A.C.J., said it was clear that, beyond the undertakings in the conditions of sale, a further undertaking was given at the sale by the defendant company to supply water to the ground. The plaintiff asked for a declaration that the defendant company were bound to lay a 4-inch pipe to each of the plots he bought. Well, he was certainly not entitled to that; all he was entitled to was a declaration in terms of the undertaking given by the defendants through the auctioneer at the sale. This undertaking was set forth in a letter written by the auctioneer, which was to the effect that the syndicate undertook to lay a 4-inch main to the ground sold within six months from the date of sale, and that water would then be available, at a charge of not exceeding £2 per annum. All that the defendants undertook, therefore, was to lay a 4-inch main pipe to the ground, and not to each of the lots sold. On the claim for damages, he did

not think any damages had been proved to have been sustained by reason of the water being taken to this ground by a 1-inch, instead of a 4-inch pipe. The water had been taken there, and he did not see how the plaintiff had suffered any damage. Judgment would be given for the plaintiff, ordering that, as purchaser of these plots, he was entitled to a declaration of rights, in terms of the undertaking given, with the authority of the defendants, by the auctioneer. As to the second prayer, it would be ordered that the defendants forthwith pass transfer, upon payment by the plaintiff of the purchase price. As to the costs, the tender being insufficient, the defendants would be ordered to pay the costs. [Plaintiff's Attorneys: Fairbridge, Arderne and Lawton. Defendant's: J. F. Wege.]

SECOND DIVISION

[Before the Hon. Mr. Justice HOPLEY.]

GENERAL MOTIONS.

GREENBERG V. MILLIN. { 1905.
 { June 30th

This was an application upon notice of motion, calling on the respondent to show cause why a certain sum of £505 4s. 8d., attached by the Sheriff *ad fundandam jurisdictionem*, in respect of an award in favour of Greenberg should not be released.

It appeared that a dispute had arisen between the parties in regard to the sale of certain mules. An arbitration took place, and a sum of £37 10s. was awarded to one Honikman. Greenberg drew a cheque accordingly, but this was stopped on account of an alleged informality in the arbitration proceedings.

Mr. Sutton was for the applicant; Mr. McGregor was for the respondent.

Counsel having been heard in argument on the facts,

Hopley, J., remarked that the proceeding seemed to him to be a silly one altogether. The parties went to arbitration, and then, when an award was made in favour of the applicant, he took exception to it.

Mr. McGregor said that his client was now willing to withdraw the summons, and to abide the arbitration.

Hopley, J., said that he was not there for the purpose of deciding whether the arbitration proceedings could be upheld.

In reply to his lordship, Mr. Sutton said he was willing to abide by the arbitration proceedings.

Hopley, J., said the arbitration award, having been accepted, Millin could have no further right to the at-

tachment of that money, and that money must, therefore, be released. As to the costs of the application, it seemed to him that Millin was responsible, and must consequently pay the costs. The application was, therefore, granted, with costs.

Ex parte ESTATE O'GRADY.

This was a petition by Mary Elizabeth O'Grady, surviving spouse and executrix of the late James Edward O'Grady, Port Elizabeth. Certain land was bequeathed to the children subject to a life interest in favour of petitioner. There was already existing a bond for £1,000 for the interest, on which a summons had been issued by the Court. There were other debts, amounting in all to £450, and petitioner asked for an order authorising her to pass a further bond for that amount.

On the motion of Mr. J. E. R. de Villiers,

Order granted as prayed.

Ex parte INSOLVENT ESTATE WALTERS.

Mr. Gutsche moved for the appointment of a commission to examine certain witnesses with reference to the settlement of the insolvent estate of Albert Walters, of the Paarl.

The application was granted, the Resident Magistrate of Paarl being appointed commissioner, costs to come out of the estate.

Ex parte COLDREY.

Mr. Gutsche applied for leave to sue for divorce by edictal citation. Petitioner's wife left for England on a six months' visit on January 14, 1903, and petitioner received a letter from her intimating that she would not return. She left her aunt in London, representing that she was returning to South Africa, but the last petitioner heard of her was that she was in the Lake District.

Leave to sue granted, the return day being fixed for August 31, personal service to be made if possible, failing which publication in "Cape Times" Weekly and "Daily Telegraph."

Ex parte KOCK

Dr. Greer moved for leave to sue by edictal citation in an action for the restitution of conjugal rights, failing which divorce. The parties were married in 1892, and resided in Prince Albert, and the respondent, Catherine Margerita Kock, was supposed to be in the Transvaal. The desertion took place three years ago.

Leave to sue granted, citation to be returnable on August 31. Personal service was ordered to be made if possible, and, failing that, publication twice in "Ons Land" and "De Transvaaler."

Ex parte JORDAAN.

Mr. Swift moved, on behalf of petitioner, as executrix dative in the estate of her late parents, for an order confirming the sale by auction to her of portion of certain farm in the district of Jansenville.

Order granted as prayed.

Ex parte WIGGETT.

Mr. Benjamin moved, on behalf of the petitioner, who resides at Oudts-hoorn, for leave to sue his wife by edictal citation for restitution of conjugal rights, failing which divorce. It was stated that Mrs. Wiggett was residing at Epsom, England.

Leave to sue by edictal citation was granted, citation to be returnable September 30, and personal service to be effected.

Ex parte JOUBERT.

Mr. J. E. R. de Villiers moved for leave to petitioner to enter into a certain partition of property. Counsel said that the matter had been standing over pending a report from the Master, and consent of the major heir, which had now been obtained.

The Master's report was favourable. Order granted as prayed.

Ex parte FICK.

Mr. Roux moved, on behalf of petitioner, for cancellation of the sale of certain land for £800, in the village of Piquet-berg, to Carlton Miller Tanner, late of Cape Town, and now of the United States. The purchaser, he said, had paid £100 as deposit, but had not made any further payment, and he was found to have no property in this colony. Notice had been served upon the Rev. A. H. Attaway, of Cape Town, who held Mr. Tanner's power of attorney.

Rule nisi granted calling upon the Rev. A. H. Attaway to show cause why an order should not be made as prayed, rule to be returnable on the last day of term.

Postea (July 14th).

Mr. Roux moved for the rule nisi to be made absolute calling upon the Rev. A. H. Attaway, the defendant's agent in this country, to show cause why a certain sale of property should not be cancelled.

Buchanan, A. C. J., said that affidavits had been received to the effect that third parties had built upon the ground. The matter must stand over until the first day of next term to give the third parties an opportunity of showing cause.

Postea (August 3rd).

Mr. Roux moved for the cancellation of the sale of a certain piece of land about 25 morgen in extent in the village of Piquetberg, the price being £800, of which the balance of £700 had not been paid.

Mr. Gardiner, for respondent, who was in America, and was returning in September, opposed the application, and submitted that the respondent had made out a good case for being allowed time to pay the balance, and that the rule should be set aside. The balance was tendered in January, 1904, but transfer could not be granted by Fick.

Mr. Roux argued that it would be a great injustice to applicant of the rule was not made absolute.

Buchanan, A. C. J., said he thought it was most probable that if Fick had set out statements which were now in the possession of the Court, he would not have got his rule, and on the sole ground that information was suppressed, the rule must be set aside.

Ex parte SACKS AND ANOTHER.

Marriage Ordinance—Description of status of spouses.

S. and his wife had been married according to Hebrew rites at Norvals Pont by the Rabbi of Bloemfontein. S. was domiciled in this Colony. Having some doubt as to the civil validity of their marriage, they wished to be re-married by a Colonial Magistrate, but having some scruples as to describing themselves as "bachelor" and "spinster," in view of their previous marriage, they now asked for an order authorizing a Magistrate to marry them without their so describing themselves. The Court refused to make any order.

This was an application of the petitioners Hermann Sacks and Lena Hetzberg, of Bellville, for an order authorising the petitioners to be married before the Resident Magistrate, without making the special declaration that they

are bachelor and spinster, and authorizing a certain ante-nuptial contract entered into by them to be registered in the Deeds Office. From the petition, it appeared that the parties had already gone through a form of marriage, according to the rites of the Jewish Church, before the Rabbi of Bloemfontein, the ceremony being performed at Norval's Pont. There was some difficulty about arranging for the ceremony, owing to there being no other Jewish minister available, and then the parties, in their dilemma, wired for the Rabbi from Bloemfontein. Since coming back to the Cape, they had been informed that the marriage was not valid, inasmuch as the Rabbi was not a marriage officer of the colony. On this point, however, they were by no means certain; but in order to put the matter beyond doubt, they were prepared to go through a form of marriage by special licence before the Magistrate, provided the usual description of bachelor and spinster were omitted from the special declaration.

[Hopley, J.: Why did they not send for the Rabbi and let him marry them across the river?]

Dr. Greer: I think that the difficulty has been that the marriage, although irregular, might possibly be held to be valid. Religiously, they say they are married, and they cannot describe themselves as bachelor and spinster.

[Hopley, J.: When were they married?]

Dr. Greer: On the 6th June. On their return to Cape Town, they were advised that there was some doubt as to whether the marriage was valid.

[Hopley, J.: If they had walked

across the bridge, there would have been no further trouble.]

Dr. Greer submitted that it was quite clear that the Rabbi had no authority to marry in this colony.

[Hopley, J.: If they are already validly married, I see no need for them to remarry, and the Court ought not to give an order for their remarriage. Why can't they describe themselves as bachelor and spinster? There is nothing against the character of these people in what they have done.]

Dr. Greer: They have been cohabiting, and they don't regard themselves as bachelor and spinster.

[Hopley, J., said he thought that the marriage had already got validity, even if it were solemnised by a person who was acting beyond the scope of his jurisdiction. He did not feel altogether satisfied about making the order asked for.

Dr. Greer (answering his lordship) said that before the marriage the bride seemed to have been living with some relatives at Norval's Pont.

Hopley, J., after consulting the Marriage Ordinance, said that he did not see his way to make an order on the present application. If the parties found on applying to the Magistrate, that he would not act, in spite of their describing themselves as being civilly, so far as the law was concerned, a bachelor and spinster, then they could come to the Court again, and perhaps the Court would give them relief. He would advise them not to be squeamish, and if, so far as the civil law was concerned, they were bachelor and spinster, not to stand in their own light by not putting that fact on paper. No order would be made at present.



"Cape Times" Law Reports.

CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

SUPREME COURT

[Before the Acting Chief Justice (the Hon. Sir JOHN BUCHANAN), and the Hon. Mr. Justice HOPLEY.]

OLIVIER V. SCHOOMBE AND { 1905.
OTHERS. } July 3rd.

Will, joint—Sale *intra familiam*—
Vesting.

S. and his wife made a joint will, whereby they bequeathed their entire estate to the survivor and the children of their marriage as their sole heirs. By a codicil to this will the testators directed that a certain farm in their estate should not fall under the provisions of the will, but should be bequeathed to their five sons for £500; which amount was to be paid after the death of the survivor to the three daughters of the testators. In a special case stated the plaintiffs contended that no portion of the inheritance vested in either of the two minor sons who predeceased the survivor, and that subject to payment, pro rata, of their share of the £500, the plaintiff, through his wife, as a beneficiary under the will, was now entitled to a share in the inheritance of the minor sons deceased. The defendants denied that on the death of the survivor the deceased minors

acquired any vested interest in the said farm.

Held, in favour of plaintiff's contention.

This was a special case stated in the following terms:

1. The plaintiff is Cornelius Hermanus Olivier, of Wodehouse, married in community of property to Dina Margaretha Olivier (born Beukes) hereinafter called the testatrix, surviving spouse of the late Andries Godlieb Schoombee, hereinafter called the testator.

2. The defendants are:

(a) Jan Albertus Schoombee, also of Wodehouse, in his individual capacity and also as the executor dative in the estates of the late Andries Albertus Schoombee, Pieter Hendrik Schoombee and Elsie Jusena Schoombee.

(b) Jacobus Nicholas Schoombee, at present of Cape Town.

(c) Hans Jacob Schoombee, of Wodehouse.

(d) Gideon Andries Godlieb Schoombee, married in community of property to Gerbreg Levina Schoombee, of Wodehouse.

(e) Christian Petrus Naude, of Steynsburg, in his individual capacity, and also as the executor testamentary in the estate of his late wife Johanna Magdalena Naude (born Schoombee), and as the father and natural guardian of his minor children Andries Godlieb Naude, Christian Petrus Naude, Ellie Petronella, Naude and Johanna Magdalena Naude.

3. Prior to his marriage to the testatrix, the testator was married to one Dorothea Maria Elizabeth Henning, and had as issue of the said marriage two children, Gerbreg Levina and Johanna Magdalena by name, who are the persons referred to in paragraph 2 (d) and (e) hereof.

4. By his marriage with the testatrix the testator had six children, namely,

the first three defendants and the said late Andries Albertus, Pieter Hendrik and Elsie Jusena, referred to in paragraph 2 (a) hereafter.

5. On or about the 9th of May, 1864, the testator and testatrix executed together a will, copy whereof, together with a true translation, is hereunto annexed marked "A," whereby the testator instituted the testatrix (now the wife of the plaintiff) together with the two children, issue as aforesaid of his previous marriage with the testatrix as his heirs; whilst the testatrix appointed the testator and the children born or to be born of their marriage as her heirs.

6. The said will also provided that the survivor should remain in the absolute and undisturbed possession of the estate in order to be better able to educate and maintain the minor children until the latter attained the age of majority, married, or attained some other approved age, when each had to be paid out his or her share of the inheritance.

7. On or about the 6th of June, 1881, the said testators executed a codicil to the said will, copy whereof together with a true translation is hereunto annexed marked "B," whereby they declared to have sold their farm Laskrantz, in the district of Wodehouse, to their said five sons for the sum of £500, to be paid to the said Gerbreg Levina, Johanna Magdalena and Elsie Jusena Schoombee after the death of the survivor.

8. The testator died on the 12th of June, 1881, leaving the said will and codicil of full force and effect and leaving him surviving his said spouse, the testatrix (now the wife of the plaintiff), and all his said children.

9. The testatrix adiated under the said will and codicil, and has remained in full possession and enjoyment, up to the present, of the said farm Laskrantz.

10. The said sons of the testators, Andries Albertus and Pieter Hendrik and their said daughter Elsie Jusena, died intestate being minors and unmarried, on the 26th August, 1888, the 3rd of July, 1888, and the 15th of July, 1888, respectively.

11. Thereafter first defendant was duly appointed executor dative in the estates of his said deceased brothers and his said deceased sister, and letters of administration were taken out by him in each of the said estates on the 15th of October, 1904. No account has been filed yet by the said executor in any of the said estates, but they are being administered by him.

12. On the 21st of June, 1900, the said Johanna Magdalena Schoombee, who was during her lifetime married in community of property to Christian Petrus Naude (the 5th defendant), died, leaving five children, issue of her marriage, whose names are set forth in

paragraph 2 (e) hereof, and leaving also a will, under which she appointed her said husband and their said children her heirs, her said husband was also appointed executor testamentary in her estate and he took out letters of administration as such on the 13th of February, 1905.

The plaintiff contends:

(a) That each of the said two deceased sons, Andries Albertus and Pieter Hendrik had at the dates of their respective deaths a vested right to a one-fifth share in the said farm Laskrantz and that their intestate estates, of which the plaintiff is through his wife (the testatrix) an heir, are now entitled to such shares in the said farm, subject to their paying in their respective portions of the bequest price of £500 to the three said daughters or their estates.

(b) That the intestate estate of the said deceased daughter, Elsie Jusena Schoombee, of which the plaintiff is also an heir, is entitled to a one-third share in the said bequest price of £500.

The defendants contend:

(a) That on the death of the testator, his son Andries Albertus and Pieter Hendrik did not acquire a vested interest in any share of the said farm, and that the two-fifths thereof does not form part of the estates of such sons or either of them; and that the said estates are not now entitled to such shares in the said farm as alleged in (a) of plaintiff's contention.

(b) That the whole of the said farm vests in the three surviving sons, or such of them as may survive the testatrix, on her death, but not before.

(c) That on the death of the testatrix, the sons surviving her will have to pay for the said farm the sum of £500 into the estate of testator and testatrix for the benefit of such daughters as survive testatrix.

(d) That the estate of the deceased daughter, Elsie Jusena Schoombee, is not entitled to one-third share in the bequest price of £500, inasmuch as the said daughter acquired no vested right in the said bequest price or any portion thereof.

To all and every one who shall see this public Act or hear it read, be it known:

That on the ninth day of the month of May in the year of our Lord One thousand eight and sixty four, there appeared before us, the undersigned two witnesses expressly called for the purpose, Mr. Andries Godlieb Schoonbe and Mrs. Dina Margaretha Beukes residing on the farm Tigerhoek, District of Aliwal North, spouses, known to us, the witnesses sound in body, in full possession and use of mind, memory and understanding, as appeared at the passing of these presents.—

Who declare to be disposed and to have resolved to make disposition of the

property to be relinquished by them on demise, so doing (as they, the testators) declare of their own free will, without the advice or persuasion of any one whomsoever, to that end annulling all testaments, codicils and all other testamentary acts which they, either jointly or severally, may have executed and passed previous to the date of these presents, therefore not wishing or desiring that all or any of the same, after the passing of these presents, shall be of the least power or value, but that on the contrary they shall be regarded as if they had never been passed.

And as his universal heirs to nominate and appoint (1) his wife, the testatrix herein; (2) his children begotten of his first marriage with his deceased wife the late Dorothea Maria Elizabeth Henning, named

1. Gerberg Levina and

2. Johanna Magdalena,

together with such child or children as are already born or still to be born of this his present marriage, and such to all the property to be relinquished by him on demise, movable as well as immovable acts and credits, inheritances and expectancies, nothing whatever excepted to be assumed and possessed for always as free personal property by his aforementioned heirs, and in case of predecease of one or more of them, the lawful descendants of the same by representation, without the contradiction of any one whomsoever.

The testatrix, likewise making disposition of the property to be relinquished by her on demise, hereby declared to bequeath to and to nominate and appoint as her universal heirs (1) her husband, the testator herein, together with such child or children as are already born or still to be born of this her present marriage, and such to all the property to be relinquished by her on demise, movable as well as immovable, acts and credits, inheritances and expectancies, nothing whatever excepted, to be assumed and possessed for always as free personal property by her aforementioned heirs, and in case of predecease of one or more of them, the lawful descendants of the same by representation, without the contradiction of any one whomsoever.

And in order to be able to ascertain the portions of their heirs, they do hereby desire and testate that six weeks after the death of one of them, their estate shall be inventoried, and shall be appraised by two good and well reputed men and in that way adjusted, the survivor of them, however, to remain in full and undisturbed possession of the estate, in order the better to be able to bring up and maintain the minors on the usufruct of their portions until their majority, marriages or other approved states, at which time there shall be paid out to each of them their portions.

Further, the testators declare to here-

by nominate and appoint as their executors testamentary administrators of their estate and guardians of their minor heirs the survivor of them with power of assumption, substitution and surrogation, and with the express will and desire that the said executors shall not be held and bound to file with the Master of the Supreme Court or any Magistrate a statement and inventory of their Estate.

Finally the testators declared expressly to reserve to themselves the power and right at all times to alter this their final disposition—(except the appointment of heirs) consequently to add thereto or take therefrom as they may be advised, either by separate act or at the foot of this will,—desiring that all such alterations so found and under their own signatures shall be regarded as if the same had been literally inserted herein.

All the aforementioned having been read to the testators word for word, they declared to have well understood and comprehended the same, and this to be their testament and final will, with the desire that in all parts it may be valid and take effect as such, either as a solemn testament, codicil, *donatio mortis causa* or as may best consist with law,—notwithstanding any solemnities may have been omitted which the testators hereby regard as having been inserted, imploring the utmost benefit under the law.

Thus testated and passed at Tigerhoek, District of Aliwal North day month and year aforesaid.

Testators:

(Sgd.) A. G. SCHOOMBEE,

" D. M. BEUKES.

As Witnesses:

(Sgd.) H. G. N. Strydom,

" N. G. Human.

" B."

Further we the testators declare that we sell the farm Lafkrantz, in the District of Wodehouse, to our five sons Jan Albertus, Andries Albertus, Jacobus Nicolas, Hans Jacob and Pieter Hendrik Schoombie, for the sum of five hundred (£500) pounds sterling.

The aforementioned five hundred pounds sterling shall be paid to Gerbig Levina and Johanna Magdalena Schoombie and Elsie Susena Schoombie after the death of the survivor.

Thus agreed and signed before the two witnesses, on this sixth day of June in the year One thousand eight hundred and eighty one.

Witnesses:

(Sgd.) C. J. Bekker

" P. H. de Villiers

Testators:

(Sgd.) A. G. Schoombie

" D. M. Beukes.

Mr. Burton for plaintiff. Mr. Searle, K.C., for defendant.

Mr. Burton said the question to decide was whether, in view of the terms of the codicil, these two sons and the daughter who died after the testator—whether at the death of the testator there was vested in them the share of the farm that was sold. The question was, whether the vesting of the rights of these children took place at the death of the testator, or whether the vesting was postponed until the death of the survivor. It was clear, if the mother had a usufruct, that the bequest vested upon the death of the testator.

Mr. Searle said the case was a very peculiar one, because here they had the survivor of an estate who wished to have it declared that she was entitled to a certain portion of a farm that would not be divided until her decease, and to money which would be paid by those who survived her. He did not think a case could be found that would prove that the survivor was entitled to money that did not come due until her demise.

[Buchanan, A. C. J.: What becomes of the money then?]

Mr. Searle: It goes into the estate. Continuing, he contended that no authority could be quoted to show that she was entitled to the money that was eventually to be paid. They held that at the death of the testatrix the sons surviving would have to pay into the estate on behalf of the surviving daughters.

[Hopley, J.: But suppose there are no daughters?]

Then the money will be paid into the estate. He contended, firstly, that the heirs' shares did not vest until the death of the surviving spouse, and that, consequently, the plaintiffs could not have any right at all until the death of the widow; and, secondly, that even if this were not granted in reference to the landed property, and if it was held to vest on the death of the first dying, at any rate, the share of the £500 belonging to the estate of the daughter who died, could not be claimed by the plaintiffs, but must be divided among the surviving sisters.

Buchanan, A. C. J.: The late Mr. Schoombe and his wife now married to plaintiff, called in the special case the testator and testatrix, made a joint will, and in this will the testator bequeathed his estate to his wife and the children as his sole and universal heirs. There was no dispute concerning this will, but by a codicil the testator and testatrix took out of their estate the farm in question, and this they bequeathed to their five sons for the sum of £500, the amount to be paid after the death of the survivor to the three daughters. The first question the Court has to decide is whether

or not this codicil gave the sons a vested interest in the property. On the death of the testator the surviving widow adiated, so that she is bound by the bequest. Though the codicil speaks of a sale, it was really a bequest of the farm upon condition of payment of a certain sum. It is true that this payment was postponed until after the death of the survivor, but according to the current of decisions in this Court the bequest took effect immediately. That was in accordance with the claim made in the previous action between the same parties. The Court then held that the will and the codicil were such as to give the survivor the right to the enjoyment of this property during her life. That certainly cleared away any difficulty that might have arisen in deciding the question of vesting. Taking it therefore that the property vested on the death of the testator, it is stated as a fact that the five sons were alive at that time. Two sons have died since then, but as the property vested in them it now went to their estate, subject to the payment of the purchase price, which was not payable until after the death of the survivor. Then comes the question of the postponement of the daughters. They, too, were all alive at the death of the testator, but since then one had died while a minor and intestate, and another, who was married to one of the defendants, had also died. The question was, were these two daughters' estates entitled to their share of the £500. It was not an uncommon thing for farmers to bequeath land to their sons at a price to be paid to the daughter at the testator's death. They thus preserved the property to the sons, but so as not to be unjust to the daughters daughters they bequeathed the purchase money to them, which was usually an equivalent to what would be the share of the daughters in the property; thus putting the children on an equal footing. If the sons took a vested interest in the land bequeathed, the daughters ought in justice to take a vested right to the money which was to compensate them for the loss of their shares in the property. I am of opinion, therefore, that the whole of the plaintiff's contention should be sustained and judgment given accordingly. The costs must come out of the estate.

[Plaintiff's Attorneys: Walker and Jacobsohn; Defendants' Attorneys: Fairbridge, Arderne and Lawton.]

WEST AND ELCOATE V. LONDON ASSURANCE CO.

Mr. Searle, K.C., moved, on behalf of the trustee in the estate of West and Elcoate, for leave to take evidence on commission. The respondents consented. Granted, costs to be costs in the case.

REX V. MEIZENHEIMER.

This was an appeal against a conviction and sentences by the Assistant Resident Magistrate of Cape Town. Mr. Pymont for the Government; Dr. Greer for the appellant.

Mr. Gardiner for the Town Council, who were called upon to show cause why they should not be ordered to pay costs.

Dr. Greer said the appellant was charged on the 9th June last with contravening section 212 of the Cape Town Municipal Regulations, framed under Act 26 of 1903, and on a second count he was charged with wrongfully and unlawfully hindering a certain police sergeant in the discharge of his duty. Prisoner was convicted on both counts, and sentenced, on the first, to pay a fine of £2, or in default to undergo 14 days' imprisonment, and, on the second, to three months' imprisonment, with hard labour, the sentences to be cumulative. Against that conviction and sentence he now appealed on the grounds that the conviction was against the weight of evidence, "that the accused was the wrong person in the dock, which place ought really to be occupied by the police constable."

[Buchanan, A.C.J.: What does that mean?]

Dr. Greer: It means that he alleges that it was he who was really assaulted, and that the police constable ought to have been in the dock.

[Buchanan, A.C.J.: It should not be put in that way.]

Dr. Greer said that a further ground of appeal was that "in other respects the verdict and sentence were vindictive and excessive, and not in accordance with substantial justice."

Counsel read the evidence. The allegations for the prosecution were that the defendant, a registered wagon driver, approached a sergeant of police, and asked him to remove another man from a position which he alleged the man had "jumped." The sergeant held that the other man was in the right, and thereupon told the defendant to "pull out" from where he was. Defendant refused, and the sergeant proceeded to arrest him. Defendant resisted, and struck the sergeant with his whip and kicked him. The evidence for the defence was that the defendant only used such force as was necessary to prevent his arrest, he being unwilling to go to the police station with the sergeant unless he also took the other man. The sergeant took hold of defendant's foot and endeavoured to pull him off the wagon.

Dr. Greer contended there was no power given under the regulation to the police sergeant to arrest the defendant under the circumstances. Defendant was in the act of moving off when the sergeant arrested him. There was a certain amount of delay on the part of

the defendant in obeying the order of the sergeant to move on. Defendant was naturally irritated, and argued the point, but all the testimony showed that he was only once asked to move, and that he was in fact leaving the stand when the sergeant tried to arrest him.

Hopley, J., said that the sergeant had stated in evidence that the defendant three times refused to go, and that upon his (the sergeant) going up to the wagon defendant kicked him in the mouth.

Dr. Greer urged that the man was obeying the order when he was arrested, and that the sergeant exceeded his duty. The name and address of the man were printed on both sides of the wagon, and there was no justification for arresting him so long as he did not continue the offence.

Without calling upon counsel for the Crown and the Town Council,

Buchanan, A.C.J., said that on the first charge there was ample evidence that the accused would not obey the orders of the police, who had the duty of controlling the traffic, to remove his wagon from the position in which it stood. He refused several times, whereupon the police-sergeant said he would take him to the police station. Then the accused attempted to drive off, and when the police-sergeant tried to arrest him he was most violently assaulted by the accused. The sergeant was kicked, and his clothes were torn, and the evidence showed that the accused acted in a most unjustifiable way. The police had the right to arrest this man, and the sergeant was only performing his duty. It was said that the penalty was a severe one, but did not think so. The Magistrate had not inflicted anything like the maximum punishment. There was of course a conflict of evidence, but there was plenty of corroboration of the police-sergeant's statement. The Town Council had received notice of this appeal, and had been brought into court on notice calling upon them to show cause why the costs should not be given against them. This, however, was not a municipal prosecution; it was a police prosecution, and there was absolutely no reason for bringing the Town Council into court. The appeal would be dismissed, and the Town Council would be declared entitled to their costs for appearance.

Hopley, J., concurred.

REX V. NICHOLLS.

This was an appeal from the decision of the Acting Resident Magistrate of Cape Town convicting the appellant of the crime of theft on the 3rd June on the charge that he had stolen certain sums of money amounting to £18. The ac-

cused was found guilty, and sentenced to two months' imprisonment with hard labour. The appeal was based on the grounds that the crime was not proved by the evidence.

From the evidence taken before the Magistrate, it appeared that two men, whilst drinking in a bar, made a bet of £9 each, and gave the money to appellant to take to Mr. Hodson, of the City Hall Hotel, to take charge of until the bet was decided. This appellant did, and received a receipt from Hodson for the amount. It was alleged that he told Hodson the money was his own property. He returned to the bar where the men who had made the bet were. He showed them the receipt. During the evening he returned to the City Hall Hotel and got the £18 from Hodson.

Appellant, in his defence, admitted that he had received the money, and that he had given it to Hodson. He afterwards got the money back from Hodson, and said that he had never been asked to return it to those who had made the bet.

Dr. Greer appeared for appellant, and Mr. Pyemont for the respondent.

Dr. Greer submitted that there was no proof of theft. These men had been drinking together during the day, and in a bar a dispute arose as to the position "Friar" held. When the money was put up it was suggested that accused should be the stakeholder, but it was eventually agreed that Hodson should hold it. Appellant's mind was not very clear on who was to be the stakeholder.

[Buchanan, A.C.J.: But he should not spend the money entrusted to his care.]

Dr. Greer contended that if the appellant had money to meet his liability he was entitled to spend a portion of the money as long as he could replace it. The question of false representation did not enter into the case. Accused was arrested before the bet was decided, and no demand was made on accused for the money.

Buchanan, A. C. J.: The appellant took the money that did not belong to him, and therefore I do not see that the Court can interfere with the decision of the Magistrate.

Hopley, J., concurred, and said it appeared to him that the appellant had made a false representation to Hobson by making out that the money was his.

REX V. AH FOO AND OTHERS.

This was an appeal from the decision of the Acting Resident Magistrate, Cape Town. Ah Foo, Leo Sam, and others had been charged with the crime of contravening sub-section 1 of section 5 of Part II. of Act 36 of 1902 in that, upon or about the 26th June

last, they each, one or more of them, did own and keep a gaming house, and were fined £100 each, or the alternative of four months' imprisonment, with hard labour.

Dr. Greer appeared for appellants, and Mr. Pyemont for the Crown.

Dr. Greer said that, in connection with this matter, there were 36 persons arrested. Three were charged with being owners, and 33 with being frequenters. The three charged with being owners were fined £100 each, and the others were fined £5 each. Under the Act under which they were charged, an owner or keeper of a gaming house was liable for a first offence to a fine of £200, and for a second offence to a fine of £500. According to the interpretation clause, an owner or occupier was deemed to mean or include any owner who was cognisant of the purposes for which or uses to which his property was used or put, and also a tenant, occupier, lodger, manager, banker, dealer, croupier, secretary, clerk, messenger, or any person employed in any house or place in any capacity other than a menial or domestic capacity. There were only two appellants, as the third man (Lee Sam) admitted being the owner, but the other two contended that they were only frequenters.

Counsel having been heard in argument on the facts,

Buchanan, A.C.J.: The two appellants base their appeal upon the ground that they were not the owners or keepers of the house, but were merely frequenters. The question turns upon the construction to be placed upon section 3 of what was commonly called the Morality Act. This section makes the owner or keeper of a gambling house or brothel include the owner of a house, who is cognisant of the uses to which the property is put, and the tenant or landlord or lodger, or any person employed in any capacity other than that of a menial or domestic servant. Now the two appellants were neither owners, lodgers, nor tenants of this house. They were there playing a certain game, and on the evidence before the Court, I think it would be difficult to hold that they were anything more than players frequenting the house. I think that the section must be taken to mean that persons so convicted must be either owners or persons who assist in running the house for the benefit of the owner. There is no proof that these two were more than frequenters, and cannot be included under the title of owner or keeper. It is quite consistent with the evidence to say that they were only frequenters, and I think the Magistrate has erred in convicting them as owners or keepers, especially where it was so conclusively proved who was the owner and keeper of the house—the tenant, who had been punished. The appeal must therefore be allowed, and

the conviction against the two appellants quashed.

Hopley, J., concurred.

REX V. ZUCKER.

This was an appeal from a judgment of the Resident Magistrate of Cape Town fining the accused £2, or the alternative of a month's imprisonment, for contravening Act 27 of 1882, section 5, paragraph 29, as amended by Act 44 of 1898, section 2.

Dr. Greer appeared for appellant, and Mr. Pyemont represented the respondent.

The section of the Act under which the appellant was convicted held that any person guilty of being a common prostitute or being a night-walker was liable to a fine not exceeding £2.

The appeal was based on the grounds that the fine was excessive, and that the conviction was contrary to law, inasmuch as the appellant was not in the street to the annoyance of the public, although that was necessary for a conviction. This woman was in very delicate health, and if she was imprisoned, it would make her much worse.

[Buchanan, A.C.J.: That will be brought to the notice of the gaol medical officer, who will not give her hard labour.]

Hopley, J., said that any man who was accosted by a prostitute would be annoyed, although he might not give evidence to that effect.

Dr. Greer said he thought that in face of the doctor's certificate, the Court might see their way to order the liberation of this woman from gaol, or the modifying of the sentence.

[Hopley, J.: That's for the Governor.]

Buchanan, A.C.J., said it had been proved that the appellant was loitering in the public street to the annoyance of the public, and therefore the conviction was properly made, and would be upheld.

SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

HAMAN V. HAMAN. } 1905.
 } July 4th.

This was an action brought by Hendrik Josias Haman, fisherman and barman, of Hermanus, division of Caledon,

against his wife, Susanna B. Haman, also of Hermanus, for a decree of judicial separation, and custody of the five children of the marriage. Defendant claimed in reconvention a judicial separation on the ground of cruelty, and also custody of the children. Dr. Greer was for plaintiff; Mr. Van Zyl was for defendant.

Dr. Greer stated that the parties were married in October 1890. The only question that now remained was as to the maintenance to be paid by plaintiff to defendant. He was instructed to consent, on behalf of plaintiff, to the children being left with defendant, subject to reasonable access being given to him. He proposed to call evidence as to plaintiff's means.

Plaintiff then gave evidence. He said that he received £8 a month as barman and drew £10 a year from his boat. He had some property. He consented to a division of the joint estate, and asked that the costs of the suit should be borne by the estate.

Cross-examined: The cause of trouble between witness and his wife was that she had been repeatedly accusing him of unfaithfulness. There was no ground for her jealousy while they were living together. He admitted that he had given her cause to complain since he had left her. He was at present living with a woman named Johanna Dempers, in regard to whom his wife had previously complained. He admitted having beaten his wife and having been fined £2 for assaulting her.

Decree of judicial separation granted, the joint estate to be divided by Mr. Attorney Krige, defendant to have custody of the children, with reasonable access to plaintiff, plaintiff to contribute £5 a month towards the maintenance of the children, with leave to either party to again move the Court on the question of maintenance, costs to be paid by plaintiff.

LUBBE V. COLONIAL GOVERNMENT. } 1905.
 } July 4th.
 } " 11th.

Martial Law—Scab inspector—
Refusal of facilities by
military—Suspension—Salary
—Estoppel.

L., a scab inspector, was during the late Martial Law regime, prevented by the military authorities from performing his duties, and was notified by the Agricultural Department that the payment of his salary would be suspended until he should again be allowed to perform such duties. The

Court found, as a fact, that the plaintiff had acquiesced in this arrangement. Thereafter the Agricultural Department discovered that he had been deported by the military as an "undesirable." No specific offence was alleged against him; but the Department nevertheless dismissed him. He was paid salary up to the time that he was deported. He now claimed salary for the entire period covered by his suspension.

Held, that the plaintiff was by his action estopped from claiming salary for the time during which he was prevented by the military from performing his duties.

This was an action brought by Franz Jacobus Lubbe, of Clanwilliam, formerly a sheep inspector employed by the Colonial Government, against the Acting Secretary of Agriculture for salary.

Plaintiff, in his declaration, said that on February 10, 1901, defendant's predecessor in office engaged his services as an inspector of sheep for wards 1, 2, and 6 of the Clanwilliam division, at a salary of £200 a year. It was agreed that the said agreement of service or engagement should be terminable upon one month's notice. Plaintiff had duly performed his part of the agreement. On August 25, 1902, he received notice from the defendant that his services under the agreement were terminated. He was paid his salary until September 16, 1901. He claimed £207 15s. 7d., as salary from September 17, 1901, to September 30, 1902.

Defendant, in his plea, denied paragraph 3 of the declaration as to the performance of his duties by plaintiff. He said that on January 31, 1902, plaintiff was reported and removed from Clanwilliam to Matjesfontein, in the district of Worcester, by the Imperial military authorities, and was detained until July 4 of the said year. Subsequent to the said date he remained in the district of Worcester and elsewhere, and did not return to Clanwilliam district prior to August 25, 1902. By reason of the said removal and absence of plaintiff from Clanwilliam, he was totally unable to perform any of the duties of his said office. Defendant admitted having given notice to plaintiff, and said that the notice referred to was given to plaintiff in consequence of his breach of contract to perform his said duties. On February 3, 1905, defendant tendered to

plaintiff his salary from September 17, 1901, to January 31, 1902, inclusive; but plaintiff refused to accept that tender in settlement of his claim. Defendant repeated the tender (£75), with taxed costs to date of tender, but said that by reason of plaintiff's breach of contract he was disentitled to claim any compensation.

Plaintiff, in his replication, admitted his deportation and detention from January 31, 1902, to July 4, 1902, but said that he was in no way to blame for such deportation, which was made under Martial Law. He held himself in readiness at all times to perform the duties of his office. He said that the contract remained in force during the period of his detention. He denied that the notice was given to him in consequence of his inability to perform any of the said duties, and said that the notice was given to him by reason of a severe accident occurring to him after his release from the said deportation.

Mr. Burton (with him Mr. D. Buchanan) for plaintiff. Mr. Searle, K.C. (with him Mr. Evans) for the Government.

Franz Jacobus Lubbe (plaintiff) was called. He said that in 1901 Martial Law was proclaimed in Clanwilliam. At that time two sheep inspectors were employed in the division, viz., witness and one Van Weilligh. After the proclamation witness was not allowed to go into his district for the first three months—January to March. In September he got a pass to go to his farm for his horses. On October 3 he received a letter from the Under-Secretary of Agriculture, stating that where inspectors were unable to carry out their duties owing to the unsettled state of the country, payment of their emoluments would be temporarily suspended, and informing witness that his salary would be temporarily stopped. He was only paid for part of September, and witness, in a letter to the chief inspector, claimed full pay for the month. Witness remained in Clanwilliam until January, 1902, in readiness to take up his duties. On January 31, he was informed by the Deputy Administrator that he, along with others, were to be taken to Malmesbury as undesirable, but he did not know the reason. Witness had had no charge against him, and he had served in the Clanwilliam Guard for six months. At Malmesbury, no one could tell him the reason, and he had not found out yet. He was taken to Matjesfontein, where he was released in July, 1902. On the day he got his pass, he met with an accident in getting out of a train, and lost his left leg. In July, 1902, he received a letter from the Chief Inspector, stating that the Scab Act was to be put in operation again, and a telegram from the Civil Commissioner asking him if he could take up his duties at once. Wit-

ness replied, asking to be excused until October, when the doctor thought he would be fit for duty. The Chief Inspector, in a memorandum, recommended that a temporary assistant inspector should be appointed until witness was ready for duty. On August 25 he received a letter from the Civil Commissioner regretting that, owing to his incapacity through accident, his services must terminate, and witness made his claim. The other inspector in the Clanwilliam division was paid for the whole period.

Cross-examined: He understood that he was to be paid during the war, and although he did not claim until a year ago, he intended all along to do so. Van der Merwe's case against the Government only made it more clear to him. In October, November, and December, he did no scab inspecting, in consequence of the communication from the Government. Witness was in the hospital from the 4th July, 1902, to the 1st November, 1902, and was unable to do any work during that time, except by substitute. The last work he did for the Government was about the middle of September, 1901.

Nicolaas van Weilligh said that he could not obtain a pass from the military to go into the district between July, 1901, and August, 1902. Witness remained in Clanwilliam, and held himself in readiness to do his work. He did not then make an application to the Government for salary during that period, but he had since made a claim and had been paid by the Government for the whole period.

Cross-examined: Witness did not claim from the Government until September, 1904.

Mr. Burton closed his case.

Charles Alfred Currey, Under Secretary for Agriculture, said that no information was received by the department as to plaintiff's deportation until the 11th August, 1904. Witness gave evidence as to certain of the correspondence.

Cross-examined: He admitted that the only difference between Lubbe's case and Van Weilligh's case was that the former had been deported. It was regarded by the Government as a misdemeanour to merit deportation. The Civil Commissioner was the officer administering martial law at Clanwilliam. The notice of dismissal given to plaintiff spoke of his having broken his leg in a severe accident. Witness had since ascertained that plaintiff had sustained an accident on the railway. The department took it for granted that plaintiff was an undesirable, seeing that he had been deported. They did not inquire as to the reasons for his deportation. The instructions that the plaintiff was to resume duty were sent before witness heard of the deportation. If wit-

ness had written the letter, he would not have put the dismissal on the ground of the accident; he would have based it on the ground that the plaintiff had been deported. The Chief Inspector reported that, leaving alone the undesirable character of the man, it was essential that he should have able-bodied active men.

Re-examined by Mr. Searle: When they found other cases similar to the one in question, general instructions were issued on the 25th August. He had no knowledge at that time of what the Magistrate wrote on the 21st August. It would principally lie with the Chief Inspector to decide as to the man's fitness for work.

Hopley, J.: He held that the dismissal was on good cause, but unfortunately the wrong reasons were given.

[Hopley, J.: Would you think it fair if, through disturbances in Cape Town, you could not get to your office for six months, the Government said: "Charles Currie, you shall have no pay for that period?"]

I should have protested.

I suppose that is because you know a little bit more than these people up-country?—I should not have accepted the decision without a protest.

You would not think it perfectly fair?—I should certainly protest.

Allen Gardiner Davison, Chief Inspector of Sheep in the Colony, said he did not consider that a man suffering from such an accident as the plaintiff could properly carry out his duties in such a mountainous district.

Counsel having been heard in argument.

Cur. Adv. Vult.

Postea (July 11th).

Hopley, J.: The plaintiff, a farmer, resident in the district of Clanwilliam, has since the year 1895 been one of the Government scab inspectors for certain wards in that district, and his most recent appointment to that position was dated February 10, 1900, when he was appointed inspector for Wards 1, 2, and 6 in the said district, at a salary of £200 per annum, the engagement being terminable at a month's notice. This was during the continuance of the war, but at a time when it was not expected that the district of Clanwilliam would be directly involved in the struggle. An invasion of this colony by the enemy and a rebellion of some of its subjects took place shortly after, and the district in question, as well as many others, came into the area of hostilities, so that a Military Commandant was appointed there, and eventually, in January, 1901, martial law was proclaimed. The plaintiff, at that time in the town of Clanwilliam, was allowed to go into the district only when it suited the mili-

tary situation, and then only upon his procuring a pass to go forth. In this respect he was in no wise differently treated from any other of her late Majesty's civilian subjects, and no blame is imputed to him therefor; but the inevitable result was that he could only intermittently and at best inadequately discharge the duties of his office, which, of course, had to be performed among the flocks throughout the wards of the district for which he was responsible. Seeing that they were getting in many quarters of the country no services for the salaries they were paying to the scab inspectors, the Government officials in charge of this branch of administrative Government, with the consent of the responsible Minister, issued a circular to all inspectors who were thus impeded by the military situation, informing them that their emoluments would be temporarily stopped. The plaintiff was one of those who received this circular, which was in the following terms: "Department of Agriculture, Cape of Good Hope, Cape Town, 3rd October, 1901.—Suspension of Duties.—Sir,—I am directed to inform you that the Government have decided that, where sheep inspectors are unable to carry out their duties owing to the disturbed state of the country, payment of their emoluments shall be temporarily stopped. In accordance with this decision, the Secretary for Agriculture has given instructions to temporarily cease payment of your salary and allowance. When you are again authorised by this department or by the Chief Inspector of Sheep to assume duty, your emoluments will be paid as heretofore.—I have the honour to be, your obedient servant, (Signed) Charles Currey, Under Secretary for Agriculture." It will be seen that this is not a dismissal from office, or a notice to terminate the engagement, but merely an intimation that pay will be suspended until the department should deem it expedient to allow the inspector to resume his duties. In the case of the plaintiff, this was followed by a letter from the Chief Inspector of Sheep, addressed to him, informing him once more of the determination of the Government, and telling him that his pay had been stopped from September 1, 1901. This letter was dated October 9, 1901, and it concludes: "When again authorised by this office to resume duty, your emoluments will be paid as heretofore." Now, when the plaintiff received the circular and this letter, it seems to me that he was bound to elect a course. It is clear that he need not have acquiesced, in which case he should have protested, and then the Government would have been able to dismiss him with his pay to date and a month's pay in lieu of notice. In that case, however, it would be unlikely that he would be reinstated when the time of

unrest should be over. His other course was to acquiesce, and thus retain his post and the goodwill of the department under which he had to work. The correspondence which ensued clearly shows that the plaintiff chose the latter alternative. All he says in his letters is, in effect, that he worked for sixteen days in September before he received any notice to discontinue, and that he should be paid for that month, and eventually when Government did pay him for the 16 days in September, his only grievance was that he should have been paid for the whole of that month. In his letter of January 11, 1902, in which he sets forth this grievance (without claiming anything for October, November, and December), he signs himself, "F. J. Lubbe, late sheep inspector, Wards 1, 2, and 6, Clanwilliam." By adopting this attitude he created a feeling of security in the Department with which he was concerned, and led them to think that the proposal they had made had been fully accepted by him, and he is estopped from now saying that he never had such intention, but that he was at all times holding himself in readiness to do his duties. There is a further phase in this case which, however, I do not consider as being of much importance after the acceptance of the Government proposal by the plaintiff. I refer to the fact that during January, 1902, the plaintiff was by the military authorities, in the exercise of their arbitrary powers under martial law, deported from his district to another district as "an undesirable." The reason for this has never been explained, and the plaintiff, though he applied to those in authority—to the Resident Magistrate of Clanwilliam, who was deputy administrator of martial law and to the military commandant of his district—has never been able to elicit any reason for the step taken against him. The result, however, was that he was not even in his own district, and was consequently wholly disabled from the performance of any portion of his duties. This, as I have said, does not, in the circumstances, seem to me to make any important difference. Had he been allowed to remain in Clanwilliam, it is clear that even if the military authorities had been willing to allow him to go about the district, he would not have done so after his acceptance of the circular and letter, which enjoined on him inactivity until he received definite instructions from the head office to resume duty. I do not agree with Mr. Currey in thinking that the mere fact of the deportation was sufficient to render the plaintiff liable to dismissal for misconduct. In the unfortunate circumstances in which this country was then placed, it was possible for innocent and harmless men to incur suspicion, and to be deported from their districts, and as to that ground alone I think

that before a public servant could be legally dismissed an inquiry should establish that he had merited such treatment. That has never been proved in the plaintiff's case. The further history of his case is that On July 4, 1902, he was freed from military surveillance and detention, and granted a free railway pass to go home, which he immediately proceeded to do; but, most unfortunately, he met with an accident on the journey, which caused him to lose a leg, and to be laid up for some time in hospital at Touws River. At the end of July the Agricultural Department, who were apparently quite ignorant of his deportation and subsequent misfortune, telegraphed to Clanwilliam to the Civil Commissioner to get the plaintiff to resume his duties as scab inspector. This was forwarded to him in hospital, whence he telegraphed that he would not be able to resume duty until October, but would be glad to be excused until January. It was then that, on inquiry, the department discovered the deportation, and the circumstances and nature of the accident, and thereupon, on August 25, 1902, the plaintiff was dismissed by a letter, which alleged his incapacity, owing to his accident, to perform his duties as the reason for the termination of his appointment. The plaintiff made no move in the matter after this letter, until September, 1904 when, as he states, the decision in the case of *Van der Merwe v. Colonial Government* (21, S.C., 520), gave him grounds for the opinion that he, too, might succeed in a similar action. The difference between the two cases, however, is that Van der Merwe never received the letter suspending him from duty, and temporarily stopping his pay. He consequently could not be held to have acquiesced in the arrangement made by the Government: but as I have already shown the plaintiff in the present case received the notifications, and elected to fall in with the proposed arrangement. His present claim, however, is for payment from September 17, 1901, to September 30, 1902 based on the ground that he was the scab inspector during all that time, and consequently entitled to pay for the full period. He certainly had never been dismissed from his post, but he was holding his position after October, 1901, on the understanding that he was to receive no pay until he resumed duty; and as he never did resume duty it seems to me that his action must fail. In the pleadings the defendants tender £75, with costs, to the date when they first made such tender, viz., February 3, 1905. This tender is really for pay from September 17, 1901, until January 31, 1902, when the plaintiff was deported. In my opinion the defendants need not have made this tender, but as they have done so they must be held bound by it, and judgment will accordingly be for the plaintiff for the amount tendered, with

costs to the date of tender, the plaintiff to pay costs after that date.

[Plaintiff's Attorneys: Van Zyl and Buissinné; Defendant's Attorneys: Reid and Nephew.]

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

WOODHEAD, PLANT AND CO. (s) 1905.
V. BASSON. (July 5th.

This was an action brought by Woodhead, Plant and Co., of Cape Town, against Johannes Matthys Michiel Basson, of Malmesbury, to recover a sum of £150, value of certain furniture, glassware, etc., alleged to have been purchased by defendant from plaintiffs on or about the 7th April, 1904.

Plaintiff, in his declaration, said that the sale took place at Malmesbury of the goods in dispute at the Central Hotel. The goods were delivered to defendant on the 7th April; and defendant took possession of the same, and agreed to pay the purchase price, viz., £150. Defendant had not paid the purchase price.

Defendant, in his plea, said that about the beginning of 1904 one Samuel Helm held the furniture, having obtained the same from plaintiffs on a hire purchase agreement. Thereafter, in March or April, 1904, Helm surrendered his estate as insolvent. Defendant subsequently bought at public auction the premises in question, together with certain furniture, but he denied having bought the goods belonging to plaintiffs. He said that he afterwards let the hotel to Helm, and that the goods remained in the possession of Helm during the whole time.

Plaintiffs, in their replication, admitted that defendant purchased the hotel, and that Helm was now occupying the premises. Plaintiffs repeated the allegation that defendant bought the goods in question.

Mr. Searle, K.C. (with him Mr. Gutsche), was for plaintiffs; Mr. Burton (with him Mr. Struben), was for defendant.

Gysbert William Kotze, secretary of the Malmesbury Board of Executors, and an attorney of this court, said that Samuel Helm, senior, surrendered his

estate as insolvent in February, 1904. Witness and Mr. Marais were trustees. Witness was the managing trustee, and he put Mr. Staples in charge of the hotel from the 23rd February until the sale. The hotel was furnished, but there was no billiard table at that time. Helm remained at the hotel, and told witness that the furniture now claimed belonged to plaintiffs. Helm told him that none of the instalments had been paid. Witness abandoned the furniture in question, which was set out in a list supplied by plaintiffs. Witness received instructions from Mr. Johnson, who represented plaintiffs at Malmesbury, to sell the furniture. He advertised the landed property and Helm's own property for sale. After the landed property and a few of the movables had been disposed of, witness pointed out the furniture of the hotel to Mr. Basson and said that the price would be £150. Defendant agreed to take the furniture, and said, "What about payment." Witness told him that he could pay in December, and that he would have to pay interest until the purchase price was paid. Witness saw defendant, who never repudiated the sale.

Cross-examined: Defendant had the reputation of being "long-winded" as regarded payments.

Frederick Salter Johnson, a commercial traveller in plaintiffs' employ, said that he instructed Mr. Kotze as regarded the sale of the goods. Witness saw Mr. Basson in the early part of April, some time before the public sale. Witness suggested to Basson that he should buy the goods, inasmuch as he understood that he would probably purchase the hotel. Basson said that he would buy the furniture. Subsequently Basson said that he had bought the goods at invoice price. Witness told him that he had got a bargain, because he (Mr. Johnson) had put the furniture in at a low price to Mr. Helm, and he would also save the cost of carriage from Cape Town.

Mr. Searle closed his case.

Johannes Matthys Michiel Basson (defendant) said that he let the hotel and certain of the furniture to Helm for about £20 for the first month, and £21 per month afterwards, having fixed a billiard table there. Helm had been in possession of the hotel practically ever since witness bought it. Witness denied that he bought the furniture in question from Mr. Kotze. He remembered having had a conversation with Mr. Kotze in regard to the second bond that he (witness) held on the premises, but he had not entered into negotiations with Mr. Kotze for the purchase of the furniture belonging to plaintiffs. He did not ascertain until after he had bought the hotel that the furniture in question was the property of Woodhead, Plant and Co.

Cross-examined: He did not speak to

Mr. Johnson about the furniture before the sale. He did not know before the sale that Helm only owned a little furniture. He had not had an intention of carrying on the hotel. After Mr. Helm had asked him to let the house to him, he said that certain of the furniture belonged to Woodhead, Plant and Co., and that he would try to arrange with Mr. Johnson to secure the goods from Woodhead, Plant and Co. Helm did not afterwards tell him whether he had arranged with Johnson.

Mr. Searle: In other words, you expected to let an hotel fully furnished without buying the furniture?

Witness: No. If I had known it was necessary to buy, I could have done it.

Samuel Helm, the lessee of the Central Hotel, Malmesbury, said that the furniture in question was not included in the agreement of lease on which he took over the hotel from defendant. He had never regarded the furniture as included in the agreement. Witness had made no attempt to obtain another hire purchase agreement from Woodhead, Plant and Co. About two months afterwards Johnson told him that Basson was going to take over the furniture.

Cross-examined: The furniture in dispute practically comprised the whole furniture of the hotel. Witness had furniture in his own private rooms. Plaintiffs' furniture was still at the hotel.

Mr. Burton closed his case.

Mr. Burton having been heard in argument, without calling on Mr. Searle:

Buchanan, A.C.J., after reviewing the circumstances leading up to the alleged sale and the chief points of the evidence, said that had there been any conversation admitted by Basson in regard to this furniture there might have been some ground for saying that Kotze had misunderstood the effect of the conversation, but the defendant said that he did not remember having had any conversation either with Kotze or Johnson about this furniture. It seemed extraordinary, if the furniture were not sold with the insolvent estate that there had been a sale of the hotel without any sale of the furniture, and that nothing whatever should have been done. Sitting as a juror in this matter, the weight of evidence, it seemed to him, was conclusively on the side of the plaintiffs, and he thought that the plaintiffs had established the fact that their furniture, which was in the hotel, had been bought by defendant from Kotze on the 7th April last, and defendant must now pay for it. Judgment would be given for the plaintiffs for the amount claimed, with interest *a tempore mora* at the rate of 6 per cent., from date of summons, and costs of suit.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

HERRON V. TORQUE CO. { 1905.
AND OTHERS. { July 5th.
" 7th.
" Aug. 2nd.
" 14th.

Joint Stock Company with limited liability—One man company—Dummy and nominee shareholders.

N., having obtained certain rights under a contract with a company, called the Trades, Markets and Exhibitions Company, for the lighting of stalls at the Exhibition, was unable, through want of funds, to carry out the contract. H. was prepared to join in the venture and supply the necessary funds if he could limit his liability in the matter through the instrumentality of a company, with limited liability. Consequently N. and H., together with five other shareholders, formed a company, in which these five shareholders held only one share each, the bulk of the shares being held by N. and H. N. and H., as directors, managed the entire business of the company without reference to the other shareholders. This business consisted entirely in carrying out the contract above mentioned under agreement between the company and N.

Held, that there was nothing illegal in the constitution of the company; and that H. was entitled under the law to limit his liability in respect of the business transacted under the contract in the manner adopted.

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This was an action brought by George Frederick Herron, an engineer, at present of Cape Town, against Edmund William McLachlan Thomas, in his capacity as trustee in the insolvent estate, the British General Electrical Company, the Telegraph Manufacturing Company (Colonial), Ltd., Stewards and Lloyds (S.A.), Ltd., and Siemens, Ltd., all of Cape Town, to have an order of seques-

tration superseded and discharged against the plaintiff, for a preferent claim for £1,000 in respect of two dynamos pledged to the plaintiff, and £2,500 damages.

The declaration set out that on a petition the Torque Electrical Company was provisionally sequestered, and among five partners the name of the plaintiff was included. On the return of the summons in connection with the making of the order final, the plaintiff appeared, and filed a short affidavit denying he was a partner in the Torque Company. The Court pronounced final sequestration against all the partners, but gave leave to the plaintiff to bring an action to prove he was not a partner. The last four defendants maliciously instituted proceedings in insolvency against the plaintiff as a member of the Torque Company, and caused the plaintiff's name to be included in the order of sequestration. The plaintiff had never been a partner of the Torque Company, and never held himself out as such, but on the contrary he frequently represented to the last four defendants that he was not such a partner, and by reason of his name appearing he had suffered damages in £2,500. On the 10th November, 1904, the plaintiff agreed with the Torque Company to endorse a bill for the sum of £1,000, the said company undertaking to deliver three dynamos to the plaintiff as security. The plaintiff had ultimately to repay the amount to the bank. After the sequestration the first-named defendant took possession of the dynamos, and the plaintiff claimed to rank as a preferent creditor to the amount of £1,000, for an order declaring the plaintiff not a partner, and superseding the final order of sequestration against him as against the first defendant, and as against the last four defendants' judgment for the sum of £2,500, with costs.

The defendants, in their plea, admitted the order of sequestration, but submitted that the claim for damages was bad in law and disclosed no ground of action. The proceedings were not maliciously taken, but were *bona fide*, and taken on reasonable cause. The Torque Company commenced business in Cape Town in September, 1904. The business was conducted by the plaintiff and Neale, both of whom gave orders to the Torque Company for goods to be supplied, and in general the plaintiff carried on the business, and led the defendants to believe that he was a partner in the Torque Company, which had a contract to supply light to the Cape Town Exhibition. The defendants did not admit that the plaintiff paid the company the said money, or that the company delivered the dynamos to the plaintiff. The defendants further alleged that the pledge was made when the company's liabilities exceeded its assets, and at a time when insolvency was con-

templated, and was, therefore, undue preference, under the Insolvency Ordinance. In reconvention they claimed that the pledge should be set aside. The replication denied that the plaintiff carried on or conducted the business, or that he led the defendants to believe he was a partner in the company. The Nealeron Company was formed to assist the Torque Company with the contract.

Mr. Alexander (with him Mr. Lewis) for the plaintiff; Sir H. Juta, K.C. (with him Mr. Gardiner) for defendant.

Sir H. Juta raised the objection that no claim could be put in for maliciously causing the proceedings to be instituted until the order had been set aside.

Maasdorp, J., said now that the witnesses were here, it would be better to let that case go on, and the question could be left over for the present.

George Frederick Herron, plaintiff, stated that in the early part of last year he came into contact with Neale, who told witness that he wanted £2,000 to carry out a contract in Cape Town, and asked witness to join him. Witness said he could join Neale without being a partner, as he wished to limit his liability, and after some argument this was agreed to. After several interviews it was finally decided to form a subsidiary company to take over the contract of the Torque Company and finance the Torque Company. The limited company took the name "Nealeron" as a combination of witness's and Neale's names. Witness had 2,000 £1 shares, which he paid for. Under the contract 4,000 5s. shares were to be given as consideration to Mr. Neale. The nominal capital of the company was £3,005, made up as follows: 2,005 £1 shares and 4,000 5s. shares. In consideration of the agreement between the Torque Company and Nealeron, Ltd., the contractor was to have the 4,000 5s. shares. Witness formed the company in order to limit his liability to £2,000. Witness came out to South Africa with Neale, partly to look after the contract. Witness was generally down at the Exhibition looking after the technical work, and any accounts that came to him he signed "p.p. Torque Electrical Engineering Company.—G. F. Herron." The names of the Torque Electrical Engineering Company and that of Neale were exhibited outside as well as inside the stand. Nealeron, Ltd., practically paid all the money in disbursements on behalf of the Torque Company. The contract was not a profitable one, and finally the Exhibition Company took it over. Witness had a written agreement with Neale with regard to the pledging of the dynamos for security on witness endorsing a bill for £1,000. Witness put a plate on the dynamos bearing his name. He told all the representatives of the defendants that he was not a partner. They all at different times asked him if he was a partner. The only person witness

had transactions with was Neale, and the only transaction with Neale was in respect of these 2,000 shares. When the contract was taken over by the Exhibition people witness remained in Cape Town. He first heard that he was included in the proceedings on the morning of the 27th January, the day after summons was issued. Witness went and saw the summons on the door of the Torque office, and there he saw his name. He received no intimation at his address at Sea Point that these proceedings were being taken. No application was ever made to him individually for payments of the debts of the company. He left Cape Town for Durban on January 27. Before leaving he swore a short affidavit. He was not here while the sequestration proceedings were on. On his return he was informed of the order, and he remained here in order to bring this action. He had been obliged to stay here for six months, and his wife also had remained. He claimed £10 a month for expenses; £200 for loss of directors' fees in two companies in England; £100 for loss of directorship, owing to being disqualified by reason of absence; £40 for telegrams and incidentals; and £750 as damages for loss of credit and injury to business. He had made up a rough statement, showing that he had sustained damage to the amount of £1,400. The dynamos were of the value of £1,000, and there was about £900 in book debts. Mr. J. E. P. Close had drawn up a balance-sheet, and made a report.

Cross-examined by Sir H. Juta: The Nealeron Company was not registered in this Colony; nor had the company an office here. The liabilities were incurred by the Torque Company, and all the money was received by the Nealeron Company. That was according to contract. Neale formerly carried on business in London as the Torque Engineering Company. Witness knew Neale carried on business here as the Torque Company. There was only one book—the petty cash-book—kept by the Nealeron Company in Cape Town. It was difficult to tell where the Nealeron Company ended and the Torque Company commenced. Neale got the contract with the Exhibition Company for himself, and witness thought it was a good thing. He was willing to put £2,000 into the concern, so long as he had his share of the profits, but should not have any more liability than £2,000. The floating of the Nealeron Company was a means towards limiting his liability. As regarded the position of the Nealeron Company, it had nothing except three calls of £1 each. He had drawn upon the Nealeron Company for expenses. He did not agree with Neale if the latter said he drew in anticipation of future dividends. A box of cigars might be said to be expenses. Whisky, lunches,

picnics, etc., might also be put down as expenses, although he knew nothing about the picnic. He had the ordinary authority of a director for drawing money out of the funds of the Nealeron Company. It was agreed before they left England that they should draw £10 a month expenses. There were meetings of the Nealeron Company in the office of Neale's solicitor—Mr. Reynolds—before they came out, but he could not say whether the directors were authorised at that meeting to come to the Cape. He believed there was authority given to the directors at a meeting to draw money. He did not remember whether it was an arrangement between Neale and himself that they should draw £10 a month; at any rate, there were three shareholders present when the matter was discussed. He could not say whether it was done at a meeting of the company. He could not say that there was a statutory meeting of the company to authorise the payment of his wife's fare out to South Africa, and also that of Mrs. Neale. The dynamos were not only necessary for supplying the electric light, but they were sent out as exhibits. They were not used, however. Neale told witness that they were his. Witness put his plates on at night after the lights had been turned off, as he did not want anybody to know at that time that he was taking the dynamos over.

Re-examined by Mr. Alexander: All the money received by the Nealeron Company was used to pay off the debts of the Torque Company.

William Hanks Rensford, clerk in charge of the bill department of the Standard, produced entries from the overdue bill account.

Cross-examined: The Nealeron Company bought a draft and paid £5 10s. 1d. for it.

Re-examined: It was really the Bank that bought the draft, and took Mr. Herron's signature as security.

Edwin Barron Lumm, from the office of Mr. J. E. P. Close, said he had inspected the various accounts at the instance of Mr. Herron, and had drawn up a report. He had also drawn up a balance-sheet for the Nealeron Company, which showed that the receipts from the exhibitors, rent, and cash received from the Torque Company amounted to £1,015 13s. The receipt-book showed receipts at £11,035 8s., and there was an amount received from the Exhibition for which no receipts were given amounting to £162 17s. 4d., making a total of £1,258 5s. 4d., and giving a difference of £242 12s. 4d. He found, however, that a sum of £295 17s. 6d. was paid into the Torque Company's account, which never reached the Nealeron Company, which made the difference £53 5s. 2d. This he could not account for. Nothing has been paid by the Nealeron Company towards the pur-

chase price of the dynamos. As regards the draft for £1,000, he had found that the money had passed through the account. There was no doubt that Mr. Herron put in £2,000. The total receipts of the company amounted to £4,034. Including the £2,000 in shares, and making allowance for the thousand pounds, the expenditure of the Nealeron Company exceeded the income by £3,019 0s. 10d.

By the Court: The Nealeron Company had the benefit of the thousand pounds draft, and certain payments were made to the Torque Company.

Examination continued: The money was undoubtedly used to pay the Torque Company's creditors.

Cross-examined by Sir H. Juta: In witness's balance-sheet the liabilities of the Nealeron Company were shown, and Herron was included as a creditor for £1,000, cash advanced. Among the items was a sum of £50 paid for raising capital. Witness understood that this was commission on account of the £2,000 found by Herron.

The Sheriff's Officer, who served the summons on the 31st December, said that Herron's name was not on the summons. Witness was unable to find the other defendants, and affixed the summons to the door of the office. Subsequently he had another summons with Herron's name as a partner.

Edward G. C. Jones, electrical and mechanical engineer, practising at Cape Town, said he had examined one of the two dynamos connected with the case. There were two generators, which he valued at £1,111. He, however, allowed 10 per cent. to the maker for disposing of it, so that the net value of the generators would be £1,000.

Cross-examined by Sir Henry Juta: He had given the English value of the generators. The South African value would be more.

Mr. Searle closed his case.

Edward W. McL. Thomas, the trustee in the insolvent estate of the Torque Company, said when he took over the affairs of the company the only book he found was a petty cash-book. At the Exhibition, in the space set aside for the Torque Company, he found two dynamos, one of which he sold after the Exhibition was over. He sold the dynamo, which was the smaller of the two, for £160. He knew of no proof of debt put in by Herron. Thomas. Parker and Co., the manufacturers, had put in a claim for the generators. The total amount of the claims put in at the several meetings amounted to £2,640 5s. 10d., whilst the assets so far had only realised about £500. On the 10th November the position of the company, so far as could be seen from the books, was that there was a deficiency of £2,647 15s. 9d., but that did not include in the assets the dynamos about which there was a dispute.

Cross-examined by Mr. Alexander: He did not remember receiving the letter from the plaintiff warning him not to sell the dynamoes. Witness did not expect the plaintiff to file a claim. There was a claim pending between the Torque Estate against the Exhibition Company. He held that the true value of the assets in the estate was about one-tenth of the cost price. In making up the account, he took "Nealeron" and the "Torque" to be one and the same thing. On the 10th November, the position was that there was £689 5s. 8d. to the credit of "Nealeron" in the Standard Bank. The Torque would have been solvent if the goods were taken at cost price; in fact, there would be a surplus on that basis.

Re-examined by Sir H. Juta: If the credit of the "Nealeron" on the 10th November was not taken in the deficiency would be much greater in the case of the "Torque." The English books showed an account with the "Nealeron," goods supplied to the "Nealeron" and moneys received from the exhibitors due to the Torque.

Frank Cook, one of the proprietors of F. Cook and Co., Cape Town, stated that the plaintiff was introduced by Lee to witness as one of the partners in the Torque Company. Witness heard that the Torque Company had trouble with another firm, and interviewed the plaintiff, who assured him that he would be paid, and the work of building in the boilers was undertaken by witness. The plaintiff again told the witness that he was a partner in the firm. When the work was finished, plaintiff repeatedly promised to pay, but failed to do so. He knew nothing of the "Nealeron" Company.

Cross-examined by Mr. Alexander: Witness looked upon Lee as a clerk in the firm; he never saw Neale. The plaintiff assured witness that the Torque was a well-to-do company in London. Lee wrote on behalf of the Torque Company accepting the witness's estimate. Witness addressed all his correspondence to the company; it was not necessary to mention the plaintiff's name.

Archibald J. G. Simpson, manager of Siemens, Ltd., said he had been introduced to plaintiff as "Mr. Herron, of the Torque Company." At that time, witness had heard nothing about the "Nealeron" Company. He considered that Herron, from the manner in which he conducted himself, was a partner in the Torque Company.

By Mr. Alexander: Plaintiff had never told him that he was partner of the Torque Company.

Walter Lee said he entered the Torque Company and came out to South Africa with Herron and Neale. An office was taken in Cape Town, and Herron was mostly in the office and at the office of the Exhibition. Witness kept the petty cash book. He did not know for certain

until a week before Christmas that there was a registered company called "Nealeron." He considered Herron was a person greatly interested in the carrying out of the contract at the Exhibition. The dynamoes were put down for the Torque Company. He remembered Herron putting the brass plate on about ten days before Christmas.

Thomas William McEwen, Cape Colony manager of the Telegraph Manufacturing Company, said when plaintiff came to his office he introduced himself as "Mr. Herron, of the Torque Company." Plaintiff wanted to see some samples with a view to placing business with witness's firm. Plaintiff did not explain his position in the company, and when witness was dealing with the plaintiff, he looked upon him as a partner in the Torque.

Cross-examined by Mr. Alexander: Although he was not a partner in the company, he would describe himself "of the Telegraph Company." Before supplying the goods, he made inquiries about the Torque Company's standing. One of the bank managers informed him that they were still awaiting a report about the Torque Company from London. The greater part of the goods had been supplied before he heard of "Nealeron." From the general conversation with the plaintiff, he concluded that he was a partner.

Edward Kitch, Cape Town manager to Clark and Co., Ltd., who entered into a contract with the Torque Company for light, stated that one cheque was paid to "Nealeron" and two to "Torque."

The evidence on commission of Walter Philip, director of the British General Electric Company and manager in Cape Town, set out that plaintiff gave him some orders for the Torque Company. He was not aware of the "Nealeron" while he was getting the orders. Witness subsequently told the plaintiff that he believed the "Torque" and the "Nealeron" were the same company. He knew of no other way of the Torque Company getting money if the stallholders did not pay for the light. The company, in his opinion, was formed to swallow up the proceeds, and he believed the "Nealeron" and the "Torque" were one and the same thing.

Cornelius Johannes Muller, of the Insolvency Branch, produced the records on which the sequestration was granted.

Sir H. Juta closed his case.

Sir H. Juta said there was evidence taken on commission of Neale which, however, he did not propose to put in.

Mr. Alexander said that the witness Neale was in court, and he submitted that either the evidence must go in or Neale called by the defence as a witness.

Sir H. Juta said supposing it was found after the evidence was taken on commission that the witness was hostile,

the defence could not be expected to call him, and now that he was in court the evidence on commission could not be put in.

Maasdorp, J., said that under the circumstances he thought Neale's evidence should be put in.

Sir H. Juta said it might be as well now that Neale was in the court to see how he looked in the box.

John Edward D. Neale was then called, and in reply to questions by Mr. Alexander, stated that he gave the rights of the Exhibition contract to the Nealeron Company. When he first met plaintiff, and spoke about the company, witness suggested that Herron should go into partnership, but Herron refused to do that. Herron said he would "go in" if his liability was limited. Witness, when they came to Cape Town, took an office in St. George's-street, and Herron was often in there looking after his interests as a shareholder. Herron had nothing to do with the Torque Company. Herron had charge of the technical work at the Exhibition.

Questioned by Sir Henry Juta, the witness said he knew a director could not appropriate the funds of a company to pay his own private debts. The £50 paid to the broker for obtaining someone to advance £2,000, he did not consider a private debt. Herron had to take instructions from witness with regard to the work at the Exhibition. A sum of £52 10s. in respect of the tuition fees of a learner—Rex—was paid into Mrs. Neale's account. This sum was witness's own personal property. Witness had given a bill in payment for the dynamos. The bill had not fallen due yet.

By Mr. Alexander: The fifty-two guineas paid by Rex was included in a sum subsequently paid into the account.

Postea (July 7th).

Sir H. Juta applied that the order of sequestration granted by the Court against the members of the Torque Company be discharged as against Forbes, Griffiths and Billiotti. He applied on behalf of the petitioning creditors, and the three persons he had mentioned were not, as the evidence in the case disclosed, partners in the firm, in so far as concerned transactions in South Africa.

Maasdorp, J., said the order would be varied by striking out the names of Forbes, Griffiths and Billiotti.

Postea (August 14th).

Maasdorp, J.: Upon the position of the four last-named defendants in this case, the estate of the Torque Electrical Engineering Company, of Cape Town, consisting of five partners, being Neale, Forbes, Griffiths, Billiotti, and the plaintiff, was finally adjudicated as insolvent on the 8th day of February, 1905. When the motion for final adjudication was heard, the plaintiff appeared to oppose on the ground that he was not a partner

in the business, and he prayed that the provisional order should be discharged so far as he was concerned. The Court confirmed the provisional order generally, leaving it to the plaintiff to have his position in the matter decided by action to be by him instituted. This action has accordingly been brought, and the plaintiff alleges in his declaration that he is not a partner in the company, and prays that his name may be struck out of the final order of adjudication. As against the creditors who obtained the order he claims damages on the ground that the legal proceedings were as against him instituted by them maliciously. He further claims to rank as a preferent creditor upon the insolvent estate in respect of a debt due to him received by the pledge of certain machinery. The defendants plead that the Torque Company commenced business in Cape Town in or about September, 1904, and opened an office in St. George's-street, a business which was conducted by plaintiff and the said Neale, and, further, that the plaintiff carried on the business and conducted himself in such a way as to lead the defendants to believe *bona-fide* that he was a partner in the said company. They further deny that the insolvent estate is indebted to the plaintiff, and that the machinery was legally pledged to him, and they say that if the machinery was pledged, such pledge is null and void under the terms of sections 83 and 84 of Act No. 6 of 1843. The first point the Court has to decide is whether the plaintiff was a partner in the business of the Torque Company, or whether anything was done by him to render him liable to be treated as a partner for the purposes of proceedings in insolvency. The question is simplified somewhat by the admission made at the trial on the part of the defendants that they are now satisfied that Forbes, Griffiths, and Billiotti were not partners in the Torque Company's business, and only Neale and the plaintiff have to be considered in this case. It appears that on the 12th day of February, 1904, an agreement was entered into between a company called the Trades Markets and Exhibitions, Limited, and John Edward Neale, carrying on business as the Torque Electrical Engineering Company, in London, the main purpose of which was to give to the second contracting party upon the terms stated the right of lighting exhibition stalls by electricity in the exhibition buildings at Cape Town upon terms to be made with exhibitors. Neale was not possessed of the means to carry out the contract, and in going round to find the necessary funds he made the acquaintance of the plaintiff, whom he told that he required £2,000 for the business, asking him at the same time to join him. Neale suggested that they should go into partnership, but the plaintiff re-

fused. The plaintiff was willing to join in carrying out the contract if he could do so without becoming a partner, and if by any means he could limit his liability in the concern. It was then suggested that that purpose could be effected through the instrumentality of a limited liability company, duly incorporated and registered. A company was accordingly formed, consisting then, and still consisting, of seven shareholders, whose names appear in the memorandum of association. One of the objects of the company, appearing in the memorandum, is to enter into partnership, or into any arrangement for sharing profits with any person or company engaged in any business the company is authorised to engage in. Under the further Articles of Association No. 5 it is provided that the company shall enter into and carry into effect either with or without modification an agreement which has already been prepared, and is expressed to be made between the company and John Edward Neale. The company was duly registered in England, and on the 28th day of May, 1904, the directors of the company, entitled Nealeron, Limited and Neale, formally executed the contract referred to in the Articles of Association, and the contract was duly filed in the office of the Registrar of joint stock companies. Under the contract Neale obtained 4,000 B shares, and in substance the agreement amounts to an undertaking on the part of Nealeron, Limited, to pay the working expenses of the Torque Company in consideration of Neale, carrying on business as the Torque Company, duly and regularly accounting to Nealeron, Limited, for all sums receivable by him under the agreement with the Trades, Markets, and Exhibitions, Limited. I may mention here that the shareholders in the Nealeron Company were Herron, the holders of two thousand "A" shares; Neale, the holder of four thousand "B" shares; Reynolds, a solicitor; Du Bois, a solicitor; Tofts and Smith, both solicitors' clerks, and Passmore, a solicitor's articulated clerk. The last five were the holders of one share each. Neale and Herron were elected directors of the company, and they seem to have transacted the business of the company without going through the formality of holding regular meetings, and recording the minutes of their proceedings. It was contended that for the purposes of the contract entered into between the Nealeron Company and Neale, carrying on business as the Torque Company, the former company might be regarded a negligible quantity, being a mere sham, or a scheme and contrivance to cover the personality of Herron, and to shelter him from responsibilities legally resulting from the business relationship entered into by him with Neale. It was argued that the constitution of the com-

pany and the circumstances under which it was formed were such as to reveal the company in its true light as a mere ingenious device, which the law would not recognise. It is enough to say that the arguments advanced in this case are similar to those employed in the case of *Solomon v. Solomon and Company, Limited* (reported in the Appeal Cases of 1897, page 22). In that case the Court of appeal held that the formation of the company was a mere scheme to enable Solomon to carry on business in the name of the company with limited liability contrary to the true intent and meaning of the Companies Act. If a transaction of this sort could be denominated a scheme or device, then the device in the case of Solomon was of a far more glaring character than that in the present case. It was frankly admitted in this case that Herron was desirous of taking part in the Torque business, by contributing to its finances, and sharing the profits, if he could do so, with limited liability, and for that purpose he took advantage of what he considered were legal means afforded by the Companies Act, by entering into the business as one of the shareholders of a limited liability company. The House of Lords held that there was in law nothing objectionable in the formation of Solomons and Co., Ltd., or in the circumstances under which it was formed, and similar considerations lead me to conclude that Nealeron was a properly and legally constituted company, with limited liability. If Herron acted in Cape Town in the capacity of one of the directors of Nealeron, he might be answerable as such director, or he might have to bear his share of responsibility as a shareholder in Nealeron, but he incurred no personal liability. It was suggested that the position of foreign companies is not well defined in law, but however questionable it may be in other respects, it was definitely decided in the case of *Bateman v. Service* (5 Appeal Cases, 336) that in the case of a properly incorporated foreign company, the liabilities of shareholders in England in respect of business transacted there would be the same as in the foreign country. In the event, therefore, of its being decided that in his connection with the Torque Company Herron was acting for the Nealeron, he would incur no personal liability. I see no reason to doubt the veracity of either Herron or Neale in the evidence they gave. They seemed to put matters very frankly, even upon points which might tell against them. Now the question arises, did Herron act only in the business as director of Nealeron, or in a personal and individual capacity; was his connection with the business only through Nealeron, or was he a partner in the business? There is no necessity to labour this point, because it is per-

fectly clear that it was only possible to connect him directly with the Torque if Nealeron was eliminated as a necessity; if Nealeron stands, then his conduct is consistently explained. It was argued that, as the evidence showed that Neale and Herron acted in a very irregular manner in doing business without formal meetings of directors, and without minuting their proceedings they must be taken to have acted for themselves, without reference to any company; but that was one of the features in *Solomons' case* relied on without avail before the House of Lords. I cannot come to any other conclusion than that Herron acted in good faith throughout the whole business. He put in the £2,000 promised by him, and lent the Nealeron Company £1,000 more. There is no evidence that he gained any profits while the business was running, and in the end he was a heavy loser. I come to the conclusion that the contract between Nealeron and Neale was a valid contract, and neither directly nor in its legal results made Herron a partner of Neale in the Torque Company. The next question is whether Herron conducted himself so as to induce people generally to believe that he was a partner, and to give credit to the business on the strength of his being a partner, with the result that he is now estopped from denying his partnership. I repeat that his share in the working of the business is explained by his being largely interested in it under the Nealeron contract, and his position could have been ascertained upon inquiry. The business was described in the contract with the Exhibition Company as that of Neale, carrying on business as the Torque Company. Apart from the existence of the Nealeron Company, there was nothing in the conduct of Herron, or in the manner he carried on some of the correspondence, to lead to the necessary inference that he was a partner. He did not give himself out to the public as a partner, and if he made statements to two or three persons, which induced them to think that he was a partner, whatever estoppel might in consequence arise in their favour, Herron would not thereby become a partner in respect of creditors generally for the purposes of sequestration in insolvency. In that view of the case it is unnecessary to decide whether the two or three persons referred to were justified upon what Herron said to them in coming to the conclusion that he was a partner in so far as to stop him from denying it as against them. But, although I hold that Herron was no partner in Torque, and do not go into the question of estoppel, still circumstances did exist which led to the reasonable belief in the partner of the four last-mentioned defendants that Herron's interest in the business was such that he

might in law be regarded as a partner, and I am of opinion that they did not act maliciously in the legal proceedings taken by them. The plaintiff sets up a claim against the insolvent estate of the Torque Company for £1,000, and also claims a right of pledge for this debt in respect of certain machinery. But it seems to me he has mistaken his remedy. The machinery for proving debts and settling up preferent claims is provided by the Insolvent Ordinance, and the plaintiff must proceed in the ordinary way. But I am quite prepared to express the opinion that the pledge was never validly constituted. The machinery remained in the possession, and under the control of Neale, and at the time of the alleged delivery was actually still in the course of erection for use by Neale. The Court will order that the final order of adjudication be varied by striking out the name of Herron as partner in the Torque Company. Defendants to pay the costs.

[Plaintiff's Attorneys: Fairbridge, Arderne and Lawton; Defendant's Attorneys: Syfret, Godlonton and Low.]

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

ADMISSIONS.

{ 1905.
{ July 6th.

Mr. P. S. T. Jones moved for the admission of Andrew Buchanan George McLeod, as an attorney and notary.

Application granted and oaths administered.

Dr. Greer moved for the admission of Frederick Perl, as an attorney and notary.

Application granted and oaths administered.

PROVISIONAL ROLL.

DELBIDGE V. HARRIS.

Mr. J. E. R. de Villiers moved for provisional sentence on a mortgage bond for £400, with interest, the bond having become due by reason of notice having been given; counsel also applied for the property specially hypothecated to be declared executable, with costs.

Order granted.

RUNCIMAN AND CO. V. PEINER.

Mr. Gutsche moved for a provisional order of sequestration to be made final.

Final order granted.

Mr. Gutsche afterwards moved for the appointment of a provisional trustee in the insolvent estate.

Buchanan, A. C. J., said that the application had not been set down, and could not, therefore, be heard now.

PICTON V. PERRINS.

Mr. Roux moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

WHITE, RYAN AND CO. V. JACOBS.

Mr. Swift moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

JONES V. UDWIN.

Mr. P. S. T. Jones moved for provisional sentence on a mortgage bond for £1,100, with premiums of insurance, etc., the bond having become due by reason of the non-payment of interest; counsel also applied for the property hypothecated to be declared executable, and for the rents of the property to be attached as they accrue.

Order granted as prayed.

COMMONWEALTH BOOT CO. V. VAN ROOYEN.

Mr. McGregor moved for provisional sentence on a promissory note for £78 18s. 1d., with interest.

Order granted.

ILLIQUID ROLL.

GIBBS V. HOGGARD. { 1905.
July 6th.

Mr. McGregor moved for judgment under Rule 319 in default of plea on a declaration filed for £144 1s. 2d., goods and materials sold, work and labour done, and disbursements.

Mr. P. S. T. Jones (for defendant) said that his client had given notice of application to purge default. Counsel read an affidavit by Mr. A. W. Steer, defendant's attorney, in support of the application, the ground being that there had been certain delay in preparing the plea, and that it had required to be printed.

Mr. McGregor read a replying affidavit by Mr. C. E. Price Hughes (plain-

tiff's attorney), who said that the defendant was not barred from pleading until three days after the time had expired, and that he had given an extra day's indulgence, but the plea was not even then tendered. Counsel read a further affidavit by the plaintiff, who said that he was seriously prejudiced in his business by the delay.

Defendant was granted leave to purge default, plea to be filed within 24 hours, and defendant to pay costs.

FRIEDLANDER AND DU TOIT V. MYBURG.

Dr. Greer moved for judgment under Rule 329d for £31 7s. 2d., balance of account for professional services rendered and money disbursed, with interest *a tempore moræ* and costs.

Order granted.

W. AND G. SCOTT, LTD. V. METTJE.

Mr. Douglas Buchanan moved for judgment under Rule 329d for £271 12s. 8d., goods sold and delivered, interest *a tempore moræ*, and costs of suit.

Order granted.

REHABILITATION.

Mr. P. S. T. Jones moved for the release of the estate of John Brinton from sequestration.

Order of sequestration superseded and applicant reinvested with his estate.

GENERAL MOTIONS.

HARRIS V. EXECUTORS OF { 1905.
ESTATE HARRIS. { July 6th.

Mr. Searle, K.C., moved, as a matter of urgency, for the appointment of a commission to take the evidence of plaintiff, Charlotte Ann Harris, and Mrs. Isabel Harvey, who, it was stated, were about to leave for England.

Application granted, Mr. Advocate Giddy, K.C., to be commissioner, and costs to be costs in the cause.

Ex parte CREDITORS IN ESTATE DE LANGE.

Mr. Benjamin moved, as a matter of urgency, for the appointment of Mr. C. M. van Coller, attorney-at-law, as trustee in the insolvent estate of Stephanus de Lange, farmer, Cathcart.

Order granted, Mr. Van Coller to be provisional trustee, with powers as prayed.

Ex parte BOUWER.

Mr. P. S. T. Jones moved for an order authorising the Registrar of Deeds to pass transfer of a certain farm in the district of Queen's Town, in the names of James A. Bremner and N. Lionel Goldmid.

Buchanan, A. O. J., said that he saw no need for the application to have been made, because the debts must be paid. An order would be granted as prayed. Petitioner was obliged to sell to pay the debts, and he would have a perfect right to sell.

Ex parte HANNAY.

Mr. P. S. T. Jones moved for an order authorising petitioner to pass mortgage bond for £300 on certain property in the estate of her first husband, Vincent Arthur Hutt, deceased.

Order granted as prayed.

Ex parte LAWRENCE AND WIFE.

Mr. P. S. T. Jones moved for leave to execute a certain contract embodying the provisions of an ante-nuptial agreement as if it had been an ante-nuptial contract, and for an order authorising the Registrar of Deeds to register the same.

Leave granted to execute a contract embodying the provisions of the ante-nuptial agreement between the intending spouses, excluding community of property, and securing to the wife sole control of her own property, rights of creditors before the filing of such contract reserved.

Ex parte INSOLVENT ESTATE
MCNAUGHTON.

Mr. P. S. T. Jones moved for an order authorising the provisional trustee, Mr. H. Gibson, to proceed with the liquidation of the estate, the only asset being the Market Buildings, Sir Lowry-road.

Order granted as prayed.

In re THE COLONIAL ASSURANCE
COMPANY, LTD.

Mr. P. S. T. Jones moved for confirmation of the liquidators' report.

Report confirmed as prayed.

IMPERIAL TOOL CO. V. GREEFF AND
WALTERS.

Mr. Upington moved for an order of personal attachment against the respondents for failing to obey an order of this Court to file true and proper accounts of their dealings as agents of the plaintiffs in the collection of certain

money. Defendants had carried on business as law agents at Laingsburg.

Application refused, his lordship holding that there had been no contempt on the part of the respondents.

Ex parte EXECUTRIX ESTATE KNOESEN.

Mr. Watermeyer moved for an order sanctioning the sale of certain property in the district of Steytleville, and authorising the Registrar of Deeds to register the transfer.

Order granted as prayed.

SNYMAN AND OTHERS V. EXECUTOR
ESTATE SNYMAN.

Mr. Searle, K.C., moved for an order for the removal of respondent, Karl Petrus Snyman, junior, from his office as executor of the estate. Respondent had become insolvent, and petitioners alleged that since his insolvency he had not exercised proper care and attention in the management of the estate.

The Court granted an order for the removal of the respondent, the Master being directed to take the necessary steps to appoint a tutor for the minors and an executor dative.

PLUMER V. PLUMER.

Mr. Douglas Buchanan moved for leave to the applicant to sue *in forma pauperis*, and by edictal citation. The applicant was the wife of the respondent.

Mrs. Plumer stated that her income was £1 a week, with which she maintained herself and children.

A rule *nisi* was granted calling on defendant to show cause why the plaintiff should not be allowed to sue *in forma pauperis*, personal service to be made if possible, rule to be returnable on the 3rd August.

Postea (August 3rd). Order granted as prayed.

Ex parte THE EXECUTOR OF THE ESTATE
OF TEMLETT.

Mr. P. S. T. Jones moved for an order authorising the purchase and registration of certain property sold to an executor dative. The affidavits of the vendor and the auctioneer showed that the sale was well advertised and the price realised satisfactory.

Order granted.

VILANDER CONCESSION SYNDICATE V.
COLONIAL GOVERNMENT.

Mr. Searle, K.C., moved for leave to appeal to the Privy Council. The application was not opposed.

Leave was granted.

DELPOR V. COLONIAL GOVERNMENT.

Dr. Rainsford moved for arbitrators' award to be made a rule of Court.

Mr. F. S. T. Jones for the Government, consented.

Order granted.

BRADLEY AND CRAVEN V. RANER.

Mr. Searle, K.C., moved for a commission *de bene esse* to take the evidence of certain witnesses in England. It was asked that the commission should be appointed in Wakefield.

Mr. Burton, for the respondent, said he did not oppose the application, but he would suggest that it would be better to appoint a commissioner in London. It would be difficult to know who to appoint in Wakefield.

The application was granted. Mr. D. G. Oliver, of London, to be commissioner.

***Ex parte* BROLE.**

Mr. Gutsche moved for an order authorising the Registrar of Deeds to pass transfer of certain properties. The consent of the heirs had been obtained.

Order granted.

APPLE V. THE DEPUTY SHERIFF.

Mr. Douglas Buchanan moved upon notice calling upon respondent to show cause why he should not be restrained from selling certain 15 horses. Petitioner alleged that the horses were his property, and that they had been seized in execution of a judgment against another person. He asked that the Deputy Sheriff should be restrained from selling the animals pending an action to decide the ownership.

Mr. Bisset opposed the application.

Buchanan, A.C.J.: The sale to Apple is alleged to be a fictitious sale, but, on the affidavits, it is impossible to decide this question. The parties must call their witnesses, and it must be determined after hearing witnesses—it cannot be determined on affidavit—to whom these horses belonged. A *prima facie* case has been shown why the sale of these horses should be restrained, pending this action, which is to be instituted forthwith. Leave, however, will be reserved to the parties to arrange for the sale of these horses, on condition that the proceeds be paid into court, to abide the result of the action, costs to abide result of the action.

**SPRIERS AND CO. V. INSOLVENT ESTATE
I. AND J. HERMANN.**

Mr. Upington moved (1) for leave to sign judgment against the plaintiffs for

not proceeding with the action within the time fixed by rules of Court; (2) for the rule *nisi* to be set aside; (3) for the sum of £120 deposited in court on behalf of the estate I. and J. Hermann to be paid over; and (4) for costs to be paid by plaintiffs.

Order granted, giving leave to applicants to sign judgment for the £120 paid into court to be returned, and for the rule *nisi* to be discharged.

STONE AND GIDDY V. SATISKY.

Mr. Douglas Buchanan moved for an order to aid the jurisdiction of the Eastern Districts Court in directing a certain writ against the goods of Max Satsky, who was now at Willowmore, and was formerly at East London.

Order granted as prayed.

***In re* DUSSEAU AND CO.**

Mr. Douglas Buchanan moved for confirmation of the official liquidators' report.

Order granted, ordering that all claims against the company be filed within six weeks from this date, that the name of Mr. Hoogendoorn be placed on the list of shareholders for 50 shares only, and that the list of shareholders so amended be settled as the list of contributories; that calls on shares not fully paid up be paid on or before the 1st August, and that the remuneration of liquidators be fixed at 5 per cent. of the amount received by them.

***Ex parte* TRUSTEE, THE ZULU AND
KAFIR WAR SUFFERERS' RELIEF FUND.**

Mr. Douglas Buchanan moved, on the petition of the Hon. Alfred Ebdon and the Rev. Rice Thomas, as surviving trustee and hon. secretary respectively of this fund, for a certain order. The petitioners said that about the month of January, 1879, a committee was formed in Cape Town to collect and administer funds for the relief of sufferers by the Zulu War, the money so collected and administered being afterwards styled the Zulu and Kafir War Sufferers' Relief Fund. Sums amounting to £9,066 were collected in this colony and in England on behalf of the said fund. The whole amount of the moneys had been disbursed in relief of the sufferers, with the exception of £1,000, which had been invested by the executive committee in Government 4½ perpetual stock on behalf of the fund, and a further sum of about £136 now standing to the credit of the fund in the Standard Bank in Cape Town. The Venerable Archdeacon Lightfoot and the first-named petitioner were appointed trustees for the said in-

vestment of £1,000. The Venerable Archdeacon Lightfoot was now deceased. The sufferers, for whom the £1,000 was invested, and who annually received payments from the interest, were nearly all deceased. In paragraph 7 of the petition the petitioners suggested that the £1,000 invested as aforesaid be retained as a nucleus of a fund for any similar emergency in the future, and that the annual interest therefrom be disbursed as follows: (a) The sum of £18 per annum to the present annuitant; (b) the balance, after deducting administrative charges, to be equally divided among certain six widows of soldiers killed in the Zulu War of 1879, whose names were set forth in the annexed memorandum marked "a," and who were now residing in this colony, to supplement a small grant which they received from another fund. In paragraph 8 the petitioners further suggested that any money which may from time to time accrue, by reason of the decease of the said widows or any of them, be paid to the general fund of the New Somerset Hospital, Cape Town. The petitioners were desirous of being relieved of their responsibility under the said trust fund, and suggested that the South African Association for the Administration and Settlement of Estates be appointed trustees of the said fund. The association were willing to accept this trust. The petitioners prayed for an order (a) releasing them from the trust, and (b) appointing the South African Association as trustees of the relief fund, with full power to such association to retain the capital of the fund, consisting of the £1,000 invested as aforesaid and the amount standing to the credit of the fund in the Standard Bank for any similar emergency as referred to in paragraph 7 of the petition, and to pay the annual interest derived therefrom in manner as set forth in paragraphs 7 and 8.

Buchanan, A. C. J.: This is an old matter in which the public are more or less interested, and some notice ought to be given to the public. You may take a rule *nisi* calling upon all persons interested to show cause on the 3rd August why (a) petitioners should not be relieved of their trust; (b) the South African Association should not be appointed trustees of the balance of the fund; (c) the interest derived from the said balance should not be distributed as recommended in the petition; and (d) payment of costs of the application should not come out of the fund, rule to be published once in the "Cape Times" and once in "Ons Land."

Postea (August 3rd). Rule made absolute.

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

TABLE BAY HARBOUR BOARD { 1905.
V. CITY LINE, LTD. { July 7th.

Sir H. Juta, K.C., for the defendants, applied for a postponement of the trial and for a commission to take certain evidence. Counsel said that, while the City of Perth was being taken out of the Cape Town Harbour under compulsory pilotage, it struck and damaged one of the quays. The Harbour Board supplied the compulsory pilot, and the Board relied upon two regulations. The first regulation was that the employment of a pilot was compulsory when a vessel left the docks, and that the Board was not responsible for the failing of any such pilot, and the second regulation was that the masters and owners of a vessel should be liable for any damage to quay fittings, etc., whether such damage was done directly or indirectly by the ship. The defendants pleaded that the ship was under the control of the pilot supplied by the Board, without which the ship could not leave the docks. The defendants did not admit that the pilot was competent, and the pilot was suspended shortly after the accident had occurred. Defendants further pleaded that the regulations were unreasonable and *ultra vires*, and it clearly became necessary to obtain the evidence of the master and officers of the ship, which would be in Glasgow at the end of September.

Mr. Searle thought the evidence would show that there might have been an error of judgment on the part of the pilot.

Maasdorp, J., ordered that the case be postponed *sine die*, and that a commission be appointed to take evidence of the master and officers of the City of Perth at Glasgow, the costs to be costs in the cause.

Subsequently Sir H. Juta asked that Mr. Robert Scott Browne, advocate, of Edinburgh, be appointed commissioner.

The Court made an order accordingly.

SECOND DIVISION.

CHANNING V. CHANNING. { 1905.
{ July 7th.

This was an action brought by Janet Channing, of Woodstock, against her husband, Matthew Channing, whose whereabouts are unknown, for restitution of conjugal rights, failing which, a decree of divorce. Mr. Douglas Buchanan was for plaintiff; defendant did not appear.

Hopley, J., said that there appeared to have been some irregularity in the matter of publication, because the rule was not published in the "Gazette" at least one calendar month before the return day, as required by the rule of Court.

Mr. Buchanan said that some delay had been occasioned by correspondence with the railway authorities in Natal and the War Office in Cape Town, in order, if possible, to effect personal service on defendant. He submitted that the irregularity was purely technical, and that it would not be likely to make any practical difference, since the defendant had not been heard of for five years, having been a member of the Railway Pioneers.

Hopley, J., said he was sorry that another delay must occur, but he had no alternative but to decline to hear the case at present. The return day would be extended until the 15th August, rule to be published once again in the "Gazette."

Ex parte ROSE.

Mr. Roux moved, on the petition of Marcus Rose, general dealer, Prieska, for a temporary interdict restraining the Registrar of Deeds from passing transfer of erf No. 120, situate in the village of Prieska, from Walter Percy Shutte and Sidney Richard Shutte, trading as Shutte Bros., to one Leopold Rose, until recently trading in partnership with the petitioner as Rose and Rose, pending an action to be instituted as to the legality of the sale of the erf to Leopold Rose.

Interdict granted as prayed, pending result of an action to be forthwith instituted by petitioner against Shutte Bros., or any other parties whom petitioner may be advised to sue.

GREENWOOD V. DE VILLIERS. { 1905.
July 7th.
" 20th.

Sale and purchase — Broker —
Identity of property sold.

This was an action brought by James Henry Greenwood, builder, Observatory-road, against Frances E. de Villiers, wife of Daniel J. de Villiers, of 182, Lower Main-road, Observatory-road, for an order requiring her to take transfer of certain property.

Plaintiff, in his declaration, said that defendant was married without community of property to Daniel Johannes de Villiers, and was by him duly assisted in this action. In January, 1905, plaintiff was owner of certain land and four houses situate thereon in Lower Main-road, Observatory. On or about the 13th January, 1905, plaintiff sold

and defendant bought a portion of land, with house thereon, No. 188, Lower Main-road, for £500, the terms being £100 in cash and balance in two mortgage bonds, a first bond of £200 and a second bond of £200, defendant agreeing to pay off the bonds in monthly instalments. Thereafter, on the 20th January, the parties agreed to substitute for the house and land defendant had bought other land and house, being No. 182, Lower Main-road. Defendant had paid £100 on account, but refused to take transfer of the land and house No. 182, which she had bought. Plaintiff tendered transfer of the property against passing of mortgage bonds. He claimed an order requiring defendant to take transfer of the property No. 182, Lower Main-road, and to pass mortgage bonds for the balance, or, in the alternative, cancellation of the sale, £100 damages, and costs.

Defendant, in her plea, denied that she bought the property No. 188, Lower Main-road, but said that she bought No. 182, including the portion on the diagram above the black line marked "E" and "L," bounded by the red dotted line, which showed the position of the fence at the back. She denied the alleged substitution of the properties set out in paragraph 2 of the declaration. She admitted having paid £100, and also that she refused to take transfer of the property, but she said that she had tendered for and was willing to take transfer of the property actually sold to her by plaintiff. She had tendered to complete her part of the purchase. She prayed that the claim might be dismissed with costs. For a claim in reconvention she said that she had been put to considerable trouble and expense by the failure of the plaintiff to transfer to her the property she had actually bought, and she claimed damages in the sum of £100 and costs.

Plaintiff, in his replication, denied that he sold the property No. 182, in the first instance, and he also denied that he sold to defendant the portion of ground on No. 182, which she alleged she had purchased.

Mr. Gardiner (with him Mr. Baile) was for the plaintiff; Mr. Burton (with him Mr. De Waal) was for defendant.

Mr. Gardiner said that the issue, briefly, seemed to be that plaintiff said there was to be the common passage shown on the diagram, while she denied that, and said that she bought from plaintiff the land forming the passage. The whole question was whether or not plaintiff sold to defendant the piece of ground mentioned.

Thomas Sloan, broker, Cape Town, said that in January this year Mr. Greenwood placed with him for sale the property known as 188, Lower Main-road, Observatory. Witness saw Mrs. De Villiers, who was then Miss Kotze.

Witness's wife went with Mrs. De Villiers to look at the property. Subsequently witness drew up a broker's note, and this was signed and accepted. About a fortnight afterwards defendant said she would like to exchange for the house occupied by Mr. Greenwood, who, she understood, was prepared to move out of No. 182. Witness explained to her that on account of the municipal regulations the fence of the yard might have to be set back to the line of the house, in order to provide a sanitary passage. The defendant understood that the land she was buying was in a line with the house. Defendant agreed to buy No. 182 on these terms. Defendant came and occupied No. 184 until Mr. Greenwood could move out of No. 182, and she subsequently went into occupation of No. 182, and was now residing there. Witness had a conversation with defendant after the sale, and she then raised no objection to the property.

Cross-examined: He was not aware that objection was raised to the alleged encroachment shown on her property immediately the diagram was sent to her. He was not aware that her attorneys wrote on the 10th April stating that the common passage marked on the diagram not only took away a portion of her property at the back enclosed in the zinc fence, but the line or passage was against the wall and windows of her house. Witness would swear that he asked his wife to go and show defendant and Mr. De Villiers the property No. 188, Lower Main-road. He admitted that defendant was shown through No. 182, which was a similar house to No. 188.

Mrs. Sloan (wife of the last witness) said that in January Mr. Sloan had for sale 188, 186, and 184, Lower Main-road, and that they showed to would-be customers No. 182 as a sample house. Mr. Sloan offered an option of any of the three first houses at that time, and told defendant that if she wished she could have No. 182 afterwards. Witness told her that No. 182 was not for sale at that time, but might be afterwards when Mr. Greenwood vacated. Witness told her of the possibility of the fence having to be set back. There was some question of plaintiff buying No. 182 before the broker's note was made, and witness told her that she would have to wait for it, but plaintiff was in a hurry to get things settled up.

James Henry Greenwood (plaintiff) said that Mr. Sloan was instructed to sell No. 184, 186, and 188, and when he had sold these he could sell No. 182. Witness consented to the exchange of 182 for 188, and he consented to Mrs. De Villiers occupying 184 in the meanwhile. Witness saw Mrs. De Villiers about the fence, and she gave him an open letter to take to her attorneys, stating that she fully understood the

position. Defendant read that letter to him. Defendant was afterwards informed that if she refused to take transfer, witness was prepared to cancel the sale, and return the £100, less an account for £25 for rent, fees, etc. He had been required by the Municipality to set back the fence.

Cross-examined: He told Mrs. De Villiers that if the Municipality allowed the fence to remain, he was quite willing. He did not remember having met Mrs. De Villiers, or her brother-in-law, Mr. De Villiers, of Durbanville. Witness got a notice from the Municipality on the 18th May to remove back the fence. He had not spoken to Mrs. De Villiers in June. He had a conversation with Mr. De Villiers, in which he told the latter that he thought the Municipality would be satisfied if the fence were set back one foot. The passage, he had always taken it, was to be a common passage for the block of four houses.

By the Court: The Municipality insisted upon a 3 ft. passage all round the property for sanitary purposes.

Peter Maakew, Government land surveyor, Cape Town, gave evidence as to preparing diagrams of the property under instructions from Mr. Sloan.

Cross-examined: Sloan instructed him that there was a common passage, the other houses having a servitude over the lane adjoining No. 182.

John Edward Jones, building inspector, employed by the Woodstock Municipality, said that plaintiff, in his original plans, showed a 13 ft. passage, or lane, but afterwards reduced this to a width of 6 feet. The practice of the Municipality was to obtain a 3-foot passage for each property, when there was only one ownership, but if the ownership were separate, then they demanded a 3-foot passage for each house.

Cross-examined: If the block of houses had remained in one ownership, the Council would not have insisted upon a passage of more than 3 feet for the property.

By the Court: If plaintiff had chosen to alter the 10-foot lane shown on his original plan to 3 feet, the Council could not have objected.

Mr. Gardiner closed his case.

Daniel Johannes de Villiers (husband of defendant), said that he was engaged to be married to Miss Kotze in January last. Witness spoke of the inspection which he made of No. 182, Lower Main-road, under the guidance of Mrs. Sloan. Witness said that he would buy the property if he could arrange to get £100 from his brother. Not a word had been said about the purchase of No. 188, Lower Main-road. Witness and his brother subsequently went to look at No. 182 and saw Mr. Greenwood, who pointed out a peg at the back, and said that a width of 3 feet remained behind, and at the side. Witness swore positively that not a word was said about buying

No. 188. Witness had a conversation subsequently with Mr. Greenwood, who said he thought all trouble and expense would be saved if he gave one foot off the lane.

Cross-examined: Witness had only signed one broker's note; he had not seen a broker's note in the possession of his wife. Witness did not read the broker's note before he signed it; Mr. Sloan read the document over, and witness took it that it would be all right. Mr. Sloan did not read out No. 182, Lower Main-road. Witness had never thought of buying No. 188. The peg that witness saw was at the back of No. 183. Mr. Greenwood took him to the back of No. 188, and showed him the peg, saying that all the houses had a 3-ft. passage along there.

Mr. Gardiner: You only claim the 3 feet where your yard comes out. Why don't you claim 3 feet right to the front, alongside your house?

Witness: We claim a 3-foot passage right round the house.

By the Court: When they bought No. 182 there was no other house on the Salt River side.

Frances E. de Villiers (defendant) said that she specially fancied No. 182, because of the open space, where the windows faced. Other houses had been built on that side since. Nothing was said to her about a common passage beside the fence. Witness had no other intention at that time than to buy No. 182. She did not remember her husband signing the broker's note. It was some days after the note was signed that No. 186 was mentioned, and she said she would have No. 182, or she did not want any property at all.

Cross-examined: She would pay the costs of this action if she lost it. With regard to the letter given to Mr. Greenwood to give to her attorneys, stating that she understood the position regarding the fence, and that they might take transfer, the letter was drafted by Mr. Greenwood, as she did not know much about business, and she copied it.

By the Court: After she had consulted her attorney she withdrew her instruction.

Cornelis de Villiers (brother-in-law of defendant) said he considered that if the fence round the yard were moved back in a line with the wall of the house, it would reduce the value of the property by £50.

Mr. Sloan (re-called by his lordship) said that the number in the broker's note had, he thought, originally been 186, but it had been amended to 188. Afterwards, number 182 was, at the request of defendant, entered at the side. A copy was given to defendant, and it was unfortunate that she could not produce it. Witness always made out his broker's notes in duplicate, and handed a copy to the purchaser.

Mr. Sloan (in reply to Mr. Burton)

stated that only recently he adopted the system of keeping a counterfoil. He was perfectly clear that he had used three sheets out of the book produced. The defendants were handed a stamped copy on the day the transaction went through.

By Mr. Gardiner: A clean copy of the broker's note was handed to Mr. Gie.

This concluded the evidence, and counsel were heard in argument on the facts.

Cur. Adv. Vult.

Postea (July 20).

Hopley, J.: The plaintiff is a builder, who had, before January, 1905, acquired a piece of ground at Observatory Road, with a frontage on Lower Main Road in that suburb, which, in 1904, he had divided into equal portions; and on the southern half he had built four houses which have since been numbered 183, 186, 184 and 182 Lower Main Road. This southern half he had mortgaged, and had caused to be deducted from his diagram for mortgage purposes. The dividing line had been pegged out by the land surveyor, and the four houses placed thereon were so located that the most northerly of them, now known as 182, stood about three feet from this boundary line. In submitting his plans to the municipal authorities he had, it is said, shown a three-foot passage on the north side, as apparently was compulsory under the Municipal Regulations. When the cottages, which were built in a continuous block with common party-walls, were completed, the plaintiff got tenants for the other three, pending a sale, and himself occupied No. 182, which he intended to inhabit until he had completed a somewhat similar block on the other moiety of the ground. In December, 1904, or early in January, 1905, he had placed these cottages in the hands of a broker named Sloan for sale. It would have been instructive to see the letter, or any correspondence, whereby this was done; but none has been produced corroborative of the statement that he placed at first only 188, 186 and 184 in Sloan's hands, and for the time being withheld 182. That, however, is what the plaintiff and Sloan state to have been the position of affairs in January, 1905, when the defendant, who was then Miss Kotze, a spinster, about to be married, and her present husband, Mr. De Villiers, were looking out for a house to live in. Attracted by one of Sloan's advertisements they applied at his office, and somewhere about January 13 they were conducted by Mrs. Sloan, who assists her husband in business, to these cottages. They were taken to 182, and they inspected that and only that. This, the Sloans explain, was done in order not to disturb or annoy the tenants of the other three cottages, who might take umbrage at such intrusions; whereas the

plaintiff, who wished to sell, would put up with the inconvenience. Mrs. Sloan says she explained that 182 was shown merely as a specimen of the rest, while Mr. De Villiers and the defendant say that it was, as they understood, shown them as the house they might buy. Be that as it may, they thoroughly inspected and liked the place; and, *inter alia*, they inspected the back yard, on the size and convenience of which Mrs. Sloan expatiated. Now as the backyard is the cause of the present suit, it would be well to state at once what the plaintiff had done there. In it he had placed an iron shed, and as to the extent of the yard itself he had encroached on the three-foot reserve on the northern side; so that the yard instead of running in the same straight line as the northern boundary of the house jutted out into the three-foot reserve, practically overlapping the whole of such reserve from where the yard started to the back, or western, boundary of the lot. At the time the defendant inspected, however, there was nothing to call attention to this, because to the north, where the encroachment was, all beyond the fence of the yard and wall of the house was open field. After the inspection, Mr. De Villiers went to Sloan's office and told him that if he could get his brother, who lives at Durbanville, to advance him the £100 (a cash payment of such amount being one of the conditions of a sale) he would buy the ground. This was about, or on, the 13th of January, and Sloan, who was apparently very anxious to push the transfer through, at once drew up a broker's note, in which he treated Mr. De Villiers as the buyer, and in which the property sold was described as "No. 188 Lower Main Road." According to Sloan, De Villiers signed the bought note then and there, and, for some reason which has not been given, a press copy was immediately, or soon after, taken of the manuscript portion of the note as it then stood. This copy was produced in Court at the end of the case, so that not much evidence was elicited about it. The note must then have run as follows:—

"January 13, 1905.—Bought on account of Mr. D. J. de Villiers, from Mr. J. H. Greenwood, certain piece of land, with house and buildings erected thereon, being No. 188, Lower Main Road, Observatory, for the sum of five hundred pounds sterling (£500). Buyer pays transfer and survey fees and bond charges. Payment £100 cash by January 20, 1905. Balance £200 on first mortgage, and balance repayable in monthly instalments of, say, five pounds sterling on second mortgage; first instalment payable 1st April, 1905. Interest, 1st and 2nd bonds, to be at the rate of six per cent. per annum.

"SLOAN AND CO."

Sloan alleges that this note was signed by De Villiers on January 13, and if so that would be evidence of a completed contract of sale on that date of No. 188 between plaintiff and De Villiers; but I find it impossible to believe that De Villiers did sign the note on that date. Besides, the fact that there is no impression of his signature in the press copy, which might be explained by his having used ordinary and not copying ink, there is the extreme improbability of a man like De Villiers concluding such a contract when he had never actually seen the property. He had seen 182; and Sloan wishes the Court to believe that he thereupon and without further inquiry or inspection signed a note proving that he had purchased 188; and Sloan's case is that De Villiers knew quite well what he was doing, and that he was purchasing not the place he had inspected, but that at the other end of the block of cottages. Besides the improbability of such conduct, there is a further feature in the circumstances which would make such conduct almost impossible since De Villiers admittedly could not have bought without an advance by his brother of £100, and his brother had at that date not yet agreed to provide that sum.

I am inclined to think that at that stage there was a misunderstanding between Sloan and De Villiers, that the latter had gone to Sloan's office and told him that if he could get his brother to advance the £100 he would purchase the house at the end of the block, or words to that effect, that Sloan had thereupon concluded that the house meant by him was 188, and that he drew up the note in anticipation of the final settlement. After that, Mr. Cornelius de Villiers, the brother in question, came in to inspect the property. He says he came in on the 13th, but I think that he came in only on the 16th, the date when the bargain was admittedly completed; but whether he came in twice or only once it is useful and instructive to observe what he actually did look at and inspect. He was not taken to, nor did he inspect, 188, but he did look carefully at 182, after which he agreed to advance the money, and accompanied his brother and Miss Kotze to Sloan's office. He also took his attorney, Mr. Gie. Now it seems clear to me that the two Messrs. De Villiers and Miss Kotze all thought that they were about to complete a purchase of 182. It is inconceivable that they would have acted as they did if they had thought that they were purchasing 188. In that case they certainly would have at least entered it to see if the internal arrangements were the same, if the rooms were equally conveniently situated and in equally good condition, and generally to satisfy themselves that it was an equally desirable property to purchase. As a matter of fact, I under-

stand that 182 and 188 are not constructed on exactly the same lines, and that they vary internally in not unimportant particulars, and this is a material point for consideration, because if the intention of Mr. or Mrs. Sloan was to sell 188 they should at least have insisted on an inspection of that property before the contract was concluded. At the meeting in Sloan's office on January 16 it is quite possible that no great attention was paid to the actual number inserted in the note, as the buyers were prepossessed with the idea that they were purchasing 182, and probably concluded that that number had been properly placed there by the broker. Now the bought note, as it finally appears in the broker's so-called "record-book"—which is merely a scrap book into which he pastes bought or sold notes of transactions concluded by him—has been considerably changed from what it was on January 13. The name of the buyer, Mr. D. J. de Villiers, has been erased, a pen having been run through it, and that of Miss Frances Elizabeth Kotze substituted. The number 188 has also undergone a change. According to the press copy the final 8 was originally a perfectly clear figure; but in the note it is by no means a clear figure. It still resembles an 8 more than anything else, but it is blurred, and evidently has clearly been changed from what it originally was by something done with pen and ink, causing it to be by no means clear and indisputable, as it originally was. Opposite it in the margin of the scrap-book is written without comment of any kind the number 182. The monthly instalment of five pounds has been changed to four pounds, the word "five" having been scratched out and the word "four" written above it. Then comes the rest of the note as quoted above. Then above the signature of D. J. de Villiers come the following words, crowded in, "Shed to be erected same as on No. 182 within one month from date." (This 182 was clearly originally 180). Then comes the signature of De Villiers scratched out with pen strokes. Then evidently after this signature had ceased to be operative and partly written over it came the words, "The wall between 188 and No. 186 is a party wall." Then in defendant's writing comes her signature thus, "Miss Frances Elizabeth Kotze." Attempts have been made to explain all these alterations; but there is a serious and direct conflict of evidence with regard to some of them. There is no great conflict as to the change of names. Apparently De Villiers thought he was to be the purchaser, and signed the note at first, but it had been arranged that the property was to be settled by ante-nuptial contract on Miss Kotze, and to effect that simply it was decided that it should be

purchased in her name, and so the changes were made. With regard to the other changes, however, the two Messrs. De Villiers and Miss Kotze all swear positively that they saw, or thought they saw, 182 on the note, and that Sloan, who read the note, read "182"—and they swear most positively that they know nothing about the provisions as to the erection of a shed, or as to the party walls. Mr. Gie, it is said, can throw no light on the matter as he was mainly interested on behalf of his client in the portion of the note arranging the terms of payment. Sloan, however, swears that the purchasers knew quite well that they were buying 188—that they stipulated for a shed such as they had seen at 182, and for the provision about party walls. He swore most positively also that he had written the contract out in duplicate on two broker's notes, and that he had delivered the second copy (which I suppose would be the old note) to Mr. Gie or the defendant. As to the latter point Sloan was undoubtedly very much surprised on the second day of the trial, when he was re-called, by having it pointed out to him that he had, in his "record book," but eight pages further back, this second copy of the contract in the form of a sold note. As to that note, it was clearly the original duplicate, when Mr. De Villiers was expected to be the purchaser, for his name appears thereon as purchaser. It has been erased by pen stroke and that of Miss Kotze substituted. In it "188" is clearly written, the instalment originally five pounds has been changed to four pounds, and for the rest it is a clean copy of the other note without, however, any reference to De Villiers's erased signature. The whole is in Sloan's writing, and ends thus: "(Signed Frances Elizabeth Kotze), Sloan and Co." It therefore, though in form a sold note, purports to be a copy of the bought note, at all events as to Miss Kotze's signature; and I am convinced that this was the second copy made by Sloan, of which he speaks in his evidence. He was therefore guilty of an inaccuracy when he swore most positively that he had given that document to the defendant or Mr. Gie. I was somewhat impressed by the fact of the stipulation about the party walls between 188 and 186 which Sloan swore was inserted at defendant's or Mr. Gie's instigation until I found, by looking through his record book, that it was apparently an invariable stipulation introduced by Sloan into all sales of similar semi-detached cottages, and that he had inserted it in broker's notes before January 13. Now if the changes in the notes were made subsequent to the completion of the contract on January 16, I could readily construct a plausible theory for what reasons such changes might have been made; but I prefer

not to express myself in that sense. All I am disposed to say as to this branch of the case is that when brokers, who are business men expected to keep accurate documentary evidence of their transactions, wish the Court to rely implicitly upon their business documents they should produce them in such a state as to be practically unimpeachable *per se*. They generally have to deal with people less skilful and experienced in such matters than themselves, and it is their duty not only to have clear documents but also to deliver them to the parties to whom they relate in such a manner and in such condition that there should be no possibility, or hardly any possibility, of a dispute about the matters involved. In the present case the documents are in such a state that they can be attacked, and they are most strongly impugned by the sworn testimony of the contracting parties on the one side; and a close study and anxious consideration of them, and of the evidence given in regard to them, have left me in a state of perplexity as to how they were completed, and when the changes and additions which are apparent upon them were actually made. I am also satisfied that for some reason or other no note, copy or duplicate, of any writing embodying the contract was at the time delivered either to the purchaser or to anyone on her behalf. Now the *onus* of proving his claim is on the plaintiff, and he wishes to rely on these so-called broker's notes, but they are so unsatisfactory that I can place no reliance upon them, and the case must be decided as though they were non-existent. In view of what subsequently happened the exact terms of the broker's notes, in so far as they set forth the number of the house sold, are not of primary importance, as I shall presently explain; but I have felt obliged to enter somewhat fully into that portion of the case, as it seems to me to determine the credibility of the witnesses and the proper weight to be given to the conflicting parol evidence as to the later stages of the case. As to the original contract, I am satisfied that the two Messieurs De Villiers and Miss Kotze clearly thought that they were purchasing 182, and that Sloan, if he thought on January 13 that the property intended was 188, found out his mistake very shortly afterwards; but that he pushed the sale through nevertheless, either hoping to persuade the purchasers to be satisfied with 188, or to induce the seller to vacate 182. Now as to what happened afterwards, Sloan states that Miss Kotze came to him about a fortnight later saying that she had heard that plaintiff was going to leave his house (182), and asking whether she could not have that instead of 188. He does not explain how Miss Kotze could have heard such a rumour—which apparently was unfounded—but he says

that he got plaintiff's consent to the exchange. The defendant's version, however, which seems to me much more likely, is that shortly after the contract Mrs. Sloan approached her saying that the plaintiff wished to remain somewhat longer in 182, and asked her whether she would not exchange to the other corner lot of the block (188). She states that thereupon she went with Mrs. Sloan, that she inspected 188 then for the first time, that she at once and unhesitatingly refused to make the exchange, and that she heard no more of the matter until she received a letter from Sloan on January 23 which is produced and which states that he had arranged that she should occupy 184 until the plaintiff should vacate 182, which he expected would be in about six weeks' time. Here again it seems to me that all the probabilities are on the side of the defendant's version, and I am convinced that, whether a mistake was or was not originally made by Sloan or his wife in selling 182, they got the plaintiff to acquiesce, as indeed it was in his own interest to do. As I find, then, that the original and only contract was the sale of 182, the one point for consideration that remains is whether there was any condition attached to the sale as regards the fence on the back-yard of that lot. Now on the Sloans' own evidence it would be very unlikely that there was anything of the kind. The plaintiff had not, so they say and so he says, on January 13, or on January 16, given them that property to sell; it is therefore eminently improbable that he had then given them any instructions about its yard, and Mrs. Sloan, when she showed them the premises, on January 13, must therefore have been in ignorance that there was any encroachment on the three-foot space reserved for sanitary purposes. No demarcation of the lines of the adjoining block had then taken place, and there was nothing to indicate in the adjoining open field where the next block of houses would be placed. The defendant and her witnesses is the I think, therefore, that the version of correct one, and that they must be held to have bought the property as it stood and as they saw it; for it should be remembered that at that time there were no diagrams in existence either of the lot being sold or of the adjacent lots, about to be built upon, and the property was admittedly not sold to diagram or plan. At that stage the only diagram in existence was that of the plaintiff's entire block from which had been deducted one-half for mortgage purposes; but the sub-division of this latter half into its various lots and the demarcation and creation of the dividing passage between it and the other half were not begun until February, when the Surveyor, Mr. Maakew, surveyed the respective blocks; and as far

as I can judge from the dates upon the diagrams the work as not completed and passed through the Surveyor-General's Office until March. To revert to the written documents, there is not a word in any of them showing any conditions or restrictions or stipulations anent the yard fence. It may be said that as, according to the Sloans, the sale was of 188 there was no need to insert such conditions, which could affect only 182; but that would not explain why when according to them, the exchange was effected nothing of the kind was put into writing. All this part of the plaintiff's case rests on alleged conversations between the Sloans and the defendant, which the latter denies, and which from the nature of the case are extremely unlikely to have taken place, until long after the contract was concluded. No doubt afterwards, when the surveyor had remonstrated that the encroachment on the passage was somewhat serious, and when transfers had to be arranged the plaintiff and Sloan became alive to this phase of the matter, and then conversations took place, and endeavours to adjust the matter were made; but the defendant, having bought, as I hold, without notice of any objection to set back the fence or of any servitude over a portion of the backyard which she bought, was not bound to take transfer in derogation of her rights under the contract without compensation for so doing. No such compensation was ever tendered to her, but an offer to cancel the sale was made on condition that she should pay certain costs and damages to the plaintiff. I have not lost sight of the letter which the defendant wrote to her attorney on April 11, in which she told him that she quite understood that she would have to move the fence if necessary, and authorising him to take transfer on that condition. That document, however, was obtained by the plaintiff from the defendant at a personal interview after the matter had been placed by her in her attorney's hands. It was drafted by plaintiff and simply copied by her, and in the circumstances cannot be approved of or supported, nor can any weight be attached to it as evidence since she was entirely without legal or marital assistance when she was induced to write it. Her attorney, on her behalf, repudiated the action, and she withdrew the instruction which she says was obtained by undue personal influence and pressure. The Municipality exercising authority in the locality in question have now given the plaintiff, who is still the registered owner of the passage upon which the yard encroaches, notice to move back the fence to the line of the house on defendant's property, and it is plain that the plaintiff cannot give the defendant the absolute and unrestricted ownership of the whole of her yard. When Mr. Maskew had

completed his survey the plaintiff made his declaration of seller, in which he declared that he had sold to the defendant Block D, as shown by the said survey. That would embrace all the ground to the middle of the passage which has been left between the defendant's house and the new houses to the north of it; and though she cannot be held to have actually bought that portion of the passage between the street and the yard, still it will be in the interest of all parties and of the public that the plaintiff should be held to his declaration as to the extent, while the defendant should receive some compensation for the servitude of common passage to which she will have to submit, and for the loss of a portion of the yard which she purchased. The Court therefore orders that the plaintiff do give, and that the defendant do accept, transfer of Lot D of the subdivisional lots as shown by the diagram, being Exhibit 5 in the present proceedings, upon the terms and conditions set forth in the deed of transfer, being Exhibit 20 in the present proceedings; that the defendant do allow the plaintiff to set back such portion of the fence of her yard as encroaches upon the common passage of 5 feet 4 inches, shown in the said diagram, as required by the municipal authorities; that the plaintiff do pay to the defendant the sum of fifteen pounds as damages; that the defendant do fulfil all the terms of the contract as to payment of the balance of the purchase price; and that the plaintiff do pay the costs of the action.

[Plaintiff's Attorneys: Moore and Son. Defendant's Attorneys: Herold and Gie.]

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice (the Hon. Sir JOHN BUCHANAN), the Hon. Mr. Justice KOTZE, and the Hon. Mr. Justice MAASDORP.]

WRIGHT V. ASHTON. { 1905.
July 10th.

Game, property in—Animals *feræ naturæ*—Trespass.

A., being lawfully on the farm of W., shot thereon certain game, although W. had by

public notice expressly prohibited the shooting of game on his farm. Thereupon W. summoned A. in the R.M. Court for damages for the game killed and removed by him. The R.M. gave judgment for the plaintiff. On appeal, the High Court held that the Magistrate should have dismissed the case.

Held on appeal, that as there can be no property in animals, *feræ naturæ*, W. was not entitled to damages for the killing of game on his farm. Semble: that as a person who enters upon land for one express purpose with the consent of the owner and takes advantage of that consent to do something which the owner has never sanctioned, thereby becomes a trespasser: W. might have recovered damages from A. for trespass.

This was an appeal brought by the plaintiff in the original action, which was heard in the R.M.'s Court, at Mafeking, from a judgment given on appeal to the High Court of Griqualand.

The Resident Magistrate's Court summons was as follows:—

Summon Henry P. Ashton, Government Land Surveyor (hereinafter styled the defendant), that he appear before the Court of the Resident Magistrate of this District to be holden at Mafeking on Friday, the 3rd day of February, 1905, at 10 o'clock in the forenoon with his witnesses (if any) to show why he hath not paid to Richard Wright of Mafeking aforesaid (hereinafter styled the plaintiff), the sum of £20, which the plaintiff complains that defendant owes him as and for damages.

And thereupon plaintiff complains and says that heretofore, to wit, in May, 1904, defendant did without the consent or authority of plaintiff, and notwithstanding notices to the contrary in the "Mafeking Mail," a newspaper published daily in Mafeking, pursue, shoot and kill certain game, to wit, certain three stembok and five guinea fowl, on the farm "Neverset," in the District of Mafeking, the property of plaintiff, and did convert to his own use the said game, by reason whereof the plaintiff has sustained damage to the extent of £20, which sum though demanded the defendant neglects to pay, wherefore the plaintiff prays that he may be adjudged to pay the same with costs of suit.

The Magistrate gave judgment for plaintiff for £3 5s., with costs.

His reasons were as follows:—

In this case I found defendant did destroy the game alleged in the summons, on the property of plaintiff and after he had given due notice in accordance with Section 7, Act 36 of 1886, in a locally published paper, prohibiting this being done; that in addition to the penalties he might have been entitled to, under the section of Act above quoted, had criminal proceedings been taken, he was entitled to be compensated for the value of the game destroyed on his property, I came to this conclusion, otherwise, the penalty in the Act being limited to £5, for first offence, a person might with impunity shoot considerably more than £5 worth of game and so be indifferent to any action which might be taken against him; that I assessed the value of the game at 15s. per buck, and 4s. per guinea fowl, making in all a total liability of £3 5s.

From this judgment the defendant appealed to the High Court. That Court upheld the appeal.

The Judge's reasons are as follows:—

The defendant in the original action was admittedly not a trespasser on plaintiff's farm when he shot the game in question. It appears that he was temporarily residing on the farm with plaintiff's consent while engaged in surveying the sites of certain graves on behalf of the Government. The action was therefore not founded on trespass but merely claimed damages for the loss of the game shot by defendant, which consisted of stembok and guinea fowl, animals undoubtedly *feræ naturæ* and in which the plaintiff had no ownership in law. This Court therefore held that the Resident Magistrate should have dismissed the plaintiff's claim on the authority of *De Villiers v. Van Zyl and Another* (Ford. S.C. Reports 1880, p. 77), which was quoted in argument before him. For these reasons the appeal was upheld and the Resident Magistrate's judgment altered to one for the defendant with costs. It was pointed out by the Court that the plaintiff was not remedied because if he had proceeded criminally against the defendant under the Game Law Amendment Act 36 of 1886 as he might have done, he would undoubtedly under section 7 have recovered the whole of the fine imposed by the Magistrate, which would probably have exceeded the value of the game as assessed in the case.

Against this judgment the respondent in the Court below (the original plaintiff) now appealed.

Sir H. Juta, K.C. (with him Mr. Sutton), for appellant. Mr. Searle, K.C. (with him Mr. P. S. T. Jones), for respondent.

Sir H. Juta: If a man is allowed to go on land on certain terms, he is no trespasser as long as he conforms to

those terms, but the moment he violates them he becomes a trespasser. Here the respondent was allowed on the appellant's farm to make a survey. The moment he shot game he became a trespasser. There is such a thing as an action for shooting game without the leave of the owner of the property. *De Villiers v. Van Zyl* (Foorde 77), and *Voet* (41—1—4), even although animals *ferae naturae* are *primi capientis*.

In this case, the main question is, are the terms of the summons sufficiently wide to cover the case? The Court will not insist on too much nicety in Magistrate's Court pleadings. It may be true that a man cannot claim the game which another has shot on his ground, but he can claim damages. I need hardly pursue the point that in such cases an *actio injuriarum* lies, *Breda and Others v. Muller and Others* (1 Menz, 425). There the word "trespass" was used, but it is not necessary to use the very word if acts constituting trespass are set out.

[Kotzé, J.: In that case the Court held that the defendant was liable for trespass.]

No doubt the consideration of trespass did enter largely into that case, but here the essence of the whole case is the shooting of the game. The respondent had a right to be on this farm, but not to shoot game there. By shooting the game he was guilty of "injury." The shooting of game on a man's land without his permission is a trespass. People may not surround a man's land and shoot his game from outside. A person may be a trespasser anywhere, even on a public road the moment he exceeds his rights there.

[Maasdorp, J.: Suppose a man comes on to my farm with my permission, and while walking across it fires his gun in the air; would he be liable in an *actio injuriarum*?]

No, but see *Harrison v. The Duke of Rutland* (1 Q.B. 142), and *Queen v. Pratt* (4 El. and Bl. 860).

[Maasdorp, J.: In such a case of trespass should the trespasser be sued civilly or prosecuted criminally? Who can bring the action?]

The owner of the soil.

[Kotzé, J.: The game on your land is not yours.]

No, but I have a right to prevent anybody else from shooting it, see Act 38 of 1891, section 3.

[Buchanan, A. C. J.]: There is nothing there about the ownership of the game.]

No, but the legislature recognises an exclusive right of shooting. See Act 36 of 1886, Sec. 7.

[Kotzé, J.: The Magistrate does not find that Ashton was a trespasser.]

No, but the whole case shows that he was sued on nothing else. He was not sued for the value of the game. As to

shooting rights, see *O'Brien v. Hansen and Schrader* (10 E.D.C. 153).

[Kotzé, J.: The shooting of game on a man's land is a very different thing from going on a man's land to shoot game.]

If a man has a right of shooting, that right must be protected by a remedy. That remedy is damages, and these it was that the plaintiff claimed in his summons.

Mr. Searle was not called upon.

Buchanan, A. C. J.: The respondent in this case—a Government land surveyor—was on the land of the appellant in the exercise of his functions as surveyor. While there, and when he was going to do his work, he says he shot certain game. Upon this the appellant brought an action against him. Now, if this action had been founded upon trespass, the whole of the argument learned counsel addressed to the Court would be very strongly in favour of our holding that there would be a ground of action for damages for trespass, although the respondent was on the farm lawfully for another purpose. I think that Sir Henry Juta is right in arguing that when a man goes to a farm for one purpose, which he has a right to do, the fact of his being there does not give him the right to do something else which otherwise he would have no right to do, but the fallacy all through this case is that the action is not one of trespass. It is not so brought, and the whole of the argument addressed to us to-day is therefore outside the case. The appellant does not allege trespass when he sends his letter of demand, and in the summons his allegation is that the defendant "did pursue, shoot, and kill certain game, the property of the plaintiff, and did convert to his own use the said game." Then the plaintiff, in his evidence before the Magistrate, says: "I consider £20 a fair value for the game shot, because I am trying to preserve the game. I don't actually claim for value of the game destroyed, but I want an amount paid to prevent my game being killed." Then he goes on to say: "Respondent was not a trespasser; he was not charged as such; this £20 damages is in no respect to trespassing." In face of that, I do not see how it is possible for the Court to hold that this is an action for trespass. It is an action simply for value of the game shot by the respondent. The Magistrate, in his reasons, stated that the action was one for £20 damages for killing the game, that he found the respondent had destroyed the game, and that plaintiff was entitled to be compensated for the value of the game destroyed on his property. Well, there is no ownership in game which is running wild. Of course, if the game were reduced into possession by an enclosure or otherwise, it would

be different, but when game is running wild, there can be no ownership. The essence of the action which might have been brought is trespass, but as the action has been limited to one for shooting things which are wild by nature, there can be no damages in respect of the shooting of them. That is the view taken by the High Court of Griqualand, and I think it is the correct one. I think that the previous decisions of the Court show that there is no property in such game. In the case which has been cited of *De Villiers v. Van Zyl*, a distinction is clearly drawn between the shooting of things in the nature of animals and an action for trespass, by which damage is done. Had this been an action for trespass, I think the evidence would have disclosed a good ground of action, but no damage can be held to be suffered by a person by the destruction of property which is not his according to our law. On these grounds, the appeal must be dismissed.

Messdorp, and Kotsé, J.J., concurred.

[Appellant's Attorney: G. Trollip.
Respondent's: Findlay and Tait.]

[Before the Acting Chief Justice, the
Hon. Sir JOHN BUCHANAN.]

REX V. FLETCHER. { 1905.
 { July 10th.

Cape Town Municipal regulations,
No. 143—Fine.

Buchanan, A. C. J., said that this case, in which the defendant was charged with contravening No. 143 of the Cape Town Municipal Regulations, had come up for review in Chambers. The regulation in question had reference to the obstruction of drainage pipes. The Magistrate convicted the accused, and he (the Acting Chief Justice) thought the evidence justified the conviction, but fined him £10. Now, the regulation under which the accused was charged provided for a penalty of not exceeding £5. It was true the same regulation went on to say that a further penalty might be incurred by a person of £2 a day for every day during which the obstruction was not removed, and the sentence might have been justified if there had been an additional charge under which the additional penalty could be imposed. But the Magistrate had taken the evidence led and not confined his sentence to the charge laid. The fine must be reduced to one of £5. When so amended, the conviction would be confirmed.

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REX V. BERNDT.

Act 28 of 1888—Prescription—
Servitude.

This was an appeal from a judgment of the Resident Magistrate of King William's Town.

The appellant was charged with contravening regulation 2, framed under the provisions of the Forests Act (Act 28 of 1888), in that, on the 6th April, 1905, in undemarcated Crown forest land he cut and removed certain three reserved trees without the permit or licence required by law. He was sentenced to pay a fine of 10s. The evidence disclosed that there was a dispute between the local Board and the Government as to the right of cutting trees in the forest. The Board claimed control, and had given a permit to the defendant to cut the trees, the defendant having paid 7s. 6d. for such permission. It was claimed that the Board had acquired a right by prescription. It was contended on behalf of the defendant that the title to property being in question, the Magistrate had no jurisdiction. A further ground of appeal was that the charge was invalidated by reason of the fact that the charge did not state that the defendant had a servitude; while it was also contended that the regulation was *ultra vires*, in that the Act did not give power to fix a penalty of the amount named in this regulation. Other grounds of appeal were that it had not been shown that this was undemarcated forest, in that the trees were dead, and were not "growing," and that the Village Management Board were the proper parties to be charged, and not the defendant, who had no criminal intention.

Mr. Douglas Buchanan appeared for the appellant; Mr. Pyemont for the Crown.

Buchanan, A. C. J., said that this seemed a very cumbersome way of settling a dispute between the Village Management Board and the Government—to fine a man who cut wood in this way. Another point which the Court would have to consider was whether, the Government having given their consent to regulations by the Village Management Board, which vested in the Board the right to grant licences to cut wood on the commonsage, that would not deprive the Government from prosecuting anyone who cut wood under a licence.

Counsel having been heard in argument,

Buchanan, A. C. J.: The appellant in this case was charged with contravening regulation 2 framed under the Forest Act, No. 28, of 1888, in that he did cut, take, and remove certain three trees specified as reserved trees in the X schedule to the Act. The evidence shows that this

case really arises out of a dispute between the Government and the Village Management Board of Frankfort. The dispute is one of long standing, and has been before the Court on a previous occasion. During the course of the case in the Court below the case of *Queen v. Schultz* (6 C.T.R. 211) was referred to, in which another inhabitant in the village of Frankfort had been charged with cutting wood on the commonage, in contravention of the Forest Act. It was there shown that the section of the Act under which the accused had been prosecuted was not applicable to the case, and it was said that if any crime at all had been committed, it was punishable only under regulations which might be framed under section 8 of Act 28 of 1888, which dealt with Crown property on which a servitude existed. It was there shown that a servitude had for a long time existed in favour of the inhabitants of Frankfort to cut timber on the village commonage, and His Lordship, in deciding that case, distinctly said: "In my opinion, the owners of the allotments in Frankfort have such a servitude by prescription. The Village Management Board have passed certain regulations, to which the assent of the Government has been given, regulating the cutting of wood on the commonage. One of these says that no person shall be allowed to chop wood of any description on the commonage without the consent of the Village Management Board, and that any inhabitant wishing to cut such wood shall obtain from the board a licence, the money for which must be paid to the Board. In this case the Village Management Board gave authority to cut down certain three trees on the commonage, which trees were dead. The appellant paid 7s. 6d. for his licence. Here we have then an act done under a regulation which has been ratified by the Government, but which is in this case repudiated by the Government. It is now said that in cutting those trees the appellant contravened the regulation which had been issued under the Forest Act. Section 2 of the regulation in question refers to land over which public bodies or persons have a servitude or right to cut wood, and it says that on these lands no person shall cut any reserved tree specified in the schedule to the Act. Section 8 states that regulations may be made to regulate the use of forest trees and produce, and that such regulation may specify the species of wood which may be cut, the season for cutting and the quantity to be cut. But the regulations which have been framed do not attempt to regulate the use of the wood to which the inhabitants are by their servitude entitled. On the contrary they prohibit the cutting of any wood specified as reserved trees in the

schedule to the Act. When I look at the schedule it embodies every tree which may be called a forest tree, and in effect prohibits the cutting of every such tree. It may well be argued that such regulations are unreasonable and *ultra vires*, but I will express no opinion on that point now. The regulation issued by the Village Management Board of Frankfort and confirmed by the Government is now to be limited to brushwood for the use of the inhabitants as firewood. Whether the regulation is *ultra vires* or not has been raised in this case. It may be that the regulation is *ultra vires*, but, as was remarked by the Chief Justice in the case of *Queen v. Matthys Arnoldus*, which was also a charge of cutting wood by inhabitants of a town, who claimed a right of servitude on Crown land—"If the Court decided to confirm the conviction they would be deciding that these people had no right to cut wood on the land; on the other hand by quashing the conviction that would only leave the question to be decided hereafter." His Lordship said that the question must be left for a test case in which all possible evidence should be brought. In this case the rights of the whole of the inhabitants of the village of Frankfort are involved. The Government are now at issue with the Management Board as to the extent of their rights. The accused in this case has acted as an innocent agent who had obtained a licence from the local authorities which under their municipal regulations they claimed they had the right to grant. On this ground I think it is only right to quash the conviction and follow the course indicated by his lordship in this case just referred to, and where there is so much in dispute as to the rights of public bodies to leave the questions to be decided by a case raised for that purpose. Taking one individual in this way and convicting him of a quasi criminal offence for the purpose of testing that right is rather a stretch of procedure that should not be encouraged. The question whether these people have a right to cut timber on the commonage or not will be left open for a decision hereafter. The appeal will be allowed, and the conviction quashed.

Maasdorp and Kotzé, J. J., concurred.

[Appellant's Attorneys: Syfret, Godlonton and Low.]

REX V. LLOYD.

Contempt of Court.

This was an appeal from a judgment of the Resident Magistrate of MacLear, who had convicted the appellant of contempt of Court.

Accused had been convicted under section 54 of the Resident Magistrate's

Court Act (No. 20, of 1856) of contempt of Court, in that on the 22nd June he appeared in the witness-box in a civil action brought against him and gave evidence while in a state of intoxication. He was fined £3, or in default two days' imprisonment.

The Magistrate stated that he informed defendant on the day in question that he would be committed for contempt, and ordered him to appear on the following day for sentence.

Mr. P. S. T. Jones was for the appellant; Mr. Pyemont was for the Crown.

Mr. Jones submitted that the moment the accused committed such acts as would render him liable to be prosecuted under section 54, the Magistrate should have dealt with the matter *instantly*, and should not have allowed defendant to go away and ask him to come back on a subsequent day. The section again did not refer to persons who were taking part in the proceedings before the Court. The Magistrate, he contended, should not have allowed the man to continue his evidence; he really invited this contempt by allowing the man to give evidence.

Without calling upon Mr. Pyemont.

Buchanan, A. C. J.: The Magistrate's Court is a Court of Record, and has also special statutory authority given to it to punish persons guilty of contempt. Punishment for contempt of Court is not a power which personally I am very much in favour of exercising, but the power is vested in the Court, and circumstances may arise which may render it necessary to exercise that power. Three objections have been raised to the conviction in this case. The first is that the Magistrate did not pass sentence on the day the contempt was committed. Out of consideration for the accused, the Magistrate postponed judgment until next morning, and I do not see how the accused was placed in a worse position by the consideration of the Magistrate. I do not think the Magistrate's postponing it until next morning was vital to the conviction. The next objection was based on the fact of accused being a party to the case. The only authorities cited apply to cases in which the prisoner in the dock created a disturbance, and it was in those cases held that prisoners under arrest could not be punished under the 54th section of the Act for contempt. That does not apply to a person in the position of accused. The third objection was that the Magistrate induced the contempt, but the improper conduct of the accused was due to his voluntary intoxication, not to his being called as a witness. It is not showing proper respect to the Court that a person should go into Court in a state of intoxication. There was contempt on the part of the appellant. I do not see any ground for interfering

with the conviction in this case, and the sentence is not an excessive one. The appeal must be dismissed.

REX V. VERWEY.

Magistrate's finding on facts.

This was an appeal from a judgment of the Acting Resident Magistrate of Aberdeen convicting the appellant upon two counts of contravening Act 36, of 1886.

Appellant was charged on the first count with contravening section 4 of Act 36 of 1886, in that on the 23rd April, at or near Wallaceedale, in the Aberdeen district, he did kill, catch, capture, pursue, hunt, or shoot spring-buck without having first provided himself with the necessary licence, as provided by section 4 of the said Act. He was further charged with contravening section 7 of the Act. He was found guilty and sentenced to a fine of £1, or 14 days' imprisonment, with hard labour, on the first count, and £3, or one month's imprisonment, with hard labour, on the second count.

Mr. Swift was for the appellant; Mr. Pyemont was for the Crown.

Mr. Swift submitted that the conviction was against the weight of evidence, and that the charges should have been dismissed.

Mr. Pyemont having been heard in regard to the conviction on the second count,

Buchanan, A. C. J.: In this case the accused is charged, firstly, with contravening the game law in hunting or shooting at a buck without a licence. This charge is clearly proved. On the second count, under which the charge is laid under the 7th section, the offence consists of shooting over private property without the consent of the owner, who had advertised under that section that he wished to preserve his game. The Magistrate has also convicted on this charge, but I must say, looking at the evidence, that the evidence does not establish the charge. What appears from the evidence is that the accused was not on the private property when he fired this shot. He was on the outspan, or on Mr. Hurndall's ground, adjoining. The fence, which I take to be the boundary fence of complainant's farm, was 200 yards or more from where the accused was seen when he fired the shot, and the accused had only a single-barrelled shot gun which would not carry to anywhere near the complainant's land. I do not think therefore that the evidence is sufficient to justify the conviction on this count. The appeal will be allowed, and the conviction quashed on the second count. On the first count the appeal will be dismissed and the conviction sustained,

REX V. WALAZA AND FUNDAKUBI.

Malicious injury to property.

M. and F. had killed a certain ox, the property of complainant. The ox was sick, complainant was absent, and the accused told complainant's son that they killed the ox to avoid quarantine.

Held on appeal, that this statement negatived any presumption of malice.

This was an appeal from a judgment of the A.R.M. of Tsomo, who had convicted the appellants (two natives), of malicious injury to property.

Accused had been charged, firstly, with cattle theft in contravening section 198 of the Penal Code, and, alternatively, with the crime of malicious injury to property. Both had been found guilty of malicious injury to property, and fined £5, or, in default, imprisonment, with hard labour, for one month.

Mr. Upington was for the appellants; Mr. Pyemont was for the Crown.

Mr. Upington said that the ground of appeal was that the conviction was contrary to law, and was not supported by the evidence. It was alleged that the accused killed a certain ox belonging to a man, who came from Whittlesea, in the district of Queen's Town, and who was travelling in the Territories. The ox was sick, and prosecutor obtained medicine for it. He alleged that the accused killed the animal without his permission, and that they ate portions of the meat. They, on their part, denied that they killed the animal, and said that they did nothing more than assist the prosecutor to kill the ox because it was sick. The Magistrate, in his reasons, said he did not think the defence was to be relied upon, and he believed perjury to have been committed. He had committed the defendants on a charge of perjury.

Mr. Upington contended that upon the evidence of the prosecution itself, it was clear that no malicious intention was shown: that any presumption of malice that might arise from the nature of the act was rebutted by the evidence of the Crown witnesses themselves.

Mr. Pyemont submitted that if there were anything in the evidence of the Crown witnesses to rebut the presumption of malice, such presumption was more than re-established by the evidence for the defence. Malice, he contended, was the doing of a cruel thing needlessly.

Buchanan, A.C.J.: The appellants in this case were charged with contravening section 198 of the Native Territories Penal Code, in that they wrongfully and

unlawfully killed a certain ox with intent to steal the carcass or part thereof. They were charged in the alternative with malicious injury to property. The Magistrate acquitted them of the former charge, but convicted them of malicious injury to property. From the evidence it is clear that the ox which belonged to the complainant was sick and unable to be used in travelling. The complainant stated that he went to get medicine for the ox, and that while he was away the ox was killed by the prisoners. The persons present at the killing of the animal were according to his account, his wife and grandson. The grandson is called; the wife is not called. The Magistrate found that the prisoners were not guilty of killing this ox with intent to steal the carcass or portion thereof, but convicted them of malicious injury to property. The essence of this charge consists in the malicious motive. Generally the motive has to be gathered from the act done, but in this case the motive was expressly stated. The boy who was present says that the accused announced that they intended to kill the ox in order to save him from being put into quarantine. It is not clear what disease the ox was suffering from, whether it was red-water, as some of the witnesses say, which is highly infectious, or whether it was gall sickness, as others say, which is not infectious. But here we have the fact that the accused stated their object in killing the ox. This object may not have justified them in killing it, but I think this negatives the allegation of malice, especially as the Magistrate has found the prisoners not guilty of killing the ox with intent to steal the carcass. I think there was no malice, and that the prisoners ought to have been acquitted of the second charge. There may be civil liability on the part of the prisoners to the complainant, but I do not think they should be punished as criminals. Under these circumstances, the appeal must be allowed, and the conviction quashed.

[Appellant's Attorneys: Walker and Jacobssohn.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

Ex parte BOTTOMLEY. { 1905.
July 10th.

Mr. Benjamin moved as a matter of urgency for an order restraining James Patrick Boyle from parting with a diamond ring and using a certain season-ticket on the railway. Petitioner was agent for Bottomley and Co., of Bradford, and early in the year he entered into partnership with Boyle, under the style of Bottomley and Co., carrying on business at Cape Town, Kimber-

ley, and East London. A diamond ring of the value of £85, the property of James Bottomley, of Bradford, was sent out to him to sell, and petitioner handed it to Boyle to dispose of in the course of his travelling. The respondent was also in possession of a railway season-ticket, valued at £75. Petitioner and respondent dissolved partnership on June 30, and petitioner continued to trade under the style of Bottomley and Co. Boyle refused to return the diamond ring or the ticket, which petitioner believed he was using for his own business.

A rule nisi was granted, returnable on July 14, calling on respondent to show cause why he should not deliver up the ring and the ticket, the rule to operate as an interim interdict, with leave to serve a copy on the Railway Department.

EXECUTORS OF VAN BREDA { 1905.
V, EXECUTORS VAN BREDA { July 11th.
AND OTHERS. { " 12th.
{ Aug. 2nd.

Will—Construction—Failure of conditional legacy—Impossibility of performance of condition—Adiation—Family arrangement—Authorization *nunc pro tunc*.

A husband and wife, married in community, owned certain farms, over 16,000 morgen in extent, in a contiguous block. By a joint will made in 1860, they divided the land into two nearly equal portions, and bequeathed the more valuable half to their eldest son M. for his life, at the price of 10s. per morgen, with strict prohibition against bonding or in any way alienating any portion thereof, the said property to pass after M.'s death to his eldest son for his lifetime for 5s. per morgen, and after his death to his brothers in succession, and on the decease of the last of these them to his eldest and other sons in succession, and on the demise of the last of such great-grandsons of the testator, the property was to be sold, but only among the direct male descendants of the testator, and the money divided among the descendants of M. per stirpes. They bequeathed the less valuable half similarly, but at a

less price, to three of their other sons and their male descendants with similar restrictions. As to the residuary estate, the survivor and the children were appointed the heirs of the first dying, and the survivor was appointed executor. The testator died in 1869, leaving his widow and eleven children surviving, of whom M. and two others, not immediately concerned in the land, were then majors. The farms had been mortgaged for £5,100 by the testator in his lifetime, and these mortgages still subsisted at his death. M. was wholly unable to pay the bequest price of £4,000 for his land, and the other three sons, at that time minors, had no prospect of being able at majority to pay the £2,000 necessary to procure their life estate. The estate, unless the land was realised, was unable to meet its liabilities. The widow thereupon determined in 1870 to take over the land at a fair valuation, and she liquidated the testator's estate on that basis, but never got the sanction of the Court to such an arrangement, nor did she ever get transfer of the land into her own name. She, however, paid out all the heirs of her husband as they came of age, and resided and farmed on the land, treating it in all respects as her sole property. No protests from any quarter were ever made to this family arrangement. The testatrix died in 1904, having made a will, disposing of the land among her sons, but in a different manner from that laid down in the will of 1860. In an action brought by the executors against the executors dative of her husband's estate and against the curator *ad litem* for a minor grandson of the testator,

Held, that the arrangement made by the widow in 1870, and acquiesced in by all parties

since that date, must be held good, and that it should be sanctioned nunc pro tunc; and that transfer of the land should be given to the plaintiffs, so that they might deal with it in terms of the will of the survivor.

Also held, that the widow had not by her conduct abdicated or accepted benefits under the joint will, so as to debar her from treating the land in a different manner from that laid down in the joint will.

Ferreira v. Otto (3 Juta, 193) followed.

This was an action for a transfer of certain property and a declaration of rights, brought by Henry Hamilton van Breda, executor in his mother's estate, against the executors dative in the estate of his father, M. J. van Breda, of Bredasdorp. The plaintiff was third surviving son of Michael van Breda and Elsie van Breda, who executed a joint will in 1860, and the action arose out of a further will, made in 1902 by Mrs. Van Breda, who survived her husband. Under the first will, provision was made for certain of Mr. Breda's sons and their sons, on condition that they should pay a certain amount of money into the estate, which, however, they were unable to do. It was also a condition of the will that the land could not be mortgaged or disposed of. All the landed property, excepting certain parts, was bequeathed under the mother's will to Henry Hamilton Breda, and before executing that will, she filed a liquidation account, and by virtue of the community of marriage, paid the heirs their shares out of one-half of the joint estate, and reduced certain debts on the estate. Plaintiff sued for a declaration of rights and transfer of the property, as the legatees had not complied with the conditions of the first will, and must be taken to have repudiated their title, or, in the alternative, for a declaration as regards one-half of the property, which the surviving spouse was entitled to deal with. The first defendants, in their plea, denied any knowledge of the material facts alleged in the declaration, or that the provisions of the will were generally stated. Subject to certain statements being accepted, they submitted to the judgment of the Court. The plea put in by the curator was somewhat similar in effect, but further denied that the heirs were paid, and claimed in reconvention for a declaration of rights on behalf of the minor

child, and any possible children that might be born.

Mr. Searle, K.C. (with him Mr. Joubert), was for the plaintiffs; Sir H. Juta, K.C., was for the executors dative in the estate of M. J. van Breda, and Mr. Gardiner appeared as *curator ad litem* for a certain minor child.

Henry Hamilton van Breda, third surviving son of the late Michael and Elsie van Breda, said the only male heir of the next generation was his son. His father was particularly energetic and industrious. He had considerable property at Bredasdorp. A couple of years before his death he was attacked with rheumatic fever, and was forced to dispose of property at Caledon, which was just about to become remunerative. His mother took over the estate on the death of his father, and became sole executrix. Witness left school to assist his eldest brother and his mother on the farm. A valuation of the property was made by his uncles, one of whom was a sworn appraiser. The property was bonded for £5,100. The bond was almost paid off in four years by his mother, who also got about £1,500 from her parents. Witness was away from 1873 to 1892, when Michael, the eldest son, became insolvent, and Dr. Albertyn (his brother-in-law) leased the farm. Witness took the property over on the same conditions as Dr. Albertyn for ten years. Witness had no means to take over the property on the conditions specified, and he was satisfied with his mother's arrangement. No objection was raised by any of the heirs to the arrangement made by his mother.

Cross-examined by Sir H. Juta: Witness was executor in his mother's estate, the moveables of which were valued at £1,500. At present between £6,000 or £7,000 was a fair valuation for the landed property. Witness was suing the executor dative to pass transfer of the property to his mother's estate. Witness was prepared to give the money to cancel his father's bond before he got transfer. As executrix in his father's estate, his mother sold certain morgen at Agulhas to the Government and a piece of land to the English Church. The arrangement was that his mother should control the farm until the heirs were in a position to take over the property.

Re-examined by Mr. Gardiner: His son was thirteen years of age.

Dr. Frederick Albertyn stated that he had lived in the Bredasdorp district since 1869, and knew the late Mr. Breda. Witness married the third daughter. Witness's wife was paid by Mrs. Breda, and of his own knowledge another daughter was paid. Witness never heard of any objection to the arrangement made by Mrs. Breda.

Cross-examined by Sir H. Juta: Except that he paid the rent he had nothing to do with old Mr. Breda's will.

Pieter Johannes Albertus Breda, youngest son but one of Michael Breda, said he was paid his share by his mother about 1886 or 1887.

Michael Dirk Breda, eldest son of the late Mrs Breda, stated that he was now 62 years of age, and was of age when his father died. Witness paid all the heirs their share of inheritance. The bonds on the farms were reduced by his mother's inheritance from her father's estate. Witness had never been rehabilitated.

Cross-examined by Sir H. Juta: While he was working on the estate the bond was reduced year by year. He had the management of the property. The bond was reduced down to a couple of hundred pounds. A fresh bond was raised by his mother. Witness could have raised enough money on bond to have paid the amount into his father's estate. He never agreed to his mother dealing with the property as her own. He always told her it was not hers. Witness paid his brothers and sisters £155 and took £155 for himself. This, witness calculated was the proper share in the moveables. When he went insolvent in 1889 the property was brought up in the schedules, witness regarding it as his.

Re-examined by Mr. Searle: He told his mother he was going to take over the property, but she said that there were minors concerned, and that the bond would have to be paid off. Witness had never been in a position to pay the £4,000 bond. He thought he could raise it on bond.

[Hopley, J.: But would you find anyone to advance you this money on your interest?]

The witness said he had not ascertained whether anyone would do so.

[Hopley, J.: Do you advance any claims under this will of your father's? I don't suppose you have any idea of taking your life interest over for the £4,000?]

Witness: If I could raise the money, I should like to take it over.

[Hopley, J.: You don't suppose that any money-lender would advance a considerable sum of money on a security like that, do you?]

Witness: No, I suppose not.

[Hopley, J.: Well, are you a consenting party to your brother taking it over on paying the money?]

Witness: Well, I suppose if my brother has the money, I ought to waive my right to him.

You would rather him have it than some outside party?—Yes.

Sir H. Juta said it might be thought the witness would get more if the property were realised.

Hopley, J., said it was not clear whether the witness would or would not gain by allowing his mother's will to stand.

Carl F. F. Juritz, accountant at the Colonial Orphan Chamber, agents for Dr. Carl Albertyn, gave evidence as to the bonds held by Dr. Albertyn. There were four bonds, for £2,000, £500, £300, and £200 respectively. Dr. Albertyn took over the bonds in May, 1893, from Mrs. E. C. van Breda, who obtained cession from the Board of Executors in 1882. The total amount of the present bonds on the estate held by Dr. Albertyn was £2,800. There was a bond on other property of £800.

R. de Waal Steyn, clerk in the Master's Office, produced certain books from the Master's Office.

Thos. Chas. van Breda, youngest son of the testatrix, said he thoroughly understood the proceedings. He had received his share of the estate. The only objection he had was that the inheritance under his mother's will could not be sold except to his brothers or their issue. He was quite willing to abide by the decision of the Supreme Court.

Henry Robert du Preez, law agent, Bredasdorp, who acted as local agent for the plaintiff in the case, stated that he communicated with all of the heirs, and got the certificates from them.

Chas. Willoughby Herald, the acting attorney in the case, stated that he had seen Mrs. Backhouse, one of the heirs in the estate, and fully explained the matter to her.

This concluded the evidence, and counsel having been heard in argument,

Cur. Adv. Vult.

Postea (August 2nd).

Hopley, J.: In or about the year 1840 the late Mr. Michael Jacob van Breda, then a young man of about 23 years of age, married Miss Elsie Catharina Smalberger, in community of property, and the couple thereafter resided chiefly at Zoetensdalsvallei, in the division of Bredasdorp, where they owned a contiguous block of land over 16,000 morgen in extent, made up of the farms Zoetendalsvallei, Klipfontein, Langerug, Waschplaats, Papenkuilsfontein, Brakkefontein, and Rhenos-terkop, on the security of which properties Mr. Van Breda borrowed in 1857 and 1862 sums of money amounting in the aggregate to £5,100, for which he gave mortgage bonds over the said farms. On October 13, 1860, when the children of the marriage numbered eleven, Mr. and Mrs. V. Breda made their will, in which, after the revocation of all previous testamentary acts, the above landed property was dealt with in two elaborate clauses, and a codicil bearing the same date. I think, in view of the contentions that have been raised in this case that it would be well to state the terms and effect of these clauses (the original will being in Dutch) as I understand them. Clause I is as follows: (1) And now disposing anew,

and, in the first place, the testator who declares that he bequeathed to his eldest son Michael Dirk van Breda, his (the testator's) farm, named Zoetendale Valley, in its entire extent, as also the farms Klipfontein, Waschplaats, and Langerug, and all other lands situate within the enclosure as at present existing, having the Honing Nest River, the sea, and the valley as boundaries on the north-east and west sides, and such for the sum of ten shillings per morgen, with this understanding, however, that the said Michael Dirk v. Breda shall not be empowered to take possession of these farms and lands until after he shall have attained his majority or some other previously approved state, at which time he will be obliged to satisfy and pay to the estate of him (the testator) the bequest value of these farms and lands, the testatrix, however, during the minority of the said Michael Dirk v. Breda being entitled to all the income and profits of the said farms and lands provided that she applies the same to the education, maintenance, and support of the said Michael Dirk v. Breda, and if necessary to her own support and maintenance. Everything, however, with this express condition, understanding, and provision, that the said farms and lands, or any part thereof, shall never at any time be mortgaged, sold, or alienated, nor shall any disposition of them be made in any way whatsoever, either by will or *inter vivos*, by the testator's said son (or by his male descendants in the cases hereinafter set forth), but that the said farms and lands after the death of the said Michael Dirk v. Breda shall pass over to and devolve upon his eldest son undivided and in their full extent under the same condition, understanding, and provision (but only at a reduced price of five shillings per morgen to the estate of the said Michael Dirk v. Breda), and after the death of the said eldest son to his next eldest brother, and to continue in this way to the last son of the testator's said son, Michael Dirk v. Breda, and when all these sons are dead the said farm and lands shall pass over to and devolve upon the oldest son of the testator's grandson, who was last in possession, under the same condition, understanding, and provision as aforesaid, without, however, any further pecuniary compensation or payment, and after the death of this eldest great-grandson of the testator, to his next eldest brother, and to continue in such wise to the last great-grandson of the testator, and on the death of all these great-grandsons the said farm and lands shall be sold entire and undivided and turned into money, yet only and exclusively amongst and between the male descendants of him, the testator, who bear the name of Van Breda, and then the proceeds thereof shall be divided amongst the then living descendants of the testator's

said son, Michael Dirk v. Breda, *per stirpes*. Should, however, the testator's said son, Michael Dirk v. Breda, die before majority or ("en") without male descendants, it is the testator's express will and desire that the said farm and lands shall pass to and devolve on his next eldest brother, and his male descendants, in the same way as hereinbefore set forth, for the same price of ten shillings, and subject to all the aforesaid more fully defined express conditions, provisions, and understanding about never at all being able to bind, mortgage, or alienate the said farm or lands or any portion thereof until they shall have to be sold and turned into money in manner prescribed after the death of the testator's great-grandsons. Moreover, the testator declared that he prohibits and forbids his aforesaid son, grandsons, and great-grandsons from demanding the Trebellian or any other portions known to the law, it being the testator's express will and desire that the said farms and lands are to be occupied, for the entire time and periods prescribed, free and unencumbered, and undivided, without contradiction of anyone in the world. In clause 2 of the will the testator made the same elaborate disposition in almost the same terms with regard to the farms Papenkuilsfontein, Rhenoster Kop and Brakkefontein. Complicated, however, by the fact that they were bequeathed in the first instance jointly to his sons, John Wilhelm and Hendrik Hamilton, who were not to be allowed to take possession until they were both respectively of age, at which date they were to pay the price, which was to be five shillings per morgen, with further devolution at their death to their "respective eldest son," but without further payment, and so on, as in the case dealt with in the first clause, with the same instructions as to alienation, etc., and eventual sale. Failing Johan and Hendrik and any descendants through males issuing from them, these properties were to pass to the sons Dirk and Pieter and their male line in the same way. These farms were eventually, by a codicil, made in November, 1866, left jointly to the three brothers Hendrik, Pieter, and Thomas, the last-named having been born in 1863. Various other elaborate provisions were made, all with the object of keeping the properties in the male line descended from the testator, with express prohibition of alienation to strangers; and these it is not necessary here to set out more fully. The intention, however, was again set forth and emphasised in a codicil executed by the testator and testatrix on the same day, but after the execution of the will, in which the testator declared it to be his will and desire that the farm Zoetendal's Vlei and the adjoining farms, after they shall have been sold, on the death

of the last surviving great-grandson in terms of the will, shall never be allowed to be sold to strangers, but only amongst the male descendants of Michael Dirk van Breda, and in default of such, then to male descendants of Johan, Dirk, and Pieter, or any other son or sons of the testator, and in the same way be limited the sale of Papenkuilsfontein, Rhenoster Kop, and Brakkefontein to the male descendants of Johan, Hendrik, Dirk, and Pieter, and in default of such, to male descendants of Michael Dirk, or of any other son or sons begotten by the testator—everything, however, with the understanding that such male descendants shall bear the name of Van Breda. The will having thus dealt with the land in question proceeded in clause 3 thereof to deal with the estate generally, and the testators therein nominated and appointed each other reciprocally, the first dying appointing the survivor, together with the children of the marriage, to be the sole and universal heirs of all the goods left by the first dying, of whatever description, on the understanding, *inter alia*, that, should the testatrix be the survivor, she should be bound and obliged to have the joint estate (with exception of the aforesaid bequeathed farms and lands) valued by two impartial persons, who were to be appraisers of immovable property in the division of Bredasdorp, in order, by so doing, to ascertain and decide the respective portions of the testator's heirs, she, however, having the enjoyment of the income arising therefrom during the minority of the children for their education and for their and her own maintenance and support. In the case of the survival of the testatrix, she, together with the testator's brother, Dirk Gysbert van Breda and Mr. Hendrik Willem van Breda were appointed executors. Such are the material portions of this will. After its execution another child, Thomas Charles, was born, in 1863, and in July, 1869, the testator, Michael Jacob van Breda, died, leaving his widow and eleven children surviving (his son Johan Wilhelm having predeceased him). Of these children only three were then majors, viz., Maria, who was then married to Mr. Haynes; Michael Dirk then in his 26th year; and Dirk, who was a barrister-at-law, a year or two younger; and the widow, who was the sole executrix, the other two having declined to act, was face to face with the problem of suitably maintaining, educating, and providing for this large family. In due time, she caused an inventory of the assets of the estate to be made, and found that, exclusive of the land specially devised, their value was about £5,902; and she found that the estate owed moneys to the extent of about £9,000, of which £5,100 was represented by mortgages on the said land. Without

the land, therefore, the joint estate would be insolvent. Now, the land had by the will been divided into two almost equal extents, each somewhat exceeding 8,000 morgen, and, consequently, if Michael Dirk had been willing and ready to pay as he had the right to do 10s. per morgen for the life interest of the farms devised to him a sum of £4,000, and over, would have been immediately available to pay off the larger portion of the mortgages and to place the estate in a solvent condition. But Michael Dirk was a young man of no means, totally unable to make any such payment, and he consequently did not take up the farms at the bequest price. He states that he did ask his mother to let him take over the farms, I presume, without any cash payment: but she very naturally answered him that she had the minors to think of, and refused to let him have them without the necessary payment. Whatever way I look at the matter I can see no possible mode by which Michael Dirk could, in the circumstances, have become the owner, that is the owner for life of these farms bequeathed to him. He says now that he might have borrowed the £4,000 by mortgaging the farms, but it is obvious that no money-lender would have advanced such a sum on such a security to a tenant for life hedged around with a complicated set of entails and stringent prohibitions against alienation. To the executrix then it must have become clear that Michael Dirk could never fulfil the necessary conditions to enable him to take up the bequest in his favour, and when she turned to the case of the other farms, which were situated in the Downs and not so valuable as the Zoetendal Vlei group, and which therefore had been bequeathed at 5s. per morgen (with no subsequent payments by the remoter heirs), it must have appeared equally clear to her that her three penniless boys, Hendrik (then 18), Pieter (then 12), and Thomas (then 6 years old) would never, on attaining their majority, be able to produce the £2,000 which would be necessary before they could get possession for life of these farms. Now, I do not think that the true meaning of the will is that the ownership of the properties should be kept in abeyance for an indefinite time to ascertain whether either the immediate legatees, or some future persons claiming through them, would, at some period more or less remote, make up their minds to pay the heavy price exacted by the will for the somewhat doubtful benefits conferred. I think that the testators had in their mind the children not benefited by the bequest of the land, and that they intended that those who obtained the land should forthwith contribute towards their education, support, and maintenance, and to the eventual portions to be inherited

by them. The will states clearly enough that those who were indicated by the will should take the land as soon as they attained majority, and that they should then pay in the bequest price to the testator's estate. I think that the devisees of the lands in both cases were doomed to failure, on account of the impossibility of the performance of what was by the will exacted and demanded from the legatees as a condition precedent to their obtaining possession of the land, and the widow seems to have made up her mind, shortly after letters of administration were granted to her, that these bequests must fail. Her position then was that she was by virtue of the community of property which had existed between her and the testator entitled to one-half of the joint estate, and by virtue of the testator's will, she was also entitled to a one-twelfth portion of the testator's half (see *Smith v. Snyer's Executors*—Ford p. 66). In view of the state of her family and of the somewhat embarrassed condition of the estate, and having regard to the inability of Michael Dirk v. Breda to pay £4,000 for his life interest in the farms bequeathed to him, and of the certainty that Hendrik, Pieter, and Thomas would, for similar reasons, be likewise unable to obtain their life interest in the farms bequeathed to them when they respectively attained their majority, I am of opinion that had she petitioned this Court at that time, she would have obtained leave to realise the farms free of any restrictions or encumbering conditions. She, however, did not take that course; but taking into consideration the impossibility of the situation created by the will, and the necessity of keeping a home in which to bring up her family, she seems to have decided to disregard that portion of the will dealing with the land, and to take upon herself the responsibility of the land with the burdens upon it. She caused the land to be valued in May, 1870, by three qualified appraisers, who valued all the farms together at £7,000, and she determined to take them over at that price, and to liquidate her late husband's estate on that basis. This was an arrangement which, I feel sure, this Court, if applied to, would have sanctioned as being in the best interests of the family as a whole; but unfortunately the executrix made no such application. She, however, sent in a liquidation account to the Master of the Supreme Court in February, 1871, in which she indicated clearly the position she had decided to take up. In that account she stated that she had taken over the farms for the sum of £7,000, and she placed that sum to the credit of the estate, while among the liabilities she included an amount of £175 due to her as executrix by way of commission on the realisation of these farms. By taking this step

she showed a credit balance on the whole joint estate of herself and the deceased of £3,775, of which amount she assigned to herself one-half by virtue of the community, and one-twelfth as an heir under the testator's will. The residue, amounting to £1,730 4s. 2d., she assigned to the 11 children in equal portions of £157 5s. 10d., of which they were to receive, after payment of succession duty, £155 14s. 4d. net. Such sum was immediately paid to each of the three majors, and thereafter to each child in succession, when she or he became of age, or as soon thereafter as their mother had funds in hand for the purpose. It will thus be seen that the testator did not abide by the terms of the will, in so far as the landed property specially bequeathed was concerned, and that she awarded and paid out to the heirs, from time to time, sums of money which could not have been in the estate for distribution, but for the sale either to herself or some stranger of the said immovable property. These sums of money were in turn accepted by all the heirs on their attainment of majority, the widow meanwhile managing the whole of what had been the joint estate and farming on the whole of the properties in question. She farmed with considerable success, for besides maintaining and educating the children, and paying them their paternal inheritances, she managed to reduce the mortgages, and eventually to practically pay off all the debts secured by bonds upon these farms, and apparently to free them from any claims by strangers for a short time. In this result, however, she was aided by inheriting, in the course of 1872 and 1873, about £1,460 from her parents, which she devoted to the extinction of these debts, but the larger portion of the debts on the estate must have been paid for by the profits made by her out of the careful and successful management of the farms. The mortgage bonds in question were originally given to the Master of the Supreme Court, N.O., for trust funds in his hands advanced to Mr. Michael Jacob v. Breda, one bond for £3,600, dating from 1857, and another for £1,500 from 1862. In 1873, the Master had ceded these bonds to the Board of Executors, and the widow, Mrs. V. Breda, had paid them off by 1882. Now, I have no doubt that if the farms had been transferred into her name she would have caused these bonds to be cancelled at that date; but as they still were registered in the name of her deceased husband, she, no doubt, in order to have some security for herself, simply took a cession of the bonds to herself individually from the then holders, the Board of Executors. These cessions were made on April 18, 1882. Shortly after that date the widow took a step which adds to the difficulties of the present case. It is possible that she

may have then received some advice, or she may have been moved by other considerations, of which there is no evidence; but, whatever her motive may have been, what she did was to send in a so-called amended liquidation account of the estate which she had been administering since September, 1869. This account is dated June 1, 1882, and it omits all dealing with the land, but is in other respects simply a repetition of the account of 1871 the result of the change being to show the joint estate to have a deficit of £3,049 17s., which was, in the words of the account, "to be found against the land." This was, however, the sole step in apparent contradiction to her previous conduct, which she took, and no one seems to have taken any notice of it, nor does she herself seem to have treated it seriously or made any change in the course of affairs, because of it. She went on living, managing, and farming as before upon the properties, still treating them apparently as her own, and eventually, as will hereafter be shown, she treated them in her separate will as though they were her sole property, and actually spoke of them as registered in her name. It is also noteworthy, in this connection, that in 1884 she paid out his inheritance of £155 14s. 4d. to her son Thomas, who in that year attained his majority, thus proving that though she had sent in the "amended account," she was still acting on the principle and figures of the original liquidation account of 1871, the basis of which was the taking over by herself of the immovable property for £7,000. After she had held the bonds as cessionary for about eight months, she ceded them by Notarial Act to Dr. Abraham Albertyn for an advance of £2,000. They have since passed by cession to Dr. Carl Albertyn who made further advances on them, and finally took cession on them on May 4, 1893, for £2,800, such being by that date the full amount advanced by him, and the consideration whereby he became the legal holder of these securities. Of the moneys so advanced by the Doctors Albertyn, there is no reason to suppose that any was used by Mrs. Van Breda, save in the interests of the family, which had then grown up, and was more expensive to maintain, as is stated in his evidence by Mr. Michael Dirk v. Breda, who admits that his mother so applied the amounts borrowed by her. With regard to the land itself, it appears that since 1886 Mrs. v. Breda has ceased farming the estate personally, she leased it from 1886 to 1892 to her son-in-law, Dr. Frederick Albertyn, and from 1892 onwards until the present time the property has been leased and worked by Mr. Hendrik Hamilton v. Breda, the second eldest of her surviving sons, but the rents have apparently always been treated by Mrs. V.

Breda, as accruing for and due to herself personally, and she has, since the debts were incurred, always paid the interest on the bonds to the successive holders thereof. It is clear, therefore, that but for the isolated act of sending in the "amended account" in 1882, Mrs. V. Breda acted consistently throughout her life, which lasted until January, 1904, on the basis of the arrangement made by her in 1870, when she took over the farms as stated by her in the account rendered in 1871. For over a third part of a century, she remained on the farms as their owner, treating and using them in all respects as though they were her sole property, and during all that time there was never a single protest raised by anyone against the arrangement which she had thought it in the best interests of her family to make. The youngest of her children, Mr. Thomas v. Breda, attained his majority in the year 1884, and all the daughters have been married; but no one ever questioned the arrangement, and none of the sons ever made any tender of the bequest-value of the farms or asked to be put into possession in terms of the will, or of the codicil of 1866, nor do they, even at the present time, advance any such claim. Upon such a state of facts I can see no just or equitable pronouncement, save that the arrangement made by the late Mrs. V. Breda in 1870, as shown by her account of 1871, whereby she took over the lands belonging to herself and her deceased husband for the sum of £7,000 was in the best interests of all concerned, that it was acquiesced in by all parties, and that it continued until the death of Mrs. V. Breda, in January, 1904, of full force and effect. It is an arrangement which the Court would have sanctioned in 1870, and I am of opinion that on the same equitable principles as were applied by the Court in the case of *Ferreira v. Otto* (3 J. 193), it should be sanctioned *nunc pro tunc*, and that the necessary transfers should be given of the farms to the executors of her estate to enable them to deal with the farms in terms of her will. Now it was argued that she had no power to make a will, at all events, regarding these lands, for two reasons—first, because there had been a massing of that portion of the estate; and secondly, because she had adiated under the will of her husband and accepted benefits under it, and that, consequently, she could not change the elaborate devices created by the will. But there clearly was no massing of these joint assets. There was no clear disposition of the farms after the death of the survivor to which she had assented. She had assented to nothing more than an elaborate conditional disposition of the land, which was to become effectual during her lifetime, and under which she would have benefited in a pecuniary sense if it had been carried out; nor

had she adiated or accepted benefits under the will, in so far as it dealt with the farms. Instead of living under the terms of the will, she distinctly and radically departed from them; and even if she had not taken over the farms in 1870, I know of nothing which could have prevented her from making a will dealing with her half-share and a child's portion of the farms at her death. But as I have already stated, I am of opinion that owing to the steps she took and the arrangement which was acquiesced in by all parties, she was entitled to deal with the whole of the farms, as her own, by her will. She executed her last will in May, 1902, and bequeathed thereby all the said landed property to her son, Henry Hamilton van Breda, for the sum of £4,800, with the exception of three defined lots of fifty morgen each at Struy's Bay, part of Papenkuilsfontein, which, with the houses and buildings thereon, she bequeathed respectively to her three sons, Michael Dirk, Pieter, and Thomas, in each case for the sum of £200; and these properties carry with them certain grazing rights over the remainder of Papenkuilsfontein, but the alienation of these portions and rights, save to their brothers or their male issue, is distinctly prohibited. After disposing of individual portions of her property leaving all her movable property to her son Henry Hamilton, she appoints all her children jointly as heirs of her residuary estate. This disposition of the landed estate seems to me to be carrying out as well as the fortunes and circumstances of the family will permit, and as far as possible the wishes and intentions of the testator Mr. Michael Jacob van Breda; since the land, which he so much prized, and which he tried so hard to keep in his family, will remain for this generation at least in the possession of his direct male offspring; moreover, the three of his sons who so far have no male issue are prohibited from alienating the portions which have been left to them except to the members of the direct male lines bearing the name of Van Breda; and the son Mr. Henry Hamilton v. Breda, who is to get the main bulk of the property and the residence at Zoetendals Valley, is the only son who hitherto has had male issue. He has one son, named Michael Jacob v. Breda, who in all probability may in his turn become possessed of the lands, the continued possession of which by his descendants was the object so close to the heart of his grandfather, whose namesake he is. It will be in the power of his father and himself if they be so minded to keep this land in the family for further generations, and as far as I can see that is the course which contains the only chance of the testator's desires with regard to the devolution of this land being fulfilled. The Court there-

fore declares that the farms in question were at the time of her death the sole property of the testatrix, and that they should be dealt with in terms of her will, and orders that the first-named defendants do give transfer, and that the Registrar of Deeds be empowered to pass transfer to the plaintiffs as executors of the estate of the said testatrix, and that the plaintiffs in their said capacity should thereafter deal with the said land in terms of the will of the testatrix. With regard to the claim in reconvention made by the second-named defendant the Court orders that it be dismissed. With regard to the costs it is clear that they should come out of the estate of the testatrix, as it was owing to her default that she did not obtain transfer of the property during her own lifetime; but it appears to me inequitable to make the heirs generally responsible for these costs as the ownership of the land was the sole matter which was in dispute, and they as a body did not add to the difficulties of the situation, nor did any of them individually make any opposition. The persons mainly interested were Mr. Henry v. Breda and his minor son, and the result of the action certainly is of considerable pecuniary advantage to the former, who obtains full property in the farms at a figure much below their market value. Had the testatrix in her lifetime made good her title it is clear that she would have had to pay the costs of the proceedings, and in that case her movable property would have been diminished. I think, therefore, that the costs should be met in the first instance by the movable property left by the testatrix, and in case of their insufficiency then by the general assets of her estate. This order as to costs applies to the costs of all the parties to this suit.

[Plaintiff's Attorneys: Herold and Gie.
Defendant's Attorneys: Van Zyl and Buissinné.]

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

Ex parte RAMJUTTUM { 1905.
BABOOLACE. } July 12th.

Mr. Lewis moved, as a matter of urgency, on the petition of Ramjuttum Baboolace, shopkeeper, of Sumax-road,

Wynberg. for an order restraining his wife from removing the child of the marriage, aged nine years, beyond the jurisdiction of the Court. Petitioner understood that his wife was leaving the Colony for Mauritius that day, and that she had no intention of returning. She intended to take the child with her. Petitioner was instituting an action for divorce against his wife. There had been considerable delay in the proceedings owing to difficulties in obtaining a copy of the marriage certificate.

Maasdorp, J., said that it was no use giving a futile order interdicting a person who was about to leave the country. An order would be granted placing the child in the custody of the applicant, pending a further order of Court, the Sheriff to execute the order.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY]

KORNOLUM V. HIGHMAN. { 1905.
{ July 12th.

This was an action for damages for malicious arrest.

Mr. Alexander (for the defendant) put in a letter from the plaintiff's attorneys stating that they had withdrawn from the case.

Upon the plaintiff's name being called, there was no appearance, and the Court granted absolution from the instance.

SUPREME COURT

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

ADMISSIONS. { 1905.
{ July 13th.

Mr. Sutton moved for the admission of Henry Alfred Ready Clark, as an attorney and notary. Counsel said that the application was made under section 17, Act 27, 1883, applicant being a B.A., of Oxford.

Ordered to stand over for production of authorities.

Later in the day Mr. Sutton referred to *ex parte Scanlon* as an authority for the application.

Buchanan, A.C.J., in granting the application, said that at the time the previous application of a similar nature was made, it was pointed out that, through what was no doubt an oversight in the Act, applicants could obtain admission without having passed a law certificate examination. The defect was one that should be remedied, and, in fact, he had been under the impression that it had been remedied, but counsel assured him that that was not so. However, as long as the statute stood as at present, the applicant was entitled to be admitted. Leave would be given, as asked, to take the oaths before the R.M. of Idutywa.

Dr. Greer moved for the admission of Wm. Tell Paschoud Hutchinson, as an attorney and notary.

Application granted, oaths to be taken before the R.M. of Port Elizabeth.

Mr. Benjamin moved for the admission of John Brand Ross as an attorney, notary, and conveyancer.

Application granted, and oaths administered.

PROVISIONAL ROLL.

SHEAR AND RYAN V. NORTJE.

Dr. Greer moved for provisional sentence on a mortgage bond for £200, with interest at the rate of 10 per cent., the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

SHEPPARD V. MCINTOSH AND STEER.

Mr. Burton moved for the final adjudication of the defendants' estate as insolvent.

Mr. Benjamin appeared for the defendant.

Mr. Burton said that the defendants had filed affidavits objecting to the final adjudication. He (counsel) was instructed that an arrangement had now been entered into between the parties, by which the plaintiff was prepared to accept a certain settlement for his debt. Upon this settlement being confirmed by the Court, the plaintiff was prepared to withdraw his application.

By consent, the order of provisional sequestration was discharged upon the conditions set out in the consent paper filed.

DUNCAN V SHAW.

Mr. Roux moved, on behalf of the plaintiff, for a provisional order of sequestration, to be suspended.

Provisional order discharged.

DONELLAN V. ESTATE CAROLUS.

Dr. Greer moved for provisional sentence on a mortgage bond for £200, with interest, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated, to be declared executable.

Order granted.

PAUL V. BAUMGARTEN.

Mr. J. E. R. de Villiers moved for a decree of civil imprisonment, upon a judgment of this Court for £11 14s. 5d.

Defendant, who was stated to reside at De Aar, did not appear.

Decree granted.

ZACKON V. ENGELBRECHT.

Mr. Roux moved for provisional sentence upon promissory notes for £50 and £73 10s. 4d., respectively.

Order granted.

S. A. BREWERIES V. STEVENSON.

Mr. Watermeyer moved for provisional sentence for £220, balance of promissory note, and for judgment, under Rule 329d.

Order granted.

WALKER V. TURMAN.

Mr. Sutton moved for provisional sentence on a mortgage bond for £500, with interest, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

FIELD AND CO. V. SOLOMON.

Mr. Bailey moved for the discharge of a provisional order of sequestration. Provisional order superseded.

PAINTER V. WESTWOOD.

Dr. Greer moved for a provisional order of sequestration to be made final. Final order granted.

MARAIS V. BARNARD.

Mr. Rowson moved for provisional sentence on a promissory note for £360, less £54 paid on account.

Order granted.

GILL V. AUGOOD.

Mr. Benjamin moved for provisional sentence on a mortgage for £3,000, with interest, the bond having become due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable. Mr. Benjamin also moved for provisional sentence on a lease for £38, rent due, and judgment under Rule 329d for ejectment from certain two houses, 3 and 4, Weston Villas, Sea Point. Counsel said he understood that a consent paper had been filed.

Buchanan, A.C.J., said that an order would be made in terms of consent paper.

Mr. Benjamin said that the consent paper did not provide for the property being declared executable, and he would prefer that the order be given in terms of the summons.

Buchanan, A.C.J., said that counsel had elected to accept the consent paper. The matter was ordered to stand over.

Later in the day Mr. Benjamin said that the defendant consented to judgment in terms of the summons.

Final judgment was given.

THORNE AND STRUBEN V. GELB.

Mr. Struben moved for the final adjudication of the defendant's estate as insolvent.

Mr. Close opposed the application, and read an affidavit by Woolf Gelb (the defendant). He denied that it would be for the benefit of the creditors that the estate should be sequestrated. He stated that it would be possible to liquidate the estate under the deed of assignment, which had been entered into. Affidavits by other creditors were put in to a similar effect.

The matter was ordered to stand over until the 1st August to enable the plaintiffs to file answering affidavits.

ILLIQUID ROLL.

HOARE AND CO. V. CARROLL. { 1905.
{ July 13th.

Mr. Douglas Buchanan moved for judgment under Rule 329d for £59 10s., balance of account for work and labour done, with interest *a tempore morae* and costs of suit.

Order granted.

ZEEDERBERG AND DUNCAN V. LEVENSON.

Mr. Douglas Buchanan moved for judgment under Rule 329d for £32 19s. 10d., balance of account for goods sold and delivered, with interest *a tempore morae* and cost of suit.

Order granted.

IMPERIAL COLD STORAGE V. KLAAS.

Mr. Watermeyer moved for judgment under Rule 329d for £373, goods sold and delivered, with interest *a tempore morae* and costs of suit.

Order granted.

CAPE TIMES, LTD. V. YEOMANS AND CO.

Mr. Sutton moved for judgment under Rule 329d for £33 4s., advertising charges, with interest *a tempore morae* and costs of suit.

Order granted.

W. AND G. SCOTT, LTD. V. CLAIN.

Mr. M. Bisset moved for judgment under Rule 329d for £20 14s. 8d., goods sold and delivered, with interest *a tempore morae* and costs of suit.

Order granted.

SWIFT V. COHEN.

Dr. Greer moved for a judgment under Rule 329d for £29 2s. 5½d., half-share of promissory note, with interest *a tempore morae* and costs of suit.

Order granted.

BANK OF AFRICA V. DREYER.

Dr. Greer moved for judgment under Rule 329d for £37 ls. 7d., cash lent and advanced by way of overdraft, interest, and costs of suit.

Order granted.

BISHOP V. BARNETT.

Mr. Russell moved for judgment under Rule 329d for £41 5s., balance of purchase price of certain shares

Order granted.

GENERAL MOTIONS.

RAUBENHEIMER V. RAUBEN- { 1905.
HEIMER. { July 13th.

Mr. P. S. T. Jones moved for a decree of divorce, with custody of the minor child, in default of the wife's compliance with an order of restitution of conjugal rights. An affidavit of service was produced.

Defendant appeared, and said that she did not intend to return to her husband.

Decree of divorce granted as prayed, defendant to have access at all reasonable times to the child.

Ex parte MABUYA.

Mr. Van Zyl moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

Ex parte ISAACS.

Mr. Bailey moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

BRILL V. MUTUAL LIFE INSURANCE CO

This was an application upon notice of motion, calling upon the respondent company to show cause why they should not be ordered to discover certain documents to the attorneys of the plaintiff in the action.

Mr. Burton was for applicant, Walter William Brill, of East London; Sir H. Juta, K.C. (with him Mr. Upington), was for respondent, the General Manager for the Mutual Company in South Africa.

From the affidavits it appeared that the applicant asked for an order on the respondent to allow his attorneys to inspect certain papers, documents, and writings set out in a schedule attached. Plaintiff was the cessionary for value of a certain life policy for the sum of £500 effected by one Edward Richard Camies, of East London, with the Mutual Insurance Company, of New York. The assured had since died. Plaintiff was now claiming payment of the proceeds of the policy, together with any other moneys which might have accrued. He claimed a right of inspection by his attorneys of certain documents in possession of the company, pertaining to the policy in question. This, respondent refused on the ground that an inspection was demanded of documents which were of a confidential nature, and, being inter-departmental, were privileged.

Sir H. Juta said that a number of the letters referred to by applicant contained the evidence collected with a view to the defence of the case, being privileged communications between defendants and their attorney, Mr. Drake. The applicant did not state which letters he wanted and to what they referred, and the defendants wanted further particulars. His (counsel's) inquiry went to show that, although a party was entitled to facts, he was not entitled to disclosure of the evidence which the other party had got for the purpose of proving those facts. Counsel added that before the case would come to trial it would be necessary to send a commission to England, because one of the issues in the case would be the condition of the assured in London,

and medical testimony would be called. Counsel further stated that defendants would raise no objection to immediate discovery of a number of the documents except such as he had mentioned. As to the others, it would be necessary to decide whether they were privileged.

The matter was eventually ordered to stand over until August 1, respondents undertaking to disclose the documents in schedule (b), which he had no objection to do, within three days.

ESTATE DE KOCK V. MALMESBURY BOARD OF EXECUTORS.

This was an application for an order declaring the applicant entitled to administer the funds belonging to the estate of her late husband, now in the hands of the Board, at her discretion, and for the best interests of the estate, and for a further order directing the Board to pay the applicant the sum of £2,314 12s. 3d., and hand over all mortgage bonds and securities belonging to the estate. The affidavit of the applicant set out that a mutual will was executed between her late husband, to whom she was married in community of property, and herself, by which the deponent, as surviving spouse, was appointed sole heir and executrix, by a codicil, which she stated she signed and did not read, all the moneys and securities were to be paid into the respondent Board, which was done. The deponent had requested the Board to hand over the moneys and securities, but they refused to do so. On the £2,314 only 4½ per cent. interest was allowed, although the ruling rate of interest on first-class securities was 6 per cent. It was a stipulation of the will that the survivor was to be sole and universal heir, to support the children until such times as they reached the age of majority, and pay to the children such sums of money as the survivor was able to pay and the position of the estate justified.

The answering affidavit of the secretary of the respondent Board, set out that the applicant never acted as administratrix of her husband's estate. The money was put into the company from time to time. In face of the codicil, he did not feel justified in handing over the money. The money was invested on fixed deposit, and the usual interest was regularly paid.

Mr. Burton for applicant; Mr. Searle, K.C., for respondent.

Application granted, the respondents ordered to hand over the assets and securities of the estate, the moneys on fixed deposit to be paid over when the deposits fell due, the costs to come out of the estate.

INSOLVENT ESTATE VAN DEN HEEVER V. VAN DEN HEEVER

Mr. Gardiner moved on behalf of the trustee in the insolvent estate for an order expunging a certain claim for £220, which had been proved in the estate by the respondent, wife of the insolvent, to whom she was married out of community of property, and, further, that the applicant be allowed further time in which to file the liquidation and distribution accounts, owing to the delay caused by liquidation pending.

Order granted expunging the debts with costs, extension of time of five months given to the trustee.

THE MASTER V. WALTER.

Mr. Morgan Evans moved for an order calling on the respondent to file a liquidation account.
Granted.

VAN ZYL V. OCHBERG.

This was an application to have a rule restraining the respondent from diverting certain water on to the property of the applicant made absolute. From the applicant's affidavit it appeared that he was the owner of certain premises on the High Level-road, at Sea Point. During the heavy rains the respondent, who was building at the back of applicant's premises, diverted certain storm-water on to the applicant's property. The garden was seriously damaged, and applicant had to keep his gardener and two Kafirs busy endeavouring to minimize the damage.

The answering affidavit of the respondent stated that the applicant agreed to withdraw the matter if the respondent cut out certain trenches. Before the work was completed the applicant set down the motion. Respondent denied that he caused any storm-water to flow on to the applicant's ground, but said that it was due to the exceptionally heavy rains between 1st June and 15th June, and the situation of the applicant's property. Affidavits adducing expert evidence set out that the erection of the houses which the respondent was building would reduce the natural flow of storm-water on to the applicant's land.

The replying affidavit of the applicant stated that he adhered to everything stated in the first affidavit, and, further, that the work of cutting the trenches was not carried out as agreed upon. It was merely agreed to postpone the matter, not withdraw it, and during the week's postponement the respondent did practically nothing.

[Buchanan, A. C. J.: There will have to be an action in any case. The only question is, who is to bring it?]

Mr. Upington was for the applicant and Mr. Alexander for the respondent.

Mr. Upington submitted that the respondent himself admitted that he had diverted water.

Mr. Alexander submitted that everything was in dispute. If the rule was made absolute, it would prejudice the respondent's case, by implying that he had diverted water on to the applicant's ground.

Rule made absolute, pending any proceedings taken by the respondent in action to have it set aside, with leave to recover the costs of the motion on an action being brought, costs limited to the costs of opposition.

Ex parte ESTATE WAIT.

Dr. Greer moved, on behalf of the executrix testamentary, for an order authorising the partition of a certain farm in the division of Humahsdorp, and the raising of a fresh bond; certain minors were interested in the estate.

Order granted as prayed, Mr. Attorney Goedhals to be *curator ad litem* to the minors.

Ex parte STRYDOM.

Mr. P. S. T. Jones moved on behalf of petitioner, who resided at Oudtshoorn, for leave to sue *in forma pauperis* for divorce.

The matter was referred to the Circuit Court.

Er parte OOSTHUIZEN.

Mr. Joubert moved for an order authorising the Registrar of Deeds to register certain transfer.

Order granted as prayed.

Ex parte LADAM.

Mr. M. Bisset moved for an order authorising the Registrar of Deeds to register certain transfer of property in the district of Umzimkulu. Petitioner was the eldest son of a Chief, who had died intestate. The Chief was married according to native custom, and the petitioner now prayed for transfer of his property.

Rule *nisi* granted, to be returnable on the 31st August; rule to be published once in the "Kokstad Advertiser" and "Imvo."

Postea (August 31st). Rule made absolute.

In re INSOLVENT ESTATE VAN DER MERWE.

Mr. Benjamin moved for leave to extend time in which to file an account.

Extension granted for three months, as prayed.

In re INSOLVENT ESTATE { 1905. MORAN. { July 13th.

Insolvency, foreign—Process in aid—Comity.

M., who had certain immovable property in this Colony, had been declared insolvent in the Transvaal, where he was domiciled. The trustees in this Colony now applied for leave to administer the estate as far as the property within this Colony was concerned. The Court granted a rule nisi, calling upon all persons interested to show cause why the appointment of trustees by the Transvaal Court should not be recognised within this Colony.

Mr. Alexander moved, on behalf of the trustees in insolvency, for leave to administer this estate so far as certain property in the Peninsula was concerned. The insolvency had taken place in the Transvaal, and the trustees were appointed in the Transvaal. Counsel quoted *Stegmann v. Cohen* (1 C.T.R., 82) in support of the application, and said that the order would not prejudice the rights of Cape creditors, who ranked concurrently.

Buchanan, A. C. J., said that if there had been a request from the Transvaal Court, under the Imperial Act, the Court would have complied with the request, but as this was an adjoining British colony, and as the Transvaal recognised the judgment of this Court and the orders of this Court in insolvency, any comity which would obtain even between foreign nations should certainly apply as between the two Courts of these colonies. The system of administration in insolvency in the Transvaal was almost identical with the system of administration here. The Transvaal Court had, in the case of *Stegmann*, recognised the power of trustees appointed by this Court to administer property in the Transvaal, and he thought this Court should reciprocate that comity, and grant an order authorising the Transvaal trustee in this case to administer the property of the insolvent in this colony. That procedure had been followed in the Transvaal and was he (the Acting Chief Justice) thought a

good procedure. A rule *nisi* would be granted calling on all persons interested to show cause why the appointment of the applicants as trustees in this insolvent estate should not be recognised in this Colony, but, of course, it would be on condition that the rights of creditors in this colony would not be prejudiced; the rule to be published once in the "Government Gazette" and once in the "Cape Times," and would be returnable on 24th August next.

Ex parte ESTATE LEIBBRANDT.

Mr. De Waal moved for leave to raise a loan.
Order granted.

Ex parte ESTATE VAN RENSBURG.

Mr. De Waal moved for an order authorising the Registrar of Deeds to register a certain transfer. Counsel stated that all the parties interested consented to the order.
Order granted.

WALKER AND JACOBSON V. MARAIS.

Mr. Gardiner moved for leave to attach certain land at St. James's *ad fundandum jurisdictionem*, and for leave to sue by edictal citation.

Order granted, the citation being made returnable on the 20th August, leave being granted to serve *intendit* with notice of trial, personal service to be effected.

Ex parte WEBB AND MARTIN.

Mr. Gardiner moved for the amendment of a certain marriage register, and ante-nuptial contract. The petition set forth that the first-named petitioner's real name was Walton, but that he subsequently changed his name, being at the time in poor circumstances—without employment—and thinking that the change of name would lead to better fortune. He married the second petitioner under the changed name, and now applied that the register should be amended by substituting his proper name. Affidavits were read, in which the deponents stated that they were convinced that the change of name was *bona fide* made, and that the first petitioner adopted the new name, under the impression, in his depressed state, that it would bring him better fortune. The Registrar reported in favour of the petition.

Order granted.

In re ESTATE NILSON.

Mr. M. Bisset moved for an order confirming the appointment of a curator *bonis* to the estate.
Granted.

Ex parte COETZEE.

Mr. Sutton moved for leave to enter into a certain perpetual servitude on behalf of an estate in which minors were interested. The Master's report was favourable.

Leave granted.

WILLIAMSON V. BERGL.

Mr. Gardiner moved for the appointment of a commission *de bene esse*. The affidavits in support of the application set forth that it was desired to take the evidence of the defendant Bergl on commission in London. He was now travelling on behalf of a company in Europe, and his engagements would not permit of his returning to the Colony before the trial.

Mr. Upington, for the respondent (Williamson, plaintiff in the action), read an affidavit by the respondent's attorneys, stating that the taking of Bergl's evidence in London would be expensive and unnecessary, and that, there being direct conflict of testimony between the plaintiff and defendant, it was essential that the defendant should give evidence to the Court in person.

The Court granted the application, the evidence of the defendant to be taken before the 1st October in London, Mr. Oliver being appointed commissioner, costs to be costs in the cause.

LINLEY V. LINLEY.

{ 1905.
July 13th.

Divorce—Domicile.

Where a wife, who had come to this Colony, sought to sue her husband for restitution of conjugal rights; the husband having promised to follow her to the Colony, but never having done so: the Court refused to assume jurisdiction.

Mr. Close moved on behalf of the wife for leave to sue by edictal citation. Petitioner alleged that she came out here to start business in 1898. It was arranged that the respondent should follow her to this country, but he failed to do so, and his present whereabouts were unknown. Petitioner intended to sue her husband for restitution of conjugal rights, failing which, for a decree of divorce on the ground of desertion.

Buchanan, A. C. J., said he did not think the Court had jurisdiction. There was no evidence that the defendant changed his domicile.

Mr. Close said he submitted that there was proof of the intention of the husband to change his domicile. He sent his wife out here, and told her he would follow her.

Buchanan, A. C. J., said he did not think this was a case in which the Court could assume jurisdiction. The domicile of the parties at the date of the marriage was not this colony. The marriage had not been solemnized in the colony and the defendant had never been in this colony. It was true he told his wife he would follow her here, but he did not do so. He was last heard of in England. He (the Acting Chief Justice) thought that, in matrimonial procedure especially, a decree of the Court, even if granted, would not be one which would command respect elsewhere. He did not think that an order should be granted, much as one would like to assist the applicant.

Ex parte ESTATE VAN DER WALT.

Mr. Van Zyl moved for leave to amend a certain order of Court so as to authorise the purchase of property elsewhere than in the district named in the original petition.

Leave was granted, subject to the approval of the Master.

Ex parte INSOLVENT ESTATE ELLIS.

Mr. Roux moved for the appointment of a commission to take evidence at Umata. The evidence related to an action, in which undue preference was alleged.

Order granted, the R.M. of Umata being appointed commissioner.

Ex parte ESTATE SCHOLTZ.

Mr. Benjamin moved, on the petition of Agnes Scholtz, as executrix in the estate of the late Dr. Scholtz, for the attachment of certain property *ad fundandam jurisdictionem*, and for leave to sue the Princess Radziwill by edictal citation. From the petition, it appeared that the Princess had pledged certain jewellery with Dr. Scholtz during his lifetime, and that an application had been made for payment of the amount against the return of the property. After some time a communication was received, requesting that the pledged property should be sent to London, with instructions to hand the same over to the Princess against payment of a sum of £160. The jewels were sent to Messrs. Vauxhall and Vauxhall, solicitors, London, and by them handed over to Mr. Charles Otto, representing the respondent. In November, 1904, a

letter was received by applicant from Mr. Otto stating that the jewels were in his custody, and that he was without instructions as to how they should be disposed of. The pledged property had since been returned to Cape Town, and was now in the custody of Messrs. Van Zyl and Buissinne, applicant's attorneys. Applicant intended to institute an action against the Princess for £160, the amount represented by the pledge, and she desired that the jewellery should be declared executable for such judgment as she might obtain. The respondent was not residing within the jurisdiction of the Court, and her whereabouts were to the petitioner unknown.

Buchanan, A.C. J., asked counsel how it was proposed to effect service of the citation upon the respondent.

Mr. Benjamin said that he supposed substituted service would probably have to be made, as respondent's movements in Europe were not known.

Buchanan, A. C. J., said that the Princess seemed to spend a good deal of her time in Paris, and if the citation were published in one of the leading Parisian newspapers it might possibly come to her notice.

Leave was granted to attach the property *ad fundandam jurisdictionem* and to sue by edictal citation, citation to be returnable on the 1st November, personal service to be effected, failing which service on Mr. Charles Otto, of London, and one publication in "Le Temps" (Paris).

Postea (September 26). Leave was granted, in Chambers to set down this case for hearing on November 9.

Postea (November 10). Mr. Benjamin moved for judgment under Rule 319, the defendant having been barred for default of plea.

The Court granted judgment as prayed.

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

SOMERVEL BROS. V. BELDON { 1905.
AND ANOTHER. } July 14th.

Mr. Watermeyer moved for provisional sentence on certain five promissory notes for £543, with exchange and costs of suit.

Order granted,

LAWRENCE AND CO. AND ANOTHER V.
LEVENSOHN.

Mr. Bailey moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

PURCELL, YALLOP AND EVERETT V.
METJE.

Dr. Greer moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

KEEP BROS. V. EDM.

Mr. Bailey moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

BULL V. WALSH.

Mr. Watermeyer moved for the discharge of the provisional order and release of the defendant's estate from sequestration.

Provisional order discharged.

FLETCHER'S WHOLESALE V. ROSSOUW.

Mr. Swift moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

SNYMAN V. EXECUTORS ESTATE ESTER-
HUYSEN.

Mr. Bailey moved for provisional sentence for £5,000 on certain conditions of sale, with interest and costs, and for judgment on certain deed of suretyship.

Provisional sentence granted, subject to production of usual certificate.

PERL AND CO. V. MCKENDRICK.

Mr. Swift moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court for £6 2s. 7d., and taxed costs.

Decree granted.

S. A. PRODUCE, WINE AND BRANDY CO.
V. DU TOIT.

Mr. Benjamin moved for provisional sentence for £112 13s. 4d., price of goods sold and delivered for which defendant had promised to pay in brandy.

Order granted.

ILLIQUID ROLL.

DEVISTON V. HILDEBRANDT. { 1905.
July 14th.

Mr. Alexander moved for judgment under Rule 329d for transfer and conveyance of certain land, and, alternatively, cancellation of sale and refund of £140 paid, and costs. Plaintiff had paid full purchase price and transfer expenses.

Judgment as prayed, transfer to be effected by August 1, failing which sale to be cancelled, and purchase price and transfer expenses to be refunded.

MCIVOR V. DE BRUYNS.

Mr. Watermeyer moved for judgment under Rule 329d for £138 2s. 1d., less £130 paid on account, goods sold and delivered.

Order granted.

VAN NIEKERK V. FABER.

Mr. Gardiner moved for judgment under Rule 329d. Counsel said that this was an action by edictal citation, and that the notice in the "Gazette" was not published until June 29, so that the requisite month had not elapsed. He had, therefore, to apply for an extension of the return day.

The return day was extended until August 24.

GENERAL MOTIONS.

Ex parte JEFFERY.

Mr. Sutton moved for a rule nisi under the Derelict Lands Act to be made absolute.

Rule made absolute.

Ex parte WOLFAARD AND OTHERS.

In this matter a son (one of the heirs of certain testators) had become insolvent. His interest in the estate was sold by his trustee to one Becker who now desired to take transfer on payment of transfer duty on the transfer from the trustee to himself. Becker could only have purchased this property subject to the onus of paying a certain sum into the joint estate bequeathed to the heirs. This sum he proposed to raise on a mortgage on the property bequeathed and sold to him. The Registrar of Deeds reported that in his opinion such mortgage could not be raised consistently with the terms of the will of the original testators, and that

as the bequest had vested in the insolvent prior to his insolvency, his estate was bound to pay transfer and succession duty.

The Master recommended that the prayer of the petition be granted on condition that the double transfer duty and the succession duty be paid.

Postea (August 3). The Court granted an order in terms of the Master's report.

MC MULLEN V. TRUSTEES, SOUTH AFRICAN HEBREW DIVIDING BENEFIT SOCIETY.

Mr. P. S. T. Jones moved to make absolute a rule nisi calling upon the respondents to show cause why funds standing to their credit in the Cape of Good Hope Savings Bank should not be declared executable to a provisional judgment obtained by applicant in the Magistrate's Court.

Barnard Israel, one of the respondents, appeared in person. He denied that they had had notice of the summons in the Lower Court, and said that the plaintiff, Dr. McMullen had refused payment of his accounts. Replying to the Court, Israel said that the plaintiff claimed £11 19s. 6d., and the funds in the bank amounted to £10. Respondents said that they only owed him £9 17s. 6d.

Rule made absolute, with costs.

Ex parte POTGIETER (MINOR).

Mr. Benjamin moved for an order authorising the Master to pay out certain sum of £800, to enable Petitioner to acquire a property, so as to continue his farming operations in the Oudtshoorn district.

An order was granted, authorising the Master to advance the minor's share, the whole transaction, including the passing of the bond, to be subject to the approval of the Master.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

TWEEDIE TRADING CO. V. { 1905.
: GARDINER AND EASTON. { July 14th.

This was an action for debt incurred by the plaintiffs on behalf of the defendants, in connection with the return of certain West Indian cattlemen, who had mutined on the barque Nordkin in September last.

The claim was based on an agreement under which the plaintiffs had victualled

the cattlemen, and had paid the expenses of their return to an American port, the defendants agreeing to relieve them of all responsibilities and expenses in Cape Town. From the pleadings it appeared that it was the duty of the defendants to pay the expenses in connection with their return to Barbadoes. The responsibility was on the ship to prevent the men escaping, and take them somewhere, as they could not land here under the immigration laws. The plaintiff company employed police to watch the men on board. The cattlemen were sent back by another barque, and £100 was paid for their passage. For victualling, it cost the plaintiffs £6 15s., police protection £6 10s. 6d., and for removing the fittings, which was the duty of the defendants under the charter party, £14 17s. 6d.

The defendants in their plea set out that the plaintiffs agreed to return the men to a United States port, and they (defendants) were only liable for any expenses incurred in Cape Town. As the men had never been landed, the defendants submitted that no expenses had been incurred in Cape Town, and they denied all liability. Defendants further claimed that the cattle had been detained for 24 hours in an unsuitable enclosure at the Docks, and they claimed in reconvention £107 10s. for damages.

Sir H. Juta, K.C. (with him Mr. Douglas Buchanan), was for the plaintiff; and Mr. Close (with him Mr. Gutsche) was for the defendants.

James Matthew Keene, representative of the African Shipping Co., who acted as agents for the plaintiffs, stated that the vessel was berthed on the 22nd September. The cattle were discharged in the usual kraal at the South Arm. The discharge was finished on the 24th September, and within a day or so she went into the bay. The cattle were detained because the defendants had not paid the freight until the 28th September. It was not until the 30th September he got the bills of lading 3 to 11, the remaining three being unimportant. On the 29th Mr. Plant told witness he paid the deposit of £170 into the Supreme Court, and promised to hand over the bills of lading, and witness allowed him to have the cattle. The bills of lading were not forthcoming until the following day. The consignees looked after the watering and feeding of the cattle. The cattle were not in a good condition on arrival; a large percentage died on the voyage. When the vessel went into the Bay, Mr. Plant said it would be cheaper to get the cattlemen to remove the fittings. The cattlemen not only removed the fittings, but they cleaned the ship. Under the immigration laws of the Colony, the cattlemen could not land. Witness employed police to watch the ten West

Indians, on board. The sum of £6 10s. was paid by witness for police supervision. £14 17s. 6d. was paid to the white cattlemen for removing the fittings. Witness subsequently paid £100 to another ship to take the West Indians back. Witness had to victual the ten coloured men, which cost him £6 15s. On the 27th September witness drew the defendants' attention to the insufficient food given to the animals at the Docks.

Cross-examined by Mr. Close: It would be the captain's duty to make a protest at Barbadoes. The captain, in his protest, stated that he put into Barbadoes, not only on account of the mutiny, but on account of being short of coal and water. The protest was extended to Cape Town. Witness knew nothing of the cattlemen mutinying through the bad food supplied. On the 23rd, witness withdrew the claim for freight on the dead animals, but that was not the cause of the defendants delaying the payment of the freight. Witness detained sufficient cattle to cover the freight charges. It was on the 23rd that the claim for freight on the dead animals was abandoned. On the 25th, notices were sent to the defendants about insufficient feeding. Defendants took action in the Supreme Court, and an order was made for the delivery of the cattle on payment of £170. Witness did not know that the defendants applied for the delivery on that day, and had been refused. As soon as Mr. Plant showed witness the deposit, a telephonic communication was despatched to the Harbour Board to release the stock. Mr. Plant promising witness to let him have the bills of lading that day. Witness did not make any arrangements with Mr. Gardiner, as Mr. Plant had given all the instructions. The defendants, in a letter, denied all liability for the return of the men to America, and on October 8 a further letter denied liability for the other items claimed.

Re-examined by Sir H. Juta: It was untrue that Messrs. Gardiner and Plant handed witness all the bills of lading on the 29th.

John Joseph Holland, in the employ of the Harbour Board, said that the mules, etc., landed on the occasion in question were landed in the usual place, and that the usual precautions were taken. The Harbour Board had nothing to do with the feeding.

John Bellam, accountant for the New Zealand Shipping Company, produced accounts, showing payments made to the cattlemen. It was in consequence of instructions from the captain of the Nordkin, and after collaboration with him, that the amounts had been apportioned.

Cross-examined by Mr. Close: He paid Cook and Son for the men to re-

turn to New York. That was via England.

Sir H. Juta closed his case.

Gwendoline Gardiner, sister of the defendant Gardiner, said that she came on board the ship, with her brother, at New Orleans. A short way out some of the men mutinied. She heard the captain say that the grumbling was about the food, coal, and water. She was at the office when the agreement was drawn up.

Sir H. Juta objected to evidence as to what passed at the making of the agreement.

[Hopley, J.: The agreement is quite clear; at all events, it was not for Miss Gardiner to agree.]

Mr. Close submitted that the agreement was an ambiguous one, and he was entitled to ask the witness what her impression of it was.

Hopley, J., said he could not see any ambiguity in the contract, and at counsel's request, noted that the evidence was tendered to explain the meaning the parties attached to the words "Cape Town."

Charles Gardiner, partner in the defendant firm, said the firm's business consisted chiefly of exporting live-stock from North and South America. Witness was at New Orleans when the cattle were shipped. The ship put into Barbadoes, and ten new cattlemen were engaged. Four days after they left the mutiny commenced, and witness and the captain wrote each other letters on the ship.

Witness further stated that he wrote to the captain protesting against the ship calling at Barbadoes for bunkering, and drawing attention to the unsatisfactory food given to the cattlemen, and warning him that the ship would be held responsible.

Mr. Close said he would formally tender the evidence as to the interpretation of the contract.

[Hopley, J.: Same ruling as in the case of the last witness. I will note it.]

Examination continued: He never deviated from the position he took up in the correspondence. He repudiated the liability altogether. Under the charter party the ship was liable.

John E. McCullum, delivery clerk in the employ of the Harbour Board, deposed that he signed the delivery tickets produced. The last delivery—160 mules—was made on the morning of the 1st October. The dates upon which the lighters went out with the corpses of cattle were marked on the tickets. Three mules, two donkeys, and four horses were taken out on September 30.

By the Court: There was nothing about the kraal likely to kill any cattle.

Mr. Gardiner (recalled) stated that he had paid the expenses of the men who had to return from Barbadoes, and had also paid the freight on the animals in

Cape Town. After the order of Court on September 29, witness went with Mr. Plant to the Standard Bank, and had the draft honoured. They were informed by Mr. King, an official of the bank, that the bills would be ready in an hour's time. Later in the day Plant told witness that he had the bills, and witness understood that he (Plant) was going down at once. Witness went at midnight to get the animals, but was told they were not released, and it was not until the following night that he got possession of the animals, and took them to his place at Mowbray, where two of the mules subsequently died. Witness kept a watchman at the Docks during the whole time the cattle were there. At that time the enclosure was unsuitable on account of building operations which were going on. He considered that the fact that only two of the mules died was proof that the general health of the consignment was good.

Cross-examined by Sir H. Juta: He did not contend that he could get the cattle before paying the freight. He maintained that he could get his consignment from a ship without the bills of lading; that was, as an act of grace; legally, he supposed, he could not. He contended that the cattle were illegally detained from the 29th until the 30th, because the bills of lading were produced on the 29th, and there should have been delivery that day. He could not say when the cattlemen were last paid—that was Mr. Plant's business—nor could he say up to what date they were paid. Some of the men were paid for the trip; others by the month.

Re-examined by Mr. Close: He paid his last instalment on the freight on the 28th.

Mr. Close closed his case, and counsel were then heard in argument on the facts.

Hopley, J., said he thought the agreement clearly meant that the defendants undertook to return the men to Barbadoes, and to pay the expenses of the men here after the ship had completed the discharge and the other expenses claimed for. He therefore found for the plaintiff in convention for £125, with costs. On the claim in reconvention he did not think that there was any illegal detention, or, even if there were detention, that any cattle had died as a result. He therefore gave judgment for the defendants in reconvention (plaintiffs in convention) on the claim in reconvention.

[Plaintiff's Attorneys: Van Zyl and Buissinné. Defendant's: Silberbauer, Wahl and Fuller.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

REX V. SEARIGHT AND CO. { 1905.
July 18th.

This was a motion to make absolute a rule *nisi*, calling upon Messrs. James Searight and Co., as agents of the wrecked steamer Clan Monroe, to show cause why they should not be ordered to remove certain dynamite and gun-cotton from the Clan Monroe by Thursday morning, and, upon their failing to do so, why the Government should not be authorised to remove the same at their expense, and why they should not be ordered to pay the costs of these proceedings.

The affidavit of Mr. H. Hawkins, manager of Messrs. James Searight and Co., Ltd., stated that he had perused a copy of the affidavit made by the Chief Inspector of Explosives (Mr. Foakes). Immediately after the wreck of the Clan Monroe had been communicated to him (Mr. Hawkins), he put himself in communication, by cable, with the owners of the steamer in Glasgow, and asked for instructions. On Saturday evening, the 8th July, he received a reply, and on Monday, the 10th July, he advertised for tenders on the "no cure, no pay" principle for salving the cargo. In response to the advertisement five tenders were received, and after referring them he received cabled instructions on Wednesday evening, the 12th inst., to accept the tender of the Cape Town Stevedoring Co. On Thursday he communicated with the successful tenderers. In the meantime he arranged for immediate steps to be taken for the commencement of the salving. On Thursday morning the second and third officers of the Clan Monroe went out to Kommetje, but they came back in the evening, and reported that the sea was too rough to go off in a boat to the wreck. On Friday, the 14th inst., the successful tenderers went out to the spot, and made an endeavour to reach the ship, but found it impossible, owing to the sea that was running. On Thursday witness received a notification that an application was to be made to the Court by the Government on the following day, but that application was not proceeded with. He was surprised now to learn of the application made to the Court on Monday. On Saturday, deponent went to the scene of the wreck in company with Mr. Wilshe, of the Customs, and Mr. Foakes, when it was found to be impossible to reach the wreck, as the sea was breaking over her. On Sunday the weather had moderated somewhat, but it was not possible for a boat to put off to the wrecked vessel. On Monday the weather was

still moderating, and if it continued the tenderers hoped to get off in a boat and to commence active operations. A considerable part of the gear required for the salving operations was aboard the wreck, and lines would have to be passed from the vessel to the shore, which could only be done when the sea had moderated sufficiently to allow a boat to get alongside. He submitted that the application was unnecessary and premature. He protested against the suggestion that the Government should now interfere in the salving, and repudiate any liability for loss or damage that might result from interfering in such operations.

The replying affidavit of Mr. Foakes stated that he visited the wreck on Sunday and again on Monday, and that it was possible on both days to get on board and commence operations. Counsel also read an affidavit by Mr. H. W. Carolin (of Messrs. Reid and Nephew, Government attorneys), stating that he called at the respondent's office on Monday morning, and informed Mr. Alex. Phillips that an application would be made to the Supreme Court that morning.

Mr. Evans moved. Mr. Benjamin appeared to show cause.

Mr. Benjamin submitted that the right to save the cargo was purely one vested in the owners, who were doing everything they possibly could.

Maasdorp, J., said that was a general question. The real question was that there was danger to the public in the vicinity of the wreck, and that danger must be removed.

Mr. Benjamin: They are doing all they can to avoid danger.

[Maasdorp, J.: And have the inhabitants been informed of the danger?]

I cannot say they have.

[Maasdorp, J.: It would be well for those responsible to make sure. Then anybody who remains in the neighbourhood will know the risks.]

Mr. Benjamin said he understood that the Government had arranged to have police guards to keep the public away.

[Maasdorp, J.: People go there at their own risk. I am thinking of the inhabitants within the danger zone.]

Mr. Benjamin said the great anxiety of the owners was to save the cargo, not so much for the value of the cargo, but on account of the danger. Counsel commented upon the absence in our ports of the apparatus necessary for salving operations, and said that the Civil Commissioner, as the harbour authority of the district, could have taken charge of the wreck.

Mr. Evans submitted that the respondents had not exercised due despatch in the preparations for carrying out the salving operations, and pointed out that they had it on affidavit that the weather had been fit to take out a boat from the shore to the vessel.

Maasdorp, J.: When a nuisance is proved to this Court, the Court has jurisdiction to order those who are responsible for the nuisance to remove it or authorise others who are willing to remove it to do so. Now, it is admitted that the existence of the wreck there, with the explosives on board, is a source of danger, and it is quite certain that this Court would have the jurisdiction to interfere to order the removal of the danger there existing. The question arises now whether circumstances have arisen calling upon the Court to exercise that jurisdiction. There is conflict of evidence upon the principal facts in the case, and that is as to the endeavours on the part of those responsible for the nuisance to remove it, and their power, or that of any other person, in taking means for its removal. Now, in that conflict of evidence, I am not now satisfied that it was possible for the respondents to have done more than they did do. I may say I am not satisfied upon that point, though there are circumstances of suspicion that they might have done more than they have done. The respondents will have to bear in mind that if any serious consequences arise through any neglect which may hereafter be proved, they may be responsible for the consequences, if it is injury to property or life, in more respects than one, but, on the whole, I have come to the conclusion that no case has yet been made out for this Court to interfere. On the one hand, the applicants have produced evidence stating that it would be quite possible to do more than the respondents have done. The respondents have given equally strong evidence that they have made every effort that lay in their power. The Court would, therefore, give a futile order unless it were convinced that it gave an order which could be carried out. If the Court were now to give an order on the respondents to effect a work which they could not possibly do, it would give an order which could not be of any value. The applicant has come forward in the interest of the public and, for that reason, although I consider that the Court is not now in a position to make any order, the Court is not in a position to say that he was not justified, with his knowledge of the circumstances, in moving in the matter. When the Court, therefore, refuses this order, it makes no order as to the costs in this case. I may also point out that it has now been suggested that if the Government wish to undertake the work themselves, no opposition will be offered. If that is so, the Court need not interfere. But the suggestion is made that the Court should now express an opinion as to what the respective rights and liabilities of the parties will be in case these operations are carried out. A case has

been cited very much in point, but it amounts to this, that the work was first done, and then the Court was asked to decide as to the liabilities of the parties, and consequently, I give no expression of opinion at all as to what the legal consequences will be if the Government undertake the work. If the liability is laid down in any statute or in any common law rules on the subject, the parties must consult the law in order to be guided in their action. No order will be made on the application, and no order as to costs will be given.

[Before the Hon. Mr. Justice HOPLEY.]

REX V. MCCOMA AND ¹ 1905.
ANOTHER. { July 18th.

Hopley, J., reviewed the facts in the case of *Rex v. John McComa and Willem Maigas*, on a charge of destroying a koodoo at Steytlerville, and held, as the first prisoner pleaded guilty and was called to give evidence before he was sentenced against the second man, the conviction must be quashed.

Ex parte NOHLAJI.

Mr. Roux moved for an order on the Registrar of Deeds to pass transfer from the original grantee to the eldest son.

A rule was granted, calling upon all persons concerned to show cause on the 31st August, 1905, why an order should not be granted as prayed, the rule to be served personally on Edward, Richard, Ura, and Samson Nohlaji, to be advertised once in the "Kokstad Advertiser."

Postea (September 1). Rule made absolute.

GENERAL MOTIONS.

Ex parte BADENHORST.

Mr. Benjamin moved, on behalf of the petitioner, for orders: (a) interdicting and restraining the respondent, Rudolf Badenhorst, from alienating any goods or rights belonging to the farm Raasfontein; (b) for the attachment of all moveable assets of the said Rudolph Badenhorst; (c) restraining the Standard Bank of S.A. (Colosberg) and Johannes Jacobus Norval, and the firm of Schutz and De Jager from parting with any of the funds or assets of Badenhorst; (d) compelling Rudolph Badenhorst to furnish the applicant with sufficient funds to enable her to prosecute her action for divorce and costs.

Order granted in terms of a, b, and c, of the application to operate as an interim interdict. As to (d), a rule nisi granted calling upon Badenhorst to fur-

nish the petitioner with £40 to enable her to institute her action. Order to be served personally, and, if necessary, to be telegraphed, rule returnable September 12.

REX V. ZIMMERMAN AND OTHERS.

This was an application to have the accused, who were at present confined in Caledon Gaol, on a charge of murder, released on bail. The matter had previously been before the Acting Chief Justice, when he ordered further evidence to be taken, and counsel citing the evidence, submitted that there was every reason to assume the prisoners' innocence while they were in gaol, and that they would be greatly prejudiced in their defence.

Mr. Burton for applicants; Mr. Evans for the Crown.

Hopley, J., said that the application, though formally opposed, was not strenuously opposed by the Attorney-General's Office, and he thought, under all the circumstances, it would be right to admit the accused to bail. Zimmerman's case was on a somewhat different basis to the others, and bail in his case should be somewhat heavier. The other applicants would be admitted to bail, themselves in £200 and sureties to the satisfaction of the Magistrate in a like sum. In regard to Zimmerman, the bail would be fixed at £500 in the accused himself and £500 in sureties to the satisfaction of the Resident Magistrate.

Ex parte LOUW AND OTHERS.

Mr. Benjamin moved for leave to transfer certain property in the estate of the first-named petitioner and his deceased spouse. The first-named petitioner was 94 years of age. Consent papers were filed.

Order granted.

Ex parte MARAIS.

Mr. De Waal moved for the appointment of a *curator ad litem*, to represent certain minors in the partition of property.

Order granted, Mr. H. J. Swanepool being appointed curator, costs to come out of the minors' inheritance.

Ex parte KEMP.

Mr. Benjamin moved for authority to sell and transfer certain property. The petition set forth that the petitioner owned certain property which he wished now to transfer to his children, in lieu of other property bequeathed to them. There was a provision in the

will that the property bequeathed should not be alienated by the heirs. It was stated that the property belonging to the children was overrun with prickly pear, and the petitioner had no means to rid the land of the pest. The property which he sought to transfer was more valuable. The Master recommended that the application should be granted, subject to the same restriction being placed on the property to be transferred to the minors.

Leave was granted to the petitioner to sell his and his wife's portion in the farm and to transfer it, on condition that he transfer to his children, born and to be born of his marriage, free and unencumbered, the property set forth in the petition.

Ex parte VAN ZYL.

Mr. Russell moved for confirmation of the sale of certain property purchased by the petitioner from her husband's estate, of which she is executrix. The sale was by public auction, and the sum paid was stated to be of fair value.

Order granted.

Ex parte PAPERT.

Mr. Alexander moved for leave to register a certain contract after marriage, having the effect of an ante-nuptial contract. It was stated in the petition that the petitioner and his wife fully intended to be married out of community at the time of the marriage. They were married before the Acting Resident Magistrate of Cape Town, but did not understand at the time that they were being married, believing that they were only going through a form of registration. Last Sunday they went through the religious ceremony, which they had understood to be required to complete their marriage.

Leave granted.

SUPREME COURT

Before the Hon. Mr. Justice MAASDORP.]

PROVISIONAL TRUSTEE.

In re INSOLVENT ESTATE of 1905.
MCLEOD. { July 19th.

Mr. Benjamin moved, on the petition of Blaine and Company and other creditors, for the appointment of a provisional trustee in the insolvent estate

of John McLeod, trading as a grocer and provision merchant under the style of Ford and McLeod at Port Elizabeth. Counsel said that he understood that the estate was voluntarily surrendered yesterday (Tuesday), and that the surrender was accepted by a Judge in Chambers. Petitioners suggested that Mr. Charles Anderson, of Port Elizabeth, was a fit and proper person to be appointed trustee until such time as a trustee was elected, and prayed that he should be appointed and be vested with power forthwith to endorse cheques payable to the estate, and to pay the same into the bank for collection, and also to dispose of the perishable assets and receive the proceeds thereof. Counsel added that his learned friend, Mr. Roux, he understood, had an application to make, but he was not sure that it was in the same estate.

Maasdorp, J., said that an order would be granted as prayed.

Mr. Roux immediately afterwards rose and moved, on the petition of Mr. James McLagan, manager for Forbes and Caulfield, merchants, Port Elizabeth, for his appointment as provisional trustee in the insolvent estate of John McLeod. The petitioner stated that his firm were creditors to the amount of £2,975 18s., while the total liabilities—according to the schedules which had been filed—were £3,239.

Maasdorp, J., said that it was strange that they should now have this application in view of the order just made.

Mr. Benjamin explained that he had been led to believe that his learned friend was moving in quite a different estate.

Maasdorp, J., asked whether Forbes and Caulfield were secured creditors?

I understand that they are secured by bond.

Maasdorp, J., said that no order would be made on this application, in view of the order already made.

Mr. Roux applied for costs against the insolvent estate.

[Maasdorp, J.: There seems to be a rush for the appointment of provisional trustee. The applicant in this matter applies for his own sake merely. No order will be made.]

DOUGLAS V. FISHER.

This was an action brought by John F. Douglas, bricklayer, Yzerplaats, Cape Division, against Thomas Fisher, of Matland, to recover a sum of £50 in respect of an alleged sale of ground.

The declaration set out that on the 29th June, 1904, defendant lent to plaintiff a sum of £15 sterling. In or about September, 1904, plaintiff and defendant entered into a verbal contract by which it was agreed that plaintiff should sell and defendant should buy for £65 cer-

tain portion of redeemed quitrent land. It was further agreed between the parties that the sum of £15 referred to should be taken in part payment of the purchase price. Plaintiff had at all times been willing to pass transfer against payment of the balance of purchase price, and had tendered and hereby again tendered transfer. He prayed for judgment for £50, with interest *a tempore morae*, alternative relief, and costs of suit.

Defendant, in his plea, denied that he had purchased from plaintiff land at Yzerplaats or elsewhere. He instructed his agent, Mr. Martin, to inspect the plaintiff's title deeds, but no agreement of sale was ever entered into between plaintiff and defendant. In re-convention defendant claimed judgment for £15, money lent to plaintiff on the 29th June, 1904.

Mr. Gutsche was for plaintiff; Dr. Greer was for defendant.

Mr. Gutsche asked for leave to amend the declaration by substituting for "in or about September, 1904," the words "at the same time."

Dr. Greer objected to the proposed amendment, and said that, if allowed, it would set up a totally different case from the one they had now come to Court to meet.

Maasdorp, J., said that the amendment would be allowed, and the question mentioned by Dr. Greer could be raised afterwards if necessary.

John F. Douglas, bricklayer, Yzerplaats, said that he applied to defendant in June of last year for a loan of £15. Defendant asked him if he would let him have the land for £65, and take the £15 in part payment. Witness agreed to do so. It was arranged in September that Fisher should give him £30 more before he passed transfer. There was nothing settled in June about passing transfer. Mr. Rosen at that time held the deeds as security for a debt. Fisher never asked him for the return of the £15. Witness took no steps in the matter until the end of the year. Mr. Carmichael, Mr. Rosen's agent, then told him that Mr. Fisher had not paid up, and witness entered into an agreement to pay off his (Douglas's) debt.

Cross-examined: On the 27th April witness received a summons at the instance of the defendant, claiming payment of the sum of £15. Witness then issued in self-defence a summons for payment of the balance of purchase price.

James Carmichael, manager for Mr. Rosen, furniture dealer, said that his firm took the deeds from plaintiff as security for a debt of about £50. Plaintiff came in September for the deeds, and witness went with him to see Mr. Martin. Witness could not wait, and he agreed to leave the deeds with Mr. Martin, upon the latter giving him a

receipt. He had since pressed Martin for payment of the money or return of the deeds. Witness had treated the transaction throughout as a sale to Fisher.

Mr. Gutsche closed his case.

Thomas Fisher, the defendant, said the plaintiff had been in his employment as foreman bricklayer. In June last plaintiff came to him and said he was "in a bit of a hole," having no money wherewith to pay interest on a mortgage. Witness lent him £15, but got no receipt. At that interview nothing was said about the purchase of property. Witness was told by his foreman (Potter) at the end of August that Douglas had some plots for sale. Witness asked Douglas one morning for the money, and Douglas asked him to buy two plots, and to allow the £15 to be retained as part payment. He said witness could pay the balance when he pleased. Witness said he would think over it. Later on he asked Douglas to take the title-deeds to Mr. Martin in Straud-street; that gentleman was auditing witness's books at the time. It was not until Martin told him that witness knew the deeds were held by Mr. Rosen. Witness told Martin to send the deeds back, as he had not the £30 to pay at that time. Witness wanted to get hold of the property as security for the £15 he had lent Douglas, and he expressed his willingness to pay £15, and the rest in three months. Martin told him that this was not accepted. Witness did not agree at any time to a sale. Witness did not agree to give a post-dated cheque. Martin said he had suggested giving a post-dated cheque, conditionally upon witness ratifying it. He sued Douglas in the Magistrate's Court for the £15.

Cross-examined by Mr. Gutsche. It was arranged in the first place that the £15 should be deducted from Douglas's wages, and witness instructed his foreman accordingly, but it was not done. Witness's only connection with Martin was that he employed the latter to audit his books. He understood that Douglas had the title-deeds in his possession. He had not seen or given instructions to Martin before Douglas took the title-deeds to his office.

George G. Martin, accountant, said his first knowledge of the matter was upon Douglas coming to his office with the title-deeds. Witness made out a receipt, the terms of which were suggested by Carmichael. Witness acted in the *bona fide* belief that there had been a sale from Douglas to Fisher. He had had no instructions from Fisher on the matter. When witness told Fisher that there was a debt of £30 against the deeds, Fisher was surprised, and said it would be better to return the title-deeds. Witness suggested to

him that it would be better to try to arrange terms, in order to secure the £15 lent to Douglas. Witness tried to make arrangements with Rosen. Fisher would not agree to give a post-dated cheque.

Edward Potter, carpenter, in the employ of the defendant, said he paid the men's wages, and Fisher instructed him to deduct so much a week from Douglas's wages to pay off the £15, but witness did not do so, as Douglas said he was in a "tight corner."

The plaintiff (recalled) said Potter never tried to stop any part of his wages.

Dr. Greer closed his case, and counsel having been heard in argument on the facts.

Maasdorp, J.: The plaintiff's case is that in June he desired to obtain a loan of £15 from the defendant, but that the defendant, who had heard that the plaintiff had land for sale, suggested instead of the loan going through they should come to some arrangement for the purchase of the land, and then he would let him have £15 as part payment of the purchase price. He agreed to the proposition made by the defendant, and a contract was entered into by which the land was sold for the sum of £65. £15 was paid on the spot, and £50 remained due. The defendant denies the purchase of this property, and says that the only thing that happened was the lending of the £15 to the plaintiff, which was to be repaid by stoppages of part payment of his salary. If the case rested there it would certainly be very difficult to decide the issue, but the question arises whether there are other circumstances which throw light upon this case, and whether the Court can gather from anything that was said or written by either of the parties, that which would go to corroborate the statement made by the plaintiff. After reviewing the evidence, His Lordship gave judgment for the plaintiff for £50 upon the plaintiff tendering to the defendant the necessary documents to pass transfer of the land, the defendant to pay costs.

[Plaintiff's Attorney: G. Trollip.
Defendant's: G. J. O'Reilly.]

Ex parte VILJOEN.

Mr. Burton moved as a matter of urgency for an interdict restraining Ferdinand Wm. Roberts, of Lady Grey, district of Aliwal North, from removing from a certain farm in the district of Aliwal North a quantity of tobacco obtained from petitioner, who resided at Belfast, district of Lydenburg, Transvaal. Petitioner said that the respondent obtained from him 1,221 lb. of uncut tobacco, valued at £45 15s., on a fraudulent representation that he had funds at the

bank in Belfast, and that respondent had removed the tobacco to the farm, Noodefontein, Aliwal North district.

Interdict granted, with leave to all parties interested to move to have it set aside.

APPEALS.

WATSON AND MALCOLM V. WILLIAMS.

This was an appeal from a judgment of the Resident Magistrate of Middelberg, in an action brought by the present respondent against the appellants for 9s., balance of wages, alleged to be due.

It appeared from the record that the respondent had been employed by the appellants as a carpenter, at 1s. 10½d. an hour. He was entitled to £11 8s. 9d. wages, but the appellants only paid him £10 19s. 9d., withholding the balance, as per agreement, for quarters provided for the respondent. The Magistrate gave judgment for the plaintiff, with costs, and held that the agreement was unwarrantable and inequitable.

Mr. Burton was for appellants; respondent in default.

Counsel submitted that the agreement was clearly proved, and that the Magistrate erred in his judgment. The Magistrate himself found that such an arrangement had been entered into between the parties.

Maasdorp, J.: Plaintiff consented to forego so much of the wages in respect of the quarters which were at his disposal. He did not actually occupy them, but he agreed to forego those wages for the right he would have to occupy those buildings. This agreement was clearly proved before the Magistrate, but the Magistrate held that it was an unreasonable thing. That is a ground upon which, I think, the Magistrate's judgment should not have proceeded. Plaintiff is not entitled to recover this alleged balance of wages. The Magistrate's judgment must be reversed to judgment for the defendants, with costs in this Court and the Court below.

KRUGER V. DU PISANI.

Magistrate's jurisdiction—Counter-claim.

Where a counter-claim in excess of the jurisdiction is brought in a Magistrate's Court, the Magistrate must take evidence as to the bona fides of the counter-claim.

This was an appeal from a judgment of the Resident Magistrate of Willow-

more in an action brought by the respondent against the appellant for £30, with interest *a tempore moras*, for rent alleged to be due by virtue of a lease. Mr. P. S. T. Jones was for appellant; there was no appearance for respondent.

Mr. Jones said that the defendant had a counter-claim for work and labour done amounting to £49 15s. 9d., which was beyond the Magistrate's jurisdiction, and he submitted that the Magistrate erred in not taking evidence as to whether the counter-claim was *bona fide*. He submitted that the case should be remitted to the Magistrate to take evidence on the counter-claim.

Maasdorp, J.: The case will be sent back to the Magistrate in order to ascertain whether this is a *bona fide* claim that the defendant sets up, and, if he comes to the conclusion that it is, then he will be unable to proceed further in trying the case. The parties may then proceed to their remedy in a court of higher jurisdiction. The respondent must pay costs of appeal, costs in the court below to remain in the discretion of the Magistrate. For the present the judgment of the Magistrate is reversed, with costs.

HEYDENREYCH V. ABDURHAM.

This was an appeal from a judgment of the Assistant Resident Magistrate of Cape Town in an action, in which the appellant sued the respondent upon a promissory note for £110.

From the record it appeared that the note in question was dated the 17th August, 1903, and was signed by the defendant, promising to pay a sum of £110 on the 6th November, 1903, to Abdul Gaffoor, of 25, Pope-street, Salt River. The note was endorsed by Gaffoor, and appellant sued as the legal holder thereof. The defence was that the amount due under the note had been extinguished by payment in account with Abdul Gaffoor. Defendant further said that the note was signed by him in blank, and that it was fraudulently filled in as £110; the correct amount being £10.

The plaintiff had taken over the note from Gaffoor, who had borrowed a sum of £1,000 from him, for which Gaffoor had been charged interest at the rate of 5 per cent. per month. The Magistrate, in his reasons, stated that the allegation of fraud, as to which he expressed no opinion, did not affect the validity of the plaintiff's claim, and the main question was whether the plaintiff was beyond all reasonable doubt still the *bona fide* holder of the note at the time the action was instituted. He (the Magistrate) came to the conclusion, for various reasons, that he was not, while recognising the presumption from the holding of the note in his favour. The Magistrate reviewed the circumstances at length, and

said it was clear that the plaintiff treated this note as discharged, and released the defendant from liability on the passing of the bond.

Mr. Burton was for appellant; Mr. Gardiner was for respondent.

Maasdorp, J., said that the question arose whether it had been proved that the note had been settled with the plaintiff. The Magistrate came to the conclusion that upon the whole of the case it was impossible for him to ascertain the exact state of accounts between Gaffoor and Heydenreich, that certain settlements took place, but that it was impossible for him to ascertain whether such a full settlement had taken place as to dispose of this promissory note. His Lordship reviewed the evidence, and said that payments had not been proved with respect to the promissory note. As to the further defence of fraud, His Lordship saw no necessity, on the authorities cited, for sending the matter back to the Magistrate. Judgment would be for the plaintiff for £130, with interest, from the January 6, 1904, the defendant to pay the costs in this court and in the court below.

SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

GRASSICK V. B.S.A. ASPHALT CO. { 1905.
July 20th.
" 21st.
" 24th.

Contract, fraudulent and immoral.

This was an action brought by Alexander Grassick, contractor, Cape Town, against the B.S.A. Asphalt and Manufacturing Co., of 62, Strand-street, Cape Town, to recover a sum of £162 3s. 6d., balance alleged to be due for work and labour done.

The declaration set out that on or about the 30th March, 1904, the defendant company entered into a contract with the Cape Town Council, by which the company agreed to do and carry out certain tar-paving of a portion of the Early Morning Market grounds at Sir Lowry-road. In June, 1904, plaintiff agreed with the company to carry out the work of laying the said tar-paving, defendants undertaking to supply all plant and materials necessary for

the due carrying out of the said work. The terms agreed upon were that plaintiff should be paid at the rate of 2s. 3d. per superficial yard of the paving that he laid, that weekly payments should be made to him on an approximate estimate of the work done, leaving the exact amount to be determined by the measurements of the City Engineer. Plaintiff thereupon proceeded to do and carry out the work of laying the tarpaving, and continued to do so until the 14th September, 1904, when he was required by the defendant company to cease continuing to do so. On or about that date he had duly completed 3,023½ superficial yards. He had also done 2,073 superficial yards, which, while not completed, were advanced to the stage known as seconds, for which plaintiff was entitled to charge 1s. 6d. per yard, making £207 19s. 6d. He had also advanced 411 yards to the stage known as thirds, for which he charged at the rate of 1s. per yard, making £20 11s. 6d. He said that the charges of 1s. 6d. and 1s. for seconds and thirds respectively were fair and reasonable. The defendant company had paid to plaintiff a sum of £368 14s. for work done. The total amount to which plaintiff was entitled for labour which he had done was £530 17s. 6d., leaving a balance owing of £162 3s. 6d., for which judgment was prayed, with interest and costs.

Defendants, in their plea, admitted paragraphs 1, 2, 3, 4, and 5 of the declaration, save that they said that plaintiff undertook to carry out the work properly and skilfully, and in accordance with the terms of the specification and contract, and to the satisfaction of the City Engineer. The defendant company admitted that plaintiff proceeded with the said work until the 14th September, but said that he did not carry out the work properly and skilfully, or in accordance with the terms of the specification and contract in regard to paragraph 2, or to the satisfaction of the City Engineer, and accordingly he was given notice to discontinue. By reason of plaintiff's breach of contract, defendants were compelled to replace and re-execute a large portion of the work at a cost of £231 12s. 5d., which said sum the defendant company were now entitled to claim from plaintiff. Defendants claimed as a set-off £231 12s. 5d. against the plaintiff's claim, so far as may be necessary to extinguish the same. In reconvention, the defendant company claimed judgment for £231 12s. 5d. additional expenses incurred as aforesaid.

Plaintiff, in his replication, said that he did not undertake to carry out the work to the satisfaction of the City Engineer, and that, so far as he was concerned, he had always been ready and willing to carry out the work according to the specifications. If the work had not been satisfactorily carried

out, it was owing to the failure of the defendant company to supply him with proper plant and materials, and their failure to give him proper facilities for doing the work. He prayed that the claim in reconvention should be dismissed, with costs.

Mr. Gardiner (with him Mr. P. S. T. Jones) for plaintiff. Mr. Upington (with him Mr. Struben) for defendants.

Alexander Grassick (the plaintiff) was called. In the course of his evidence, he said that he was told by Mr. Allan the manager for the company, whose instructions he was to take while he was executing the sub-contract, that—

Mr. Upington objected to this, on the ground that it was evidence varying the agreement, as set out in paragraph 3 of the declaration, and that a written agreement had been proved, dated 6th June, 1904, whereby the plaintiff agreed to carry out the work according to the City Engineer's specification, which provided that the work was to be carried out under his supervision.

Mr. Gardiner submitted that the City Engineer's supervision applied to the contract, and that the City Engineer had no supervision over the sub-contract.

Hopley, J., ruled that the evidence should be admitted.

Witness (continuing his evidence) said that Mr. Allan told him that he must take instructions from him, and witness drew his attention to the clause in the specification regarding the City Engineer's supervision. Mr. Allan said, "never mind, I will arrange with the City Engineer." Witness's first tender was 3s. a yard; he afterwards made a tender of 2s. a yard, but he never agreed to satisfy the City Engineer at that figure. He was told not to bother about the specifications. Witness considered that the B.S.A. Company, as the contractors, never attempted to approach the conditions set out in the Council's specification. The materials with which he was supplied did not come up to the specification. The roller with which he was supplied was too light for the work that was to be done. No proper covering was provided for the engine. The site of the works was too low, and could not be kept dry. Witness went on to speak of the defects of the plant furnished to him. Witness said that more than once he pointed out to Mr. Allan that he was not complying with the specifications, and that Mr. Cook might pass and make a complaint, but Mr. Allan said, "Never mind; I will arrange with Mr. Cook." A good deal of the material was put down during the wet weather, although the specification said that it must only be laid in dry weather. Afterwards, about the 14th or 20th September, the City Engineer came on the scene, and complained about the way in which the work was being done, and stopped oper-

ations. Witness went to the B.S.A. Asphalt Company's offices and saw the manager and secretary, who said that it was his fault, through mixing the material while it was wet. At that time he claimed on his approximate measurements that a sum of about £55 was due to him. Subsequently he had an offer of £25 from the company, and a proposal that he should recommence the work, defendants promising that such sum as was found to be due to him upon the measurements of the City Engineer should be paid. The company also required him to withdraw the action that he had commenced.

Cross-examined: He had not laid macadam in this country before he took this contract, but he had laid considerable macadam in Australia. He had laid tar paving in Johannesburg on the Geldenhuis Estate. This was the first contract for tar paving he had taken in this country. The letter which he signed for 2s. a yard was a facsimile of the letter he had had sent for 3s. a yard, except as to the figure. Witness told Mr. Allan that he could not carry out the specification at 2s. per yard. Mr. Allan said, "Grassick, you can do it; never mind the specification—that is my business." Witness heard that a letter had been received from the City Engineer stating that the work was being done in a slovenly manner, but it was impossible to do it otherwise than slowly at that time owing to the terribly wet weather.

The tar-paving he had laid was still there. The "bottoming" was laid on an uneven surface, consisting of "loose stones, boulders, and brick-bats," as the City Engineer described, material supplied to him by the defendants. Witness tried to make the surface even. He attended a meeting of the company's directors on the 30th October.

Mr. Upington asked witness whether it was correct, as set out in the company's minute-book, that "the foreman, Grassick, then attended the meeting, and, after some discussion, it was resolved that the sum of £25 be paid to him on account of the balance of his measurements. This payment was made entirely without prejudice to the company's position, Grassick agreeing to let the matter stand over pending the City Engineer's further contract."

Witness replied that the record was incorrect, because he was told at the meeting that it would be settled at once.

Mr. Upington asked witness if he understood that the terms, "without prejudice to the company's position," referred to the company's right to make him responsible for any improper workmanship?

Witness said that he did not understand the terms in that sense. In further cross-examination, witness said that he received a payment of £25 on the

1st November. During subsequent negotiations, witness agreed to allow the company £5 in respect of a small portion of the paving, if he were allowed to complete the work. Witness claimed a balance of £30 10s. 6d., and he took up the position that, if that balance were paid to him, he would be prepared to go on with the work. Witness thought that the company were charging him too much in the claim in reconvention. Witness had had experience of estimating for tar-paving in Australia. He had had experience of estimating at the Early Morning Market. He agreed to try the contract at 2s. per yard.

Mr. Upington: You did not tender to carry out the specification of the City Engineer?—No.

You tendered for a cheap and nasty job at a very low price. Is that so?—No, that is not so. I tendered at 3s. a yard.

What did you tender to do for 2s. ?—I agreed to do the work in a most slovenly manner to the satisfaction of the B.S.A. Company, and not to the satisfaction of the City Engineer.

Re-examined by Mr. Gardiner: Allen threatened to clear witness off the work if he did not continue to lay the macadam in wet weather. In the early stage of the work witness asked for a heavy roller, but his request was not met with when he was filling in the foundation. It was a great mistake to put on a steam roller when the asphalt was laid, as it crushed the tar through the clay. He found fault with the charges made by the Asphalt Company for wages and labour.

By Hopley, J.: Allen told witness that he (witness) was taking the contract too seriously. Witness understood that Allen was going to put the specification to one side, and carry it out to his own idea. Allen said he would make the matter all right with Mr. Cook. Witness quite understood, as he laid down every yard of stuff that the corporation were not getting what they specified for.

William P. Turner, Superintendent of Roads, in the City Engineer's Department, stated he had under his supervision all the tar paving under the Corporation. He had other work on at the same time as that at the Early Morning Market, so that he could not give it his undivided attention. He knew of the work going on in wet weather. During process of mixing some of the substance got on to dirty ground. The cover which was necessary at the maturing stage was insufficient. There was not sufficient stacking to make the quantity of tar for the area to be covered.

Cross-examined by Mr. Upington: Witness might have visited the place three times a week. He might not have been on the spot when the clay shale arrived. The bluestone could be obtained without any clay shale. From time to time he noticed that the stuff was being properly mixed, and reported that, as

he also did the work taking place in wet weather. The accommodation for the preparation of the stuff was unsuitable.

By Hopley, J.: Witness left it to his chief after reporting the defendants to stop the bad work.

John Cook, City Engineer, who had under him the paving in question, said the contract provided there should be no sub-letting, and he never heard of the arrangement between the plaintiff and the defendants until the present trouble began. Witness always understood the plaintiff to be foreman in the employ of the B.S.A.A. Company. The site was sufficiently large for the making of the tarred macadam, but there ought to have been more room for maturing, which could only have been done with considerable delay. Witness drew defendants' attention on July 14 to the unsatisfactory way in which the work was being carried out, and they replied they would pay attention to witness's requirements. It was improper to mix and lay the material as fast as it came from the crusher, and witness did not know of any instructions being given to the defendants to do that. When witness drew attention to the cartload of wet stones, defendants replied that their "foreman" was very careful, but sometimes the ordinary workman was careless. On the 6th September he gave defendants notice to stop the work until such time as the Council met, when he would advise the cancellation of the contract. If there was manure deposited he would be glad to have the asphalt dug up if the spot was pointed out. On the 17th September the defendants asked for a reconsideration of witness's decision, pointing out that there had evidently been a misunderstanding between them, defendants thinking that it was the wish of the Corporation that the work should be pushed on as quickly as possible. In the correspondence or in any interviews between witness and the defendants, there was no room for any such misunderstanding. It was only last week that he finally passed the work, and not the 17th April, as set out by Mr. Davis in his affidavit.

Cross-examined by Mr. Upington: On the 17th April the first payment on account was made. The material was quite good enough if there had been proper consolidation. Outside the Corporation Quarries there was a general attempt to mix the bluestone with a certain amount of clay shale.

Mr. Upington: Generally, I take it that your objection was to the manner in which the actual work was carried out, more than to the materials that were employed?

Witness: It was to both.

Mr. Upington: Your objection was rather to the way in which it was carried out?

Witness: It was carried out in wet weather.

Further cross-examined: He had sworn an affidavit in which he said that his chief reason for condemning the work was because of the use of wet and dirty materials, the materials not being matured, and having been laid in wet weather. The company afterwards took the whole of the toppings off the portion that witness had complained of, and allowed the material to dry, and re-toppings were afterwards placed in that part. He had reported to the City Council that the work was fairly satisfactory. The work had been accepted, but it was a question whether the pavement would carry the traffic, and that time alone could decide. The Corporation desired that the work should be pushed on reasonably, and early after the contract had been signed, but they did not want the materials to be mixed in the rain or to be laid in the rain.

By the Court: It was not chiefly because of the quality of the stone that he condemned the work that was partly the reason, but the stone had been brought from the Barracks site and was dirty, and the tar would not adhere. All the stuff that had been put down was still there. The toppings had since been chipped off about an inch down, so as to expose the seconds and bottomings to the atmosphere. There were three causes of the trouble—unmatured materials, wet weather, and dirty stones. The bottomings and intermediate layer were faulty, and had to be dried by the air, but the job was not now as good as it would have been if it had been carried out according to specification. Witness could not from memory say how much of the work done by Graesick was satisfactory.

David John Clarke, stonemason, Henry F. W. Rohr, manager for Jenkins and Co., and John H. Gibbs, iron-founder, also gave evidence for the plaintiff.

Mr. Gardiner closed his case.

George Allan, manager for the defendant company, said that he did not tell the plaintiff that he was to take no notice of the specification to the contract, and that he was only to listen to witness. The site for the mixing materials was above the level of the gutter. Graesick never complained about the unsuitability of the mixing site, nor did he complain about the drying table. Plaintiff was fully authorised to turn away bad stuff, and did actually turn away certain stones. Witness had not told plaintiff to work in wet weather. The company got several crushers for the plaintiff. Plaintiff found fault with the first, and he selected the second one himself, and it was erected under his supervision. The company afterwards got him a third crusher. Witness did not think that the stone was wrong. The company paid a good price for the

best stone they could get in the district. They obtained blue stone from the Mount Prospect Quarries, and also from the Barracks. He believed the cost of the stone obtained from the quarries was about 7s. 6d. a cubic yard. He had not told plaintiff to do the work in a slovenly manner, but on several occasions he drew plaintiff's attention to the terms of the specification. He complained to plaintiff about the way in which he was doing the work. Plaintiff was putting too much tar into the stuff, with the result that the finished surface was too soft. Plaintiff's brother was employed on the job for some time, and the City Engineer found fault with his work. Witness called Grassick's attention to the need of dispensing with the services of his brother. When the work had been stopped the City Engineer did not make any complaint about the materials which had been used. He complained rather of the way in which the work was done, the surface being soft and uneven. Witness's intentions all the way through was to make a first-class job of the contract; that was why he wanted to fix the responsibility on the man who was putting down the paving.

[Hopley, J.: Why didn't you put a clerk of works on, because Grassick seemed to be putting down some very bad work?]

Witness: I did not notice anything very bad until he came to the surface. When you stood on the material you sank down. The surface was all hollows. Witness (continuing his evidence) said that he was not aware that the plaintiff was using damp stones; he had always been under the impression that Grassick was using dry stones. Grassick had a good fire burning all the time so as to enable him to dry any wet stones. Witness did not see any leak in the roof of the drying and mixing shed. In regard to the claim in reconviction, witness said that the amount of £213 odd represented actual expenditure. Plaintiff was in error in stating that a cart load of stones went to one yard of paving; three loads would be equal to two yards. Witness did not deny that if the plaintiff had done the work properly he would have been entitled to the amount that he claimed, but plaintiff was indebted to the company for the wastage caused by having to re-execute the work. They did not claim anything against plaintiff for the rest of the contract that they had executed. On the whole job, the company would make a loss.

[Hopley, J.: There ought not to have been a loss at that price of 2s. a yard?]

Witness: There should not have been, but the way we have been humbugged about has caused us to make a loss.

Cross-examined by Mr. Gardiner: They came to the conclusion that Grassick was not satisfactory when the City Engineer complained. He had no idea

that Grassick was laying the paving in wet weather, until the City Engineer drew his attention to the matter some time in July and August. Witness went to the job every day, but he did not see Grassick laying the paving in wet weather. Witness admitted having written on the 30th August to the City Engineer, saying: "Our foreman exercises all the care possible." He meant by that that Grassick had promised to be as careful as possible.

Mr. Gardiner: Did you mean what you said, that he did exercise all the care possible.

Witness: While I was there, he certainly did.

Mr. Gardiner: Yet, you tell us you had to complain to him on several occasions that he was not carrying out the specification. I suppose you meant to tell the truth when you wrote to the City Engineer?

Witness: I always tell the truth as far as I know.

Cross-examination continued: Grassick first tendered at 5s. per yard for the labour. Witness told him that the figure was too much, and Grassick went and looked into the matter again, and tendered for 2s. a yard. The defendants did not ask the consent of the Corporation when they gave this work to Grassick. He did not consider that they had sub-let the contract, and thus broken their undertaking with the Council. He did not think it was necessary to obtain the consent of the Corporation to sub-let piece work. He was anxious to fix the responsibility for doing the work upon the man on the job. Dirty stone was not used on the job. Only the clean stone in the company's yard was intended for the job. Witness never intended that the materials should not be matured. When he said in his letter to plaintiff that the material should be used as fast as it came from the crusher, he did not mean that it must be immediately laid, but that it should be used at the same rate as it came from the crusher. They could have done with more space for maturing, but he did not think that Grassick was hampered by want of sufficient space. He denied that they had a misunderstanding with the City Engineer as to the kind of weather when they should lay down the paving. It was not correct that the City Engineer took one view as to the weather when the work should go on, and that the company took another. Witness was not aware that the defendants offered Grassick 6d. a yard if he would do the re-topping.

Alexander Allan, brother of the last witness, said the time-sheets produced passed through his hands, and the stuff that was used for the re-topping was entered in his books, and made up the defendants' counter-claim.

H. Davis, secretary of the defendant company, gave evidence as to the de-

defendants' outlay for wages on the time-sheets and other expenses.

Mr. Uppington closed his case.

Mr. Gardiner was heard in argument on the facts.

Without calling upon Mr. Struben, Hopley, J.: In this case the plaintiff entered into a contract with the defendant company to do a certain piece of work in a certain way. The defendants had entered into a contract with the Town Council to do certain tar-paving at the Early Morning Market according to certain carefully drawn specifications, to the satisfaction of the City Engineer. This contract the defendants employed the plaintiff to carry out; he agreeing to do it at 2s. a yard. Now in making that agreement he signed a document which clearly sets forth that he undertook to do the work at the price stated in terms of the specifications, a copy of which he had received; but he now says that it was understood from the start and before he signed that document that no attention should be paid to the specifications, and that the work should be scamped; that he should do cheap and bad work, and cover it over rapidly and that the defendant's manager should in some way or other satisfy the City Engineer. This seems to me, if true, to amount to a dishonest and immoral contract between the plaintiff and the defendants; but it was the only line the plaintiff could take up, as he was forced to admit that he did do bad work, nowhere approaching the specifications. When he made out such a case I listened to it with considerable impatience and repugnance for it amounts to nothing short of a combination between the plaintiff and the defendants to swindle the rate-payers of Cape Town, who were under the contract with the defendants paying a handsome price for the work which they might therefore expect to be thoroughly well done. If such a contract had in fact been made, it seems to me that no Court should assist either of the parties to recover under it. If the plaintiff's evidence on this point is true, it seems to me that he should fail in his action by reason of the immorality and dishonesty of the contract. The defendants, however, entirely deny the plaintiff's version and say that the contract was honestly entered into as set forth in the written document, and that the plaintiff should have performed the work in terms of the specifications. Now this seems to me a much more likely version. The defendants are a large paving company, and it would be little short of suicidal on their part to do such work for such a customer as the Town Council in the city where they hoped to do a large business: and in any case I feel inclined to hold that the contract was the honest thing which the written document states it to have

been, and not the fraudulent arrangement which the plaintiff endeavours to set up. Plaintiff was entitled to recover the sum of £162 3s. 6d. that he claimed for the work that he did. A lot of the work that he did had to be picked up again, the surface had to be exposed so as to let the air reach the parts underneath, and a fresh topping had to be put on. The amount claimed in reconvention by the defendants was £213 odd. It had been admitted that 15 per cent. was included in the claim for profit. He (the learned judge) did not think that defendants should be allowed any profit, and judgment would be given for the claim in reconvention, less profit. The judgment of the Court would be for the plaintiff in convention for £162 and for the defendants (now plaintiffs) on the claim in reconvention for £172, leaving a balance due to defendants of £10, plaintiff to pay costs of suit.

[Plaintiff's Attorneys: C. E. P. Hughes. Defendant's: Van Zyl and Buseinné.]

BABOOLALLAND V. BABOO- { 1905.
LALLAND. } July 20th.

This was an application on notice calling on the respondent to show cause why a certain order of Court should not be reviewed and rescinded. On the 12th July the present respondent made an ex parte application to the Court, and obtained an order giving him the custody of the child of the marriage of the then respondent and himself, pending further order of Court. The wife now applied to have the order rescinded, and the child restored to her custody, and for an order upon the respondent to pay the sum of £8 per month towards the maintenance of the applicant and the child.

In an affidavit made by the present respondent on the occasion of the proceedings in July, he stated that he was married to the respondent in 1897 at Mauritius. He alleged that his wife had deserted him, and was living with another man named Pandey, and that she intended to leave the Colony and to take with her the child.

In support of the present application, the wife deposed on affidavit that her husband had ill-used her, and had deserted her, leaving her and the child destitute a few months after her arrival here in 1898. She denied the allegations of desertion and of living with another man for other than moral purposes. Her husband had been sentenced to three years' imprisonment for wounding another man with a knife. She was afraid of the respondent, and so kept away from him. She further alleged

that the respondent was living with another woman. He had endeavoured to take the child forcibly from her. She had intended to visit her parents at Mauritius, but it was her intention to return to the Colony.

The replying affidavit of the respondent said he intended to sue his wife for divorce. He admitted the sentence referred to, but said that he had discovered criminal intercourse between his wife and the man he assaulted. He denied the allegations of adultery. The child made an affidavit in support of the allegations of adultery against the wife, and stated that he wished to remain with his father. In a replying affidavit, the wife asked that the child should be brought before the Court.

Mr. Gardiner moved. Mr. Burton for respondent.

The child, a boy of nine years, was called, and interrogated in Dutch by His Lordship. He said that he had lived with his mother in the house of one Pandey, at Worcester. His mother and Pandey occupied the same room. His father lived in the same room as another woman.

[Hopley, J.: Who would you like to live with—your father or your mother?]

The Boy: Both.

Later on, his lordship repeated the question, and the lad said that if he had to choose, he would prefer to live with his mother.

Hopley, J., asked Mr. Gardiner whether his client would agree to remain here pending the action to be brought by the husband.

Mr. Gardiner said his client would remain if she were given the custody of the child in the meantime.

Mr. Burton urged that the father should have the custody.

The wife, examined on oath, said she would stay here until the action.

Replying to Mr. Burton, she said Pandey was on the ship by which she had arranged to go to Mauritius, but he did not intend to accompany her. He was going as far as East London on business. She kept house for Pandey at Worcester, but they did not occupy the same room.

By the Court: The boy was taken from her on the ship, and she did not, therefore, go to Mauritius; nor did Pandey go to East London. She asked him to look after her luggage.

Hopley, J., said that it appeared that the child had never been away from his mother, and it was quite natural that his genuine feelings were as he stated to the Court: that if he had to choose between his parents, although he would rather see them re-united, he would prefer to live with his mother, of whom he appeared to be very fond. He (the learned Judge) did not think there was anything underhand or clandestine about the departure of the mother for Mauritius, which was only natural in the circumstances, as she

wanted to visit her mother. But the father of the child came before the Court, and on an ex-parte statement got an order giving him the custody of the child pending further order of the Court. He (Mr. Justice Hopley) took it that if the learned Judge had then had all before him that he (Mr. Justice Hopley) had that day, he would have hesitated about giving the father the custody of the child. Putting aside the question of the morality or immorality of either of the parents—a matter with which the Court at present had very little to do, because it was a question which would have to be tried very shortly—one had to look at the general features of the case, and on that basis alone one found that the father had been convicted of very violent behaviour, that he had been in prison, and that for a number of years he had had nothing to do with the support of this child. He had been out of gaol for a couple of years now, and had apparently had nothing to do with the mother or the child. If he were aware of the immorality of his wife, he did nothing to make the Court think that he cared about having either his wife or the child back. He took no steps until, at a very inconvenient moment for his wife, he came before a Judge in Chambers, to stop her going to Mauritius. He (Mr. Justice Hopley) thought that if the learned Judge in Chambers had known of these facts, he would have taken into consideration the conduct of the man, his past history, and that probably he would have held that he was only doing this to annoy his wife, and would not have given him the temporary custody of the child. The final issues of the case and the ultimate custody of the child could be settled very shortly by action, but at present his (Mr. Justice Hopley's) feeling was that the child's own feelings should be respected. The child had always lived with his mother, and it was very natural that he should prefer to remain with her. He (the learned Judge) thought that during the short time which would elapse before the action he should continue to remain with his mother, who had apparently looked after him well during all these years, which was more than one could say about the father. The Court would order that the child be restored to the custody of the mother. The matter of costs could be decided at the trial.

BENYA V. MAGUGWANA AND OTHERS.

Mr. Burton moved for an order on the respondents to restore certain stock, alleged to have been unlawfully seized from the applicant at a location in the district of Butterworth.

Order granted, leave being granted to either of the parties to bring an action

as to the final rights. A rule *nisi* was also issued calling on the respondents to show cause why they should not pay the costs of the proceedings.

SUPREME COURT

[Before the Hon Mr. Justice HOPLEY.]

CORNEY V. SHAW. } 1905.
 } July 24th.

Mr. Alexander moved for a commission to take the evidence of Alexander Robert Smith, who was about to proceed to Johannesburg. The case was set down for the 16th August. Counsel read an affidavit by applicant's attorney.

Mr. P. S. T. Jones read a replying affidavit by the attorney for respondent (plaintiff in the action), who said that the applicant should bear the costs of the application.

Commission granted, Mr. Advocate Giddy, K.C., to be commissioner. Costs to be costs in the cause.

REX V. HARRIS.

Undesirable alien—Act 47 of 1902
—Deportation.

Act 47 of 1902 makes no provision for the deportation of an undesirable alien who having been permitted to enter this Colony and having been naturalized therein has not subsequently acquired any domicile of choice elsewhere.

This was an application as a matter of urgency calling upon the Attorney-General to show cause why one Max Harris, a naturalized British subject, who had been arrested, and whom it was proposed to deport at once should not be set at liberty.

The applicant's affidavit was as follows: "I am a naturalised British subject in pursuance of letters of naturalisation granted to me whilst residing in this colony on the 7th August, 1903, a certificate of which I have in my possession at the present time, and can produce to the Court. I have lived in the Cape Colony for a period of seven years, and the same is my permanent home and residence. I have no other. I have al-

ways intended to stay here and recognise same as my permanent abode. I am a tinsmith and plumber by trade, and have carried on business as such here, and acquired landed property. I have been duly qualified to vote for the Municipal Council of Cape Town, and its Parliamentary division, and acquired all the necessary qualifications to entitle me to the position of a British subject, duly and properly domiciled in Cape Town to the best of my knowledge and belief. About the 7th July, 1904, at Cape Town, I was sentenced to two years' imprisonment, with hard labour. On the 18th April, 1905, I was discharged from gaol. At the time of my discharge I obtained a certificate thereof, of which the following is a copy: "This is to certify that number H 3,646, Max Harris, was tried at Cape Town on the 7th June, 1904, and sentenced to two years' imprisonment with hard labour, and, having a mitigation of sentence for good conduct from His Excellency the Governor, is discharged accordingly. Given under my hand, 18th April, 1905, at Tokai Convict Station." (Signed) H. W. A. Coly, Assistant-Superintendent." The affidavit proceeded: "I am not aware of any terms or conditions relative to my release and discharge, and, so far as I know, the same was unconditional, and I bound myself to no promise or consideration to leave this colony, either before or after my release. Immediately after my release, under the advice of my agent, Mr. Shaw, I, at my own expense, obtained a return ticket for Durban, Natal, and left Cape Town by boat on or about 19th April, 1905, for a short rest, and I left only on account of my health, and not with any intention of quitting South Africa, or acquiring a new domicile. On my arrival at Port Elizabeth I felt too ill to proceed further, and I landed at that port, and returned to Cape Town the same day, when I immediately went to my house in Cannon-street, where I have lived ever since. I left Cape Town on the 19th April and was back on the 24th April, 1905. On Thursday, 20th July, 1905, two detectives, one named Grant, and another, came to where I was living in Cannon-street, Cape Town, and requested me to accompany them to the office of the Immigration Offices in Burg-street, which I did, and from that office I accompanied them to the office of Mr. Broers, the Acting R.M. of Cape Town, who ordered my detention pending my deportation from this colony as an undesirable. Since my release from gaol I have made no attempt to conceal myself, but gone about my business as usual, and Detective Grant, who escorted me to the gaol on the 20th inst., knew of my residing in Cannon-street some months previously, as he came there and saw me, and at his request I produced the letters of naturalisation granted to me as afore-

said. I am now wrongfully and unlawfully detained, I submit, in gaol, and I claim to be released on the ground that amongst other things I am a British subject, properly domiciled in South Africa. Application has been made to the said Acting Resident Magistrate for bail on my behalf, pending this application, but refused.

The answering affidavit of Henry Benjamin Shawe, Acting Under-Colonial Secretary, set out that the applicant obtained the letters of naturalisation by fraudulent misrepresentation, and they were therefore null and void. The applicant had never acquired a domicile in this colony, and if any was acquired it was abandoned on the 19th April, 1905, when he left the Colony, and his domicile of origin (Russia) thereupon revived. The applicant was released from gaol on the understanding that he would leave the Colony for ever. On the 19th July, 1905, deponent was officially informed by the hon. the Attorney-General that, in pursuance of section 2, sub-section F of Act 47 of 1902, the applicant was an undesirable immigrant, and should be excluded from the Colony.

An affidavit by Sir John J. Graham, Secretary of the Law Department, called attention to a petition received from the applicant while he was in gaol, and to a letter received from his law agent, Mr. W. B. Shaw.

The applicant, in his petition for release, drew attention to the fact that during the period covered in the indictment upon which he was convicted in June, he was some three months previously convicted under another section of the Act, and sentenced to pay a fine of £150, which he duly paid. At the time of the first prosecution, which was for keeping a gambling house, it must have been well known to the police that he was also liable to prosecution under the latter clause of the Act, for the contravention of which he had been tried and convicted. If both charges had been brought simultaneously, as he submitted they ought to have been, his sentence, if convicted of both offences, could not have been greater than that passed upon him for the single charge of contravening section 33 of the Act. He humbly begged for leniency also on the grounds revealed in the subsequent prosecution against the police officers. He took the course of giving evidence simply in the interests of justice generally on the advice of his law agent. He ventured to submit that he had rendered some service to the State that would tend to prevent crime in the future, and which was worthy of some consideration. What he had done had naturally ostracised him from those who had been his friends and associates in the past. He was a ruined man in every sense of the word, and it was his intention to go away to some new country, where, by a life of future rec-

titude, he might in some measure redeem the past. The petitioner's law agent, Mr. W. B. Shaw, in applying for a consideration of the accused's case, pointed out that the information given by Harris was true and correct, and had been of great service to the Crown. The accused had spent his time and money in getting that information, and further his health was such that his release would be a general advantage. In the event of the Crown being willing to grant him a reprieve, he (Mr. Shaw) was prepared, if so desired, to arrange for him to at once leave the Colony.

Dr. Greer for applicant. Mr. Evans for the Crown.

Mr. Greer said that under the circumstances of both these affidavits the police authorities had taken a course that was altogether *ultra vires*. They had done a thing that they had got no possible right to do. They were proceeding under section 8 of Act No. 47, of 1902, and that dealt directly with people immigrating into this colony, not with people living in the Colony, who had acquired domicile here. The sub-section (f) of section 3 distinctly exempted from the operation of this Act persons domiciled in South Africa. As to the question of the applicant's domicile in South Africa, that seemed to be perfectly clear. He was naturalised on August 7, 1903, having then been some time in this colony. It was said now that letters of naturalisation were obtained by fraudulent misrepresentation. But, of course, that was not a thing that Mr. Shawe could pronounce upon; that was a matter for the Court; it was not a matter that any official could pronounce upon.

[Hopley, J. (interposing): If that is so how can the letters be withdrawn?]

It must be done by proper authority. It cannot be done by an official of the Colony.

[Hopley, J.: What is the procedure for cancelling letters of naturalisation?]

Dr. Greer: I take it that it would be by application to the Court for cancellation, and on cause shown that there had been fraudulent misrepresentation. Continuing, counsel said that so long as these letters of naturalisation remained, Max Harris remained a citizen of this country. He had not shown any intention to leave here; he had lived with his wife and family, and had acquired property here. Before he was convicted of this charge under the Gambling and Betting Act he had acquired the right to vote both at municipal and Parliamentary elections. There could be no clearer case of the domicile. Harris was clearly excluded from the operation of this Act. Mr. Shawe had further said that if Harris had acquired a domicile he had lost it by leaving Cape Town on the 19th April last. But, as a matter of fact, he was never outside the Colony; he was never outside the Colonial

waters. He said himself that he did not intend to stay away from Cape Town.

[Hopley, J.: He had taken a ticket to Durban.]

Dr. Greer: Yes, a return ticket, my lord, intending to come back. Proceeding, counsel said that it had been attempted to set up an undertaking by Harris that he would leave the Colony altogether. That was a position that was not supported by practically any evidence whatever. Harris said distinctly that no such condition was made, and that he received his good conduct discharge, without any condition whatever endorsed upon it. Then it was attempted to bind him by some proposal in the petition made by him on the 7th July, 1904. He said then that he was sick, and the whole thing was in such a position in Cape Town in reference to his associates that he would probably clear out altogether. But there was no undertaking to do that. His law agent used the words "if so desired," but that was more than six months before Harris was released. Where was the evidence that the Government ever asked Harris to leave? He (counsel) submitted that, upon all the points, the case attempted to be set up by the Government had broken down, and that their attempt to extend unduly the scope of the Immigration Act, which was never intended to apply to a case of this kind, had failed. It was intended to apply, as the 8th section distinctly said, only to people coming into the Colony for the first time. Counsel submitted under the circumstances that the Court would grant the applicant the relief asked for.

Mr. Evans on behalf of the Crown, said that this case was one of very great importance from a constitutional point of view, and also, he thought, from a criminal point of view. It was one of the first duties of the Executive to see that crime was prevented as far as possible, and if they found coming into the Colony a man whose character they knew to be bad, and who had been living on the earnings of prostitution, it was the duty of the Executive to do all in their power to keep that man out, and if there were any statutory enactment in their favour, they should take advantage of it. In this case his learned friend presumed that they were acting under the Immigration Act. They did not by any means bind themselves down to the Immigration Act. It had been held that it was within the prerogative of the Executive to keep out an undesirable alien. That power of excluding aliens was one that was not exercised arbitrarily. In the case of *Raner v. Colonial Secretary* (14 C.T.R., 247), the Executive had an intimation that this man was an undesirable. They found that he was not a British subject, and exercised the prerogative of the Crown, and shut him out.

[Hopley, J.: What was Raner?]

He was a Polish Jew.

Hopley, J., put it to counsel whether there was not a difference between the two cases, seeing that Harris was already in the country, and that the Government were trying to turn him out.

Mr. Evans: Raner was also in the country.

[Hopley, J.: How had he got in? He had never got in as a matter of right.]

Mr. Evans: He was in Cape Town. Counsel went on to argue that the prerogative of the Crown also applied to expulsion.

[Hopley, J.: That's just it. Where are your powers of transportation and expulsion?]

Mr. Evans: That is the prerogative of the Crown. It is one of the few remaining prerogatives of the Crown; it still exists, and may still be exercised. Its exercise, as a matter of fact, is subject to a certain amount of control by precedent and practice. Counsel went on to refer to the Immigration Act, and said it was clear that the Act applied to all British subjects. It was not a defence to any prosecution under the Act that a man was a British subject, but it did not apply to certain classes of British subjects, and one of these classes was all persons domiciled in South Africa. So far there had been no decision on the meaning of that expression, "persons domiciled in South Africa." It looked as if the Legislature used the expression "domicile," not in its ordinary legal sense, because in law a person must have a domicile in a country, whether it were England, Scotland, Ireland, Cape Colony, Orange River Colony, or the Transvaal but he could not have a domicile in South Africa any more than a man could have a domicile in Great Britain.

[Hopley, J.: What the Act obviously means is a man who is domiciled in any of the States of British South Africa.]

Mr. Evans went on to urge that the intention of the Legislature was to exclude a certain kind of person. He did not think that the Legislature had used the word "domicile" in its strict legal meaning, but rather in its wide signification. He thought they meant persons whose domicile of origin was South Africa, and that they did not wish to exclude persons who had always lived in South Africa.

[Hopley, J.: Oh, no. It is no use arguing that point; if you argue here till night, you will not convince me of that.]

Mr. Evans (proceeding) submitted that it was for Mr. Harris to satisfy the Court that his domicile was in South Africa. Clearly, from his own affidavit, his domicile of origin was Russia. They all knew that in law it was very

difficult to get rid of one's domicile of origin. It was for a person who asserted the acquisition of a domicile or choice to show that he had acquired it, because the Court would always regard a person's domicile as the domicile of origin, unless satisfied by evidence that he had acquired a new domicile. The burden of the proof was on the person who asserted a new domicile, as had been decided in a number of cases. The Court had no evidence, except the applicant's own words, that in coming to this colony he ever gave up his Russian domicile.

[Hopley, J.: There could be nothing stronger than the fact that he has actually got letters of naturalisation, signed by the Governor of this colony.]

No, that is not so; naturalisation is not essential proof.

[Hopley, J.: Surely it is not for the country that has granted him letters of naturalisation to now come and say that he has not lost his domicile of origin?]

It is not conclusive evidence of domicile.

[Hopley, J.: Take that in conjunction with other circumstances?]

If a man comes to this country with the bona fide intention of remaining, then that is evidence.

[Hopley, J.: I wish I saw some prospect of some of these people who do come to this country wishing to leave it.]

Mr. Evans submitted that the applicant by his subsequent conduct showed what his intentions were. He had no intention of staying here, and subjecting himself to the laws of this colony.

[Hopley, J.: He has subjected himself to the law of this country; he has had a taste of it already.]

Mr. Evans submitted that the very mode of the man's life showed that he did not intend to live here permanently. He began his career by shebeening, and after that he was convicted of living on the proceeds of prostitution. Surely he could not intend to live permanently in a country the law of which he contravened every day.

Hopley, J.: If your argument is worth anything at all, nobody born in this country, and who has a domicile of origin here, would engage in the illicit diamond trade or live on the proceeds of prostitution. There are a great many people born here who do break the law in that respect.

There is nothing at present to show that he ever acquired a domicile here.

[Hopley, J.: I think there is everything to show it. Of course, you may show me how he lost it.]

Mr. Evans said that the applicant arrived here from Russia, and no doubt, like others, he was forced to leave that country.

[Hopley, J., said that counsel should

not assume that the applicant was forced to leave Russia.

We do know a number of cases of immigrants who have left Russia because they were forced. Proceeding, he said that the applicant must show that he intended to permanently reside in this colony. He (counsel) should be able to show that, as a matter of fact, he did not reside all this time in the Cape Colony.

Dr. Greer (interposing): There is nothing of this in the affidavits.

Mr. Evans said that the affidavits had been hurriedly prepared, as the Law Department only got notice about half-past eleven of the application.

Hopley, J., put it to counsel whether he was supposed to go behind the letters of naturalisation granted by His Excellency the Governor.

Mr. Evans said that if there were any false statements in the declarations, then the letters of naturalisation were void. If there were not absolute fraud in this matter, there was *suppression veri*. At the very time Harris applied for his letters, and declared that he was a respectable man, he was living on the proceeds of prostitution, according to his own evidence in the Charteris case.

[Hopley, J.: Is not that rather a matter to be determined by a trial.]

Mr. Evans said that there was no need to declare the letters null and void, because if they were obtained by false representations they were void.

Hopley, J., said that it was perhaps the intention of the applicant, when he petitioned for release, to leave the Colony, and set up a home elsewhere. It was not fair to assume now that that was a deception practised by him to get a remission of sentence.

Mr. Evans pointed out that in his letters the applicant said that he intended to leave the Colony if released. His agent also said so. It was upon the belief that what the applicant said was true that he was released.

[Hopley, J.: You know yourself how a man's intentions may change from time to time. Had you made a contract with him that he should be bound to leave, it might have been different. Did you make any condition?]

Mr. Evans said that the Governor could not attach any condition to the discharge.

[Hopley, J.: Very well, then; it would have been *ultra vires*.]

Mr. Evans said that the Governor could not attach such a condition, but they were satisfied that it was the man's intention to leave the country.

[Hopley, J.: It shows you how dangerous it is to believe those people.]

Mr. Evans went on to argue that the applicant had lost his domicile by leaving the country in April last.

[Hopley, J.: He only goes from one port to another; from one South African port to another.]

Mr. Evans contended that as soon as the applicant put his foot on board the ship and proceeded beyond the territorial waters of the Colony, he left the Cape Colony and his domicile of origin revived, and he would have no other domicile. It did not matter whether he intended to make any other domicile.

[Hopley, J.: Still, he is a naturalised British subject. Even if he had gone back to Russia, he would have been a naturalised British subject. If he had been naturalised in London that would have carried him anywhere.]

He was not naturalised in London, my lord, but in Cape Town.

[Hopley, J.: That is just the point.] A Colonial Legislature has no power to grant any certificate which is operative outside the territorial limits of the Colony.

[Hopley, J.: Still, we are in this colony now.]

But Harris went out of it.

[Hopley, J.: Never mind, you let him in again.]

He sneaked in. He came in in contravention of our Immigration Law. I submit that he has failed to satisfy the Court that he is domiciled in South Africa. He cannot show continuous residence here, and that he came here as a law-abiding subject.

[Hopley, J.: Assuming for a moment that these letters should be declared null and void, then how do you shut him out?]

Then he is deported under prerogative.

[Hopley, J.: Where do you get that from?]

Mr. Evans: That was upheld in the case of Rainer.

[Hopley, J.: Have you any power to expel one of your own subjects?]

Mr. Evans: I think we have under statute.

[Hopley, J.: Which?]

Mr. Evans (after a pause): No; I think we have not.

Proceeding, counsel submitted that the letters of naturalisation were null and void *ipso facto*. Those letters of naturalisation could only have effect within certain limits. This man was not an international law British subject.

[Hopley, J.: He has every right of a British subject in this colony.]

No; because a British subject has a right to be a British subject all round the world. The rights Harris has are clearly rights of a certain kind; they are not international law rights.

[Hopley, J.: You seem to think that one of these Colonial-made British subjects, when he goes outside the three-mile limit, is no longer a British subject.]

He is not an international law British subject.

In further argument, counsel said that when Harris was released the Law De-

partment had no reason to disbelieve him when he said he would leave the Colony.

[Hopley, J.: You see to-day why you should have disbelieved him.]

Not necessarily. I honestly believe that at the time he sent in that petition he intended to leave the Colony. I do not believe that he had and idea of defrauding the Government.

Mr. Evans proceeded to read from the applicant's petition for release, and said it was from a man down on his luck; in fact, it was like a dying deposition.

[Hopley, J.: Quite enough to deceive the Attorney-General's Department apparently. Surely all that canting nonsense did not take the department in?]

He said he would leave Cape Town. Why should he remain hiding like a rat in a hole? Was his conduct consistent with the case which he wished to make out to the Court now that it was *bona fide*?

[Hopley, J.: He might be afraid of having his neck broken by some of the people he gave evidence against.]

Mr. Evans urged that the applicant should be put in the box in order to undergo a cross-examination as to his whereabouts since he arrived in South Africa.

[Hopley, J.: How do you know he left at Port Elizabeth?]

He landed as a passenger on the way to Durban.

[Hopley, J.: If you had been a little bit more prudent, you might have excluded him from doing that.]

We might have; but we did not know he was going to land.

[Hopley, J.: You are singularly trusting in the Criminal Department.]

Mr. Evans said there was every reason to believe Harris that he would quit the country. Counsel said he believed that Mr. Shaw, the agent, believed in Harris's *bona fides*.

[Hopley, J.: I suppose your intention is to deport him. How will you get rid of him?]

We will get rid of him at five o'clock.

[Hopley, J.: By a ship?]

Yes.

[Hopley, J.: Supposing he remains in this colony, are you going to bring any further criminal action?]

I don't think so.

Dr. Greer was not called upon in reply.

Hopley, J.: In this case, it appears that the applicant, Max Harris, was in the course of 1904 sentenced by the Resident Magistrate of Cape Town, under the Morality Law, to a sentence of two years' imprisonment with hard labour, and to a certain number of lashes. I can take it, therefore, *ab initio*, in this application that Harris was proved in 1904 to be a most undesirable person to have in this country. A man who not only contravened the Morality

Laws, but contravened them in such a way that the Magistrate would go almost to the extreme of his jurisdiction, which is very extensive in these cases, and inflict such a punishment must in the Magistrate's opinion have offended against those laws in a very gross manner. We also have it stated that Harris followed a career of systematic crime in this country. While Harris was undergoing the punishment which the law had awarded him for immoral conduct, the Government made use of him as a Crown witness, and he was instrumental, apparently, in furthering the ends of justice by getting other malefactors convicted. Now, whether it was in consideration of that conduct or in consideration of general good conduct, it appears that there was a considerable mitigation of the sentence given, and a pardon was issued by the Governor, no doubt with the advice of the Executive Council. I think it was in April last that the rest of the sentence was remitted, and the ground there stated is simply one generally of good conduct. It will be observed there was absolutely no condition attached to this mitigation of sentence by His Excellency or by the department which had to do with this matter making it obligatory on this man to leave the country. But it is said that the Attorney-General's Department thought that the petitioner, as he then was, was quite sincere in his expressed intention to go to a new country and live a new life, and so redeem the errors of his past, and that acting upon that assumption, which they thought must be sincere, coming from such a source, at such a time, they advised His Excellency the Governor to grant this mitigation of sentence. All I can say is that they proceeded on very slight grounds if they were taken in by words of that sort. In this particular case there was abundant opportunity of knowing the character of the man they had to deal with. A man of honour might consider that having obtained his release, he should at once leave the country, but in this case they were not dealing with a man of honour. The very fact of the man's career, so far as it had been exposed, ought to have shown that there was not a shred of honour in him. Having got his release, it seems to me he might have gone about the streets of Cape Town or about this colony generally without anybody being empowered to get rid of him. But it is contended that, because, shortly after his release, he took a return ticket from Cape Town to Durban, he became once more an alien. I should remark that, while he was residing here, and in the year 1903, he had obtained letters of naturalisation from His Excellency the Governor, which letters are now produced in court, and are still apparently of full

force and effect. According to them on the 3rd June, 1903, Max Harris, was, under His Excellency's hand, granted a certificate of naturalisation as a British subject, giving him all the privileges and rights and subjecting him to the laws of a natural-born British subject in this colony. It seems to me, as I have said, that when he got his release on the ground of good conduct, he could have gone about wherever he wished, and he need never have left this country, there being nothing at all making it obligatory on him to do so. The fact that he took a return ticket to another colony in South Africa is very material in the present circumstances, and in view of the contention that has been raised against him by the Crown, because one has to judge his intentions by his acts. One would say that his intention when he left for Natal was to return again to Cape Town within three months, which I believe to be the time for which such return tickets are available. We have the further fact that he has a house here at the present time, and that he has a wife living in that house. As far as one can judge from his acts, it seems that when he expressed his intention to go away to a new country, he did not intend to fulfil that intention, although apparently the department which had to do with this matter thought they might trust him to carry it out. Mr. Evans has argued this matter as though it were a case of losing domicile of choice. Harris had clearly obtained a domicile of choice and that in South Africa. Has he lost that by anything he has done? Mr. Evans is forced to go so far as to say that Harris when he left Cape Town with the return ticket in his pocket, and went on board a British ship bound from one British port to another, as soon as he went beyond the three-mile limit, ceased to be a British subject as far as this colony was concerned. I do not think that any case has ever gone anywhere within measurable distance of such a proposition as that, and it would be impossible to hold that that it is founded on good law. It is quite possible that if the Attorney-General's Department had been very suspicious and very vigilant, and had telegraphed to every intermediate port between this and Durban, it might in the circumstances have prevented his landing at any such port, but whether it was on account of his illness or whether it was by subterfuge or stratagem, he got back here again. What the man did was to get off at Port Elizabeth—I think he said he was too ill to proceed—and then he took train, and came back to Cape Town almost immediately, where it is said he has been living ever since. Now, it is stated on behalf of the Government, that he is a most un-

desirable man, who should be got rid of, and he certainly is one of whom I wish the Colony could be rid. The Under-Colonial Secretary says that applicant is to be deported from this colony under sub-section (f) or section 2 of the Immigration Act (No. 47 of 1902). That section, however, is simply a defining section. Sub-section (1) simply defines a prohibited immigrant. The fourth section of the Act says that subject to the provisions of this Act it shall be unlawful for a prohibited immigrant to enter this colony either by sea or by land. All that is very well when a person is seeking to set foot in this colony and for a case such as that of Raner. The Attorney-General knew what sort of man this Harris was, and he could certainly have prohibited him from landing in this colony if sub-section (f) of section 2 of the Act could be made to apply. But it was stated at the beginning of the case that an important constitutional point was involved, and, however much one may wish to get rid of undesirable people, the Court must always be guided in the first instance by great constitutional principles and be careful not to infringe upon the rights and liberties of any of His Majesty's subjects, or any other human beings, so far as they have rights and liberties. Is there anything in this Immigration Act which authorises the Government of this colony, if they think a man a British subject, is an undesirable person to have in this colony, to get rid of him? I see nothing at all in this Immigration Act which enables the Government, if a man is living here, and especially if he has taken out letters of naturalisation, even though he may be an undesirable, to deport him to some foreign country. Under the Act a person who is undesirable would not be allowed to land here, but, still, through some oversight or other, or because it was done in ignorance, Harris has been allowed to land in this country, he has been allowed to be naturalised as a British subject, and it is impossible now to get rid of him on such grounds as are now relied upon by the respondents, though they may possibly discover some legitimate way of doing so. It seems to me, therefore, that the application must succeed.

Hopley, J., said he regretted, under the circumstances, because he knew something of the character of this man, that such an order must be given, but it seemed to him, as a matter of law, that applicant should be released from custody as prayed. An order would be granted accordingly.

[Applicant's Attorney: C. Brady.]

SUPREME COURT

[Before the Acting Chief Justice (the Hon. Sir JOHN BUCHANAN), and the Hon. Mr. Justice MAASDORP.]

GRASSICK V. B.S.A. ASPHALT { 1906.
CO. { July 31st.

Mr. Struben, on behalf of the defendants in the action, moved for an order for the return of a sum of £162 paid into court by defendants as security, in order to purge default. The action had resulted in a judgment for the defendant company for a net sum of £10.

Order granted as prayed.

STEER V. KALK BAY MUNICIPALITY.

This was an argument upon an exception taken by the defendant municipality to the declaration of the plaintiff, an auctioneer and conveyancer, residing at Sea Point.

From the pleadings, it appeared that the plaintiff in 1903 entered into an agreement to lease for a period of three years from the Venerable Archdeacon Lightfoot, since deceased, certain premises at Kalk Bay, known as Douglas Cottage. In October, 1904, the premises were purchased by defendants, and plaintiff was accepted as tenant under the agreement of lease. In his declaration plaintiff said that the lease provided that the lessee should, during his tenancy, keep in repair the interior of the buildings, so let, and that he should at the expiration of the lease deliver over the premises in the like order and condition as he should have received them, reasonable wear and tear only excepted. There was no clause in the agreement relating to the repair of the exterior of the building. Plaintiff said that defendants had allowed the exterior to become extremely dilapidated, and had refused to put the same in repair. In paragraph 7 of his declaration, plaintiff said that by clause 6 of the said lease it was provided that the lessee should have the right to sub-let the property or any portion thereof, and the plaintiff had been prevented, by reason of the premises, for a long period from sub-letting the property or from having the use and occupation thereof, and had sustained damages in the sum of £100. He claimed (a) an order requiring defendants to put the exterior in due repair, or, in the alternative, to pay him £56 3s. 6d., which amount it was estimated would be required to place the premises in repair; (b) £200 damages, as set out in paragraph 7; (c) alternative relief; (d) costs of suit.

The defendant municipality excepted to the declaration, and especially to

paragraph 7 thereof, and said that it was vague and embarrassing, and did not set forth a cause of action. The excipients prayed that paragraph 7 and prayer (b) of the declaration may be struck out, with costs.

Mr. Russel was for the excipients and defendants; Mr. Upington was for the respondent and plaintiff.

Mr. Russell: The exception is taken to paragraph 7 of the declaration on the ground that it is vague and embarrassing and does not set forth a good cause of action. The plaintiff does not allege knowledge on our part of any defect in the premises.

[Buchanan, A. C. J.: Do the premises belong to you?]

Yes.

[Buchanan, A. C. J.: Surely you know the condition of your own premises.]

But our knowledge is not alleged.

[Buchanan, A. C. J.: Paragraph 6 of the declaration covers that.]

The cause of action must be stated in the declaration. Here the respondents claim £100 as damages, and yet we have been owners for only six months and they could only be prejudiced by any action of ours to the extent of £5 a month.

[Buchanan, A. C. J.: In paragraph 6 the allegation meets your exception.]

The words used there are *de presenti*. But the declaration was filed after the damage was alleged to have been sustained, and it does not say that we knew anything about the alleged defect anterior to that date. I submit that the plaintiff has not set out any cause of action to which the defendant can plead.

Mr. Upington was not called upon.

[Buchanan, A. C. J.: The plaintiff is the lessee of certain premises now belonging to the defendants, and sues the defendants for a breach of the contract of lease, the alleged breach being the want of repairing by the landlord of the exterior of the premises leased. To the declaration a general exception is taken, stating that it does not set forth a cause of action, and in argument learned counsel has stated the grounds of his exception to be firstly, that there is no allegation that the defendants knew of the defects in the repairs to the premises; and, secondly, that the damage claimed for occurred before such knowledge was brought home to the landlord. I see in paragraph 6 of the declaration an allegation that a demand was duly made upon the landlord to execute the repairs, and that he refused to do so. That is a distinct allegation of knowledge in the declaration. As to the second ground of exception it is true that the declaration does not go on to say that the notice was given before the damage occurred. That is a matter of evidence and the evidence may or may not prove defendant's liability. I

think there is not sufficient ground upon which to take exception to the declaration. The exception must be over-ruled, with costs.

HOULDER BROS. V. COLONIAL GOVERNMENT. 1905. { July 31st.

Pleading — Exception — Demurrage — Consignee.

H. Bros. contracted under a C.I.F. contract to supply certain coal to the Cape Government. The Government agreed to pay demurrage to the owners of the vessels conveying the coal at certain rates. Plaintiffs alleged in their declaration that this contract had subsequently been varied by a certain letter written by them to the Agent General for the Colony, but this amendment was not specially pleaded.

Held on argument on exceptions, that the declaration was irrelevant, embarrassing and bad in law.

This was an argument upon an exception taken by the plaintiffs to the defendant's plea in an action for demurrage.

Plaintiff's declaration alleged that in the month of August, 1901, and in London, there was an agreement made between the parties in regard to the supply of certain coal. Plaintiffs had to supply certain coal, send it from England, and deliver it in this colony. They alleged that it was agreed between the parties that the delivery should be taken at a certain rate, or that the Government was to be liable for demurrage at the rate of 4d. per net registered ton per day for sailing vessels and 6d. per net registered ton per day for steamers. The delivery had to be at the rate of 120 tons per day for sailing vessels, and 250 tons per day for steamers. The plaintiffs said that the defendants neglected and failed to take delivery as agreed upon, and that they thereupon became liable in demurrage at the rate agreed upon. In the alternative, plaintiffs said that, by reason of the failure and neglect of the Cape Government to take delivery, the steamers were unduly and improperly detained in Table Bay, and plaintiffs suffered loss and damage, which loss and damage the Government had paid, with the exception of a certain amount now claimed.

The defendants in their plea said that the terms of the agreement referred to in the said paragraph were contained in a certain letter addressed by the plaintiffs on the 7th August to the Agent-General for the Cape of Good Hope, and for greater certainty, prayed leave to refer to that letter.

Sir H. Juta, K.C. (with him Mr. Struben), was for the excipients and plaintiffs; Mr. Searle, K.C. (With him Mr. Burton), was for the respondents and defendants.

Sir H. Juta said that the defendants, in that plea, did not set up the point which was now before the Court, but they received leave to amend their plea, and they put this particular plea in paragraph 7. Sub-section (a) said that the ships referred to in paragraph 4 of the declaration were all of them ships chartered by the plaintiffs, and the rates of discharge and demurrage stipulated for in the charter parties were different from those mentioned in the said letter of August 7, 1901, which constituted the contract between the parties. The liabilities of the defendants, if any, were to the owners of the said ships respectively, and not to the plaintiffs, and were for amounts which depended upon the terms of the bills of lading for the cargoes transferred by the plaintiffs to the defendants, and not otherwise. In sub-section (b), defendants said that if the plaintiffs suffered any loss or damage by reason of the alleged detention of the said ships, the amount of such loss or damage, if any, was in respect of the liabilities of the said plaintiffs under the said charter parties, and no particulars had been supplied to defendants of any such loss or damage. To this plea the plaintiffs excepted, in that, according to the true intent and construction of the annexed letter (of the 7th August), the Cape Government contracted liability direct to the plaintiffs, and not to the owners of the said ships, with whom the said Government had 2nd priority of contract. As to paragraph 7 (b), by the agreement in the said letter, the said Government undertook to pay demurrage at a specific rate, and were liable to damages for detention of the said ships without any reference whatever to the liabilities, if any, that the plaintiffs had or may have in respect of the said charter parties. By reason thereof, the said paragraphs were irrelevant, embarrassing, and bad in law, and the excipients prayed that the said paragraphs might be ordered to be struck out of the said plea, with costs. Counsel argued that the reason why the exception was taken was that, should the plea be allowed, there would have to be a commission appointed to go to England in order to ascertain what the meaning was of the various charter parties, and in order to obviate any unnecessary costs, the ex-

ception had been taken. The excipients said that the contract was between themselves and the Government.

Mr. Searle said this must be considered as a C.I.F. contract, and not an F.O.B. contract. That was set out in the declaration. The freight and insurance had to be paid out here by the shipowner and the consignee, and the cost had to be paid to the consignor. It was quite clear that under a contract of this kind Houlders took up a ship to deliver this coal, and the Government who took part in that were liable to the shipowners for demurrage. They were liable under the C.I.F. contract. The meaning of this contract was that the Government could not make Houlders liable for more than fourpence per ton per day, and if they got it for less the Government would benefit. The Government could not be liable to two people, and they were liable to the ship. An action had already been entered in England with regard to this case, and many of the documents were at present there. His point was that under a "C.I.F." contract the consignee had to become definitely liable to the shipowner, and a contract sprang up between the two parties, and there could not be a contract with a third party. The meaning of the letter written to the Colonial Government by Houlder Bros. was that in chartering a ship they were not to incur more liability for the Government than fourpence per ton per day as demurrage. He submitted that this was not a matter that could be disposed of on exception. It was a matter that should form portion of the evidence given at the trial to show exactly what happened. They wanted the charter parties, the bills of lading, and the whole amounts paid before them. He really thought it was impossible to settle this point without going into the whole of the contract. The exception had been raised because it was thought that that would do away with the cost of a commission, but evidence on commission was absolutely necessary, especially the evidence of a gentleman in the Agent-General's office, and without that evidence he did not see that the Court could give judgment in this case.

Sir H. Juta, in reply, said he did not see how any gentleman in the Agent-General's office in London had anything to do with the delay in the vessels arriving here. Under a C.I.F. contract the man in Europe sold for a lump sum, and if the freightage in the meantime went up that was his look-out. He submitted that this contract was perfectly clear, the terms were perfectly clear, and consequently they were liable to his clients for the amount. The point the Court had to decide about the demurrage was whether it was fourpence or sixpence per ton per day. They had not to decide the amount due.

In reply to Buchanan, A. C. J., Sir H. Juta said the exception they raised was that the defendants wished to set up under paragraph 7a some liability inconsistent with the contract which they themselves entered into.

Sir H. Juta applied for leave to withdraw his alternative claim.

The application was granted.

Buchanan, A. C. J., said the plaintiffs in this action (Messrs. Houlder Bros.) entered into a contract with the Cape Government for the supply of certain coal on terms stated in a letter of August 7, 1901. In this letter provision was made for shipping the coal to Table Bay and Port Elizabeth at a certain rate covering all charges—a C.I.F. contract. The agreement went on to say that if there was any delay in discharging the ships carrying the coal the Government was to pay a fixed amount of demurrage at the rate of fourpence per ton per day for sailers and sixpence per ton per day for steamers. The contract was entered into during the late war and from the condition of the port of discharge, demurrage became payable, as no doubt both parties to the contract anticipated it would. The Government, to obtain delivery of the coal from the various vessels, paid them a certain amount of demurrage, leaving a balance now claimed by the plaintiffs of some £10,000. The defendants pleaded the letter of August 7, which set forth the terms of the contract, and then two paragraphs of a plea, to which exception was taken to as being inconsistent with that letter. One of the clauses—clause 7 (a)—stated that "the ships referred to in paragraph 4 of the declaration were all of them ships chartered by the plaintiffs. The rates of discharge and the rates of demurrage stipulated for in the charters of these vessels were different from those mentioned in the letter of August 7. The liabilities of the Cape Government were to the owners of the ships respectively, and not to the plaintiffs, and were for amounts which depended upon the terms of the bills of lading for the cargoes transferred by the plaintiffs to the Cape Government, and not otherwise." Now, he thought that the exception that this paragraph was inconsistent with the letter of August 7 was a good one. The letter of the 7th August was the basis of the contract between the parties, and if there was any subsequent contract which rendered the Cape Government liable for another scale of charges that should have been set forth. There was no allegation of any subsequent contract in between the parties departing from the original terms. In the absence of any clear assertion of that kind, the plea was inconsistent with the letter and would have to be amended. If the Government could show any specific subsequent contract, then that

should be specifically pleaded so that the plaintiffs would know what they had to meet. If there was any such contract to be found in the bills of lading, it was not sufficient merely to have a casual reference in the plea to these bills and not to set out the new agreement whatever it might be. Paragraph 7b had also been excepted to. It would be very difficult to say that it was bad, in view of the fact that Sir H. Juta had applied for leave to withdraw the alternative claim. This withdrawal of the declaration would necessitate the alteration of the plea. The question as to whether a commission should be appointed would have to stand over a little until they had the pleadings before the Court. On those grounds the exception would have to be allowed, and costs would be costs in the cause.

Sir H. Juta said that as the exception had been upheld he thought costs should be given against the defendants.

Mr. Searle said that as the plaintiffs were withdrawing portion of their case, he thought the costs should be costs in the cause. It would necessitate his clients amending their plea.

An order was made allowing the plaintiff the costs of the exception, but the plaintiff would have to pay any costs necessitated by the amendment of the declaration.

GROBBELAAR V. COLONIAL GOVERNMENT.

This was an argument upon an exception taken by the plaintiff to the defendants' plea in an action instituted for £204 10s., salary alleged to be due to the plaintiff as sheep inspector in the employ of the Government.

The declaration set out that the plaintiff was a sheep inspector residing at Murraysburg, and the defendant was the Minister for Agriculture. On the 9th November, 1900, defendant employed plaintiff as inspector of sheep under the provisions of section 10, Act 28 of 1899, for Field-cornetries 5 and 6, division of Murraysburg, at a salary of £175 per annum, the employment to be terminable at one month's notice. He had at all times material been ready and willing to perform and had performed the duties of his office. Defendant duly paid to the plaintiff salary in respect of the said employment up to and including the 6th July, 1901, and from the 1st August, 1902, to the 25th August, 1902, upon which latter date the defendant purported to summarily dismiss the plaintiff, and terminated the said employment. There was now due and owing to the plaintiff a sum of £204 10s., as and for salary aforesaid from the 6th July, 1901, up to and including the 31st July, 1902.

Defendant in his plea, admitted the formal allegations, and admitted that the

plaintiff duly entered upon the said employment, but he denied the other allegations in paragraph 4, and said that on the 12th August, 1901, plaintiff was deported from Murraysburg by the Imperial military authorities, and continued to be so deported, and was wholly unable to perform, and did not perform the duties of his employment from the said date until the 31st July, 1902. Defendant had tendered to the plaintiff salary due to him up to the 12th August, 1901. He denied that the sum of £204 10s. was due to plaintiff from the 6th July, 1901, to the 31st July, 1902, and said plaintiff was entitled to claim for the period 6th July, 1901, to 12th August, 1901. Defendant prayed that the claim may be dismissed, with costs.

Plaintiff excepted to the plea as bad in law, and disclosing no defence to the plaintiff's claim, and said more particularly that the allegations contained in paragraph 3 thereof, even if proved, afforded no answer or defence in law to the said claim.

Mr. Upington was for the excipient and plaintiff; Sir H. Juta, K.C., was for the respondents and defendants.

Mr. Upington said that their lordships would recollect that the liability of the Government in regard to the salaries of sheep inspectors, and other Government contractors, who had been unable to perform their duties, owing to the existence of martial law, had been before the Court in several cases. The first case was that of a postal contractor, *Muller v. Colonial Government* (12 C.T.R. 946). Then there was the case of *Van der Merwe v. Colonial Government* (14 C.T.R. 732) and recently there had been the case of *Lubbe v. Colonial Government* (15 C.T.R. 521). Lubbe's case was one of deportation, but the judgment did not go upon that point. His (counsel's) submission in the present case would be that a sheep inspector, who was engaged on a contract terminable at one month's notice, and who was prevented from performing his duties owing to the intervention of the military authorities, acting under martial law, was entitled to recover salary, unless the Government took the course which was open to them of terminating the contract; in other words, the Government could not continue their contract with their official and have the right to call upon him at any time to perform his duties, and at the same time refuse to pay him salary. Counsel went on to quote at length from the judgment of Mr. Justice Maasdorp in the case of *Van der Merwe v. Colonial Government* (21 Supreme Court Reports, 320, and 14 C.T.R., 732). He stated that the only difference between *Van der Merwe's* case and the present plaintiff's was that the former was not actually deported from the scene of his duties, but was kept in Aberdeen and refused a pass by the military au-

thorities, while the present plaintiff was deported.

Without hearing Sir H. Juta, Buchanan, A. C. J.: The matter for decision now is purely a question of pleadings. The plaintiff, in his declaration, alleges that in pursuance of his contract with the Government he duly entered upon his employment, and that he was at all times ready and willing to perform and did perform all the duties of his said employment. In answer to this allegation, the defendant in his plea denies that the plaintiff was at all times ready and willing to perform, or that he did perform the duties of his employment; and further alleges facts to show that the plaintiff could not and did not perform his employment, and said that, at the very time he was claiming for, plaintiff had been deported by the military. An exception is now taken that the plea does not disclose a defence to the claim. Well, it is a defence when a man alleges that he did perform his duties, to say that he did not perform his duties. In the replication plaintiff pleaded over and admitted that he was deported, but said that he was deported without default on his part. Well, these are questions which may very well be dealt with at the trial. I do not wish to say anything that may prejudice the case, especially in view of the cases which have already been decided. I think it is rather a question of evidence than of pleading. The exception will be overruled, with costs.

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

ADMISSIONS.

Ex parte CLARK. { 1905.
 { Aug. 1st.

Attorney—Admission—Sec. 17 of Act 27 of 1883—Sec. 1 of Act 11 of 1903—Withdrawal of admission.

C. had been admitted as an attorney in July, 1905, under Sec. 17 of Act 27 of 1883,

On its being discovered that this section had been repealed by Sec. 1 of Act 11 of 1903, the admission was withdrawn.

Held, that as the applicant was not articulated prior to the date of the passing of the former Act, he was not entitled to admission.

Mr. Sutton moved for the admission of Henry Alfred Ready Clark, of Idutywa, as an attorney and notary. Counsel said that the matter had already been before the Court (15 C.T.R., 559), and Mr. Clark, who was an Oxford M.A., was admitted, but subsequently, on its coming to the notice of the Court that the 17th section of the Act 27 of 1883, under which Mr. Clark applied, had been repealed, the order was withdrawn. Counsel contended that the repeal of the 17th section brought into effect 14th section and that the case of such applicants as Mr. Clark was therefore safeguarded, inasmuch as he had been articulated prior to the repeal of the section.

The 14th section of Act 27 of 1883 provided that nothing contained in that Act should apply to the admission of any person who had been articulated previous to the taking effect of that Act. So likewise Act 11 of 1903 was not retrospective. Mr. Clark had actually completed his service of articles before that Act was passed, and it would be a great hardship upon him if after having in all good faith served his articles, he now found his admission barred by an Act which was not in existence during his term of service, and which in view of *ex parte Sranlen* (7 C.T.R., 209) he could not have anticipated.

Buchanan, A. C. J.: Before the Act of 1883, which now regulates the admission of attorneys, it was not compulsory on any candidate to pass a law examination. That Act made such an examination compulsory, but in the 17th section exempted persons who came under the 10th section of the English Solicitors' Act. One admission was made under the exemption provided by the 17th section, but the circumstances there disclosed showed that there had been an oversight in authorising exemption in the terms stated. Afterwards the Legislature repealed the 17th section absolutely, without any saving clause. When the Act of 1883 was passed a proviso was put in that nothing in the Act should apply to any person who should have been articulated previous to the taking effect of the Act. When the Legislature repealed the 17th section, they made no such proviso. Now, some years after the passing of the section

of the Act of 1883, the applicant wishes to come in and take the benefit of a clause which has already been repealed. It may be a hardship on the applicant, but at the same time I cannot make an exception in his case. No order will be made at present.

Mr. Gutsche moved for the admission of Ernest H. Solomon as an attorney and notary.

Application granted, oaths to be taken before the Registrar of the High Court, Kimberley.

Mr. J. E. R. de Villiers moved for the admission of Ockert Jacobus Oosthuizen as an attorney and notary.

Application granted and oaths administered.

Mr. Benjamin moved for the admission of Sidney S. Saayman as an attorney and notary.

Application granted, oaths to be taken before the R.M. of Riversdale.

Mr. P. S. T. Jones moved for the admission of Walter Reid as a conveyancer.

Application granted and oaths administered.

Mr. Bailey moved for the admission of Vivian Lionel K. Murray, as a conveyancer, and for leave to applicant to take the oaths before the R.M. of East London.

Buchanan, A. C. J., said it appeared that the applicant applied to be admitted as a conveyancer of British Kaffraria, to which he was entitled as the Statute stood. Here again he (the learned Judge) would point out that a different examination, a more searching examination, was required for conveyancers admitted in the Registry of Deeds of this Court than in British Kaffraria. It had been repeatedly pointed out that it was a question that the Government should consider whether all the Registries should not be consolidated. Applicant would be admitted as prayed, oaths to be taken before the R.M. of East London.

PROVISIONAL ROLL.

NOCHAMSON V. NEL. { 1905.
Aug. 1st.

Mr. Benjamin moved for provisional sentence for £150, upon a promissory note. The action was originally heard in the R.M.'s Court at Calitzdorp, and was removed, at the request of the defendant, to this Court. The question to be decided was as to the genuineness of the signature on the note.

Mr. Burton (for defendant) said that his client's position was that the signature was a forgery.

Buchanan, A. C. J., directed that the case should be removed to the next Circuit Court, at Oudtshoorn, for deter-

mination of all questions, including costs, both in the Magistrate's Court and the Supreme Court.

NEIMAN V. NEIMAN.

Mr. Roux moved for the discharge of the applicant, who was in custody, under a writ of arrest.

There was no appearance for respondent.

The applicant was discharged.

NATIONAL BANK V. HARRIS.

Mr. Watermeyer moved for provisional sentence for £600 upon a promissory note, and costs.

Order granted.

DE WAHL V. DE ROUBAIX.

Mr. De Waal moved for provisional sentence on two mortgage bonds for £800 and £100 respectively, due by reason of the non-payment of interest, and for the property specially hypothecated to be declared executable.

Order granted.

HIGGS V. KROUSE.

Dr. Greer moved for provisional sentence on two mortgage bonds for £400 and £100 respectively, due by reason of the non-payment of interest, and for the property specially hypothecated to be declared executable.

Order granted.

TRILL V. BOYCE.

Mr. Sutton moved for provisional sentence on a mortgage bond for £2,000, and for £2 9s. insurance premiums, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable, and for the rents due to be declared executable. Counsel said that notice had not been given to defendant of the application, so far as rent was concerned.

Order granted as prayed, His Lordship remarking that in future these applications must be put in order, and proper notice given to the parties concerned. He hoped that there would be less laxity in the practice of the Court.

DAY V. MOEZELANY.

Mr. De Waal moved for provisional sentence on a mortgage bond for £1,600, due by reason of the non-payment of

interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

THORNE AND STRUBEN V. GELB.

Mr. Struben moved for the final adjudication of the defendant's estate as insolvent. The petitioners, Sir Wm. Thorne and Mr. H. W. Struben, said that Gelb was indebted to them in the sums of £6,600 and £1,600 respectively for money lent and advanced upon bond. The estate had been assigned, but, under all the circumstances, the petitioners said that they did not think the estate beneficially liquidated by the assignees any longer.

The affidavit of defendant stated that nothing had happened to justify the assignees in sequestrating his estate. He had been, and was still willing to render the assignees all the assistance in his power in connection with the liquidation. He pointed out, further, that the petitioners put the value of their claims at the full amount of the bonds. Affidavits of P. J. Bosman and other creditors, said they thought it would be to the benefit of all the creditors if the estate continued to be liquidated under the assignment.

The affidavit of Mr. G. W. Steytler, joint assignee of the estate, confirmed the allegations and statements contained in the petition. He said that there was an annual loss of not less than £220, and he gave particulars showing how the losses occurred. Instead of the liabilities being liquidated, they were, he said, being increased.

The affidavit of Mr. E. R. Syfret, co-assignee of the estate, confirmed the allegations in Mr. Steytler's affidavit. The answering affidavit of defendant repeated that it was perfectly possible to beneficially continue the liquidation.

The replying affidavit of Mr. Steytler stated that the statement of the receipts and disbursements made by Gelb was misleading, and repeated that there was an annual deficiency as he had alleged.

Mr. Close for defendant.

Counsel having been heard in argument on the facts.

Buchanan, A. C. J.: There is no allegation of fraud or concealment on the part of the debtor; there has been no act of insolvency by the debtor and there is no allegation of misconduct since the assignment, and no ground is shown for this application, except the bare fact that the assignment is not working out so beneficially to the creditors as it is thought that sequestration would work out. Because the estate does not now work out so well as they thought it would, they want to go back upon their previous decision. The provisional order for sequestration must be set aside, with costs.

KANSLEY V. SABER.

Mr. P. S. T. Jones moved for a provisional order of sequestration to be made final.

Final order granted.

VAN DER BYL AND CO. AND OTHERS V. DAWOOD.

Mr. M. Bisset moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

OHLSSON'S CAPE BREWERIES V. EASTON.

Mr. Gutsche moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

ABELN V. BURCHARTH.

Mr. Sutton moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

FOSTER V. SOLOMON.

Mr. Sutton moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

MALMESBURY BOARD OF EXECUTORS V. SMUTS.

Mr. J. E. R. de Villiers moved for provisional sentence on a mortgage bond for £1,500, due by reason of the non-payment of interest, less £79 paid on account of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

GIBBS V. FISK.

Dr. Rainsford moved for provisional sentence on a mortgage bond for £600, with interest, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Defendant said that he had paid £28 for the rents to the plaintiff's agent, Mr. Steer.

Order granted.

MARSH V. FISK.

Mr. Russell moved for provisional sentence on a mortgage bond for £700, with interest, the bond having become

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due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Defendant said that he had paid £10 to the agent, Mr. Steer.

Order granted.

TREGIDGA AND MOSSOP V. GOODSON.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £60, and also £1 premium of insurance, the bond having been become due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

ALBOW V. SANDLER AND OTHERS.

Dr. Greer moved for the final adjudication of the defendants' estate as insolvent.

Final order granted.

WHITE, RYAN AND CO AND ANOTHER V. ASHLEY.

Mr. Payne moved for provisional sentence upon a promissory note for £146 11s. 6d., with interest and costs, and for judgment under Rule 329d for £18 11s., balance of account for goods sold and delivered.

Buchanan, A. C. J., said that the power of attorney granted by defendant, which had been put in, was not stamped. An order would be granted as prayed, subject to the stamping of the power of attorney.

LAWRENCE V. MELEKOW.

Mr. Swift moved for provisional sentence on a mortgage bond for £1,300, with interest, the bond having become due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

MEYER V. BOTHA.

Mr. Van Zyl moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

SAACHS, CHIATT AND ANOTHER V. FRANKEL.

Dr. Greer moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

ZOUTENDYK AND CO. V. TRUTER.

Mr. P. S. T. Jones moved for provisional sentence on a promissory note for £256 2s., less £116 16s. 8d., credit given by plaintiffs to defendant in the summons.

Order granted.

ILLIQUID ROLL.

CAPE TIMES, LTD. V. TERRA- { 1905.
BONA TEA CO., LTD. { Aug. 1st.

Mr. Douglas Buchanan moved for judgment, under Rule 329d, for £42 4s., advertising charges, with interest *a tempore morae* and costs.

Order granted.

SOEKER V. ASSIZ.

Mr. Van Zyl moved for judgment, under Rule 329d, for £50, less £8 paid, due upon an exchange of horses.

Order granted.

BUSSELL AND CO V. KOTZE.

Mr. De Waal moved for judgment, under Rule 329d, for £181 9s. 5d., balance of account.

Order granted.

FRIPP V. BARNETT.

Mr. Douglas Buchanan moved for judgment, under Rule 329d, for £35, balance of rent due, with interest *a tempore morae* and costs.

Order granted.

ESTATE VAN DER HEEVER V. VAN DER HEEVER.

Mr. Gardiner moved for judgment, under Rule 329d, for a refund of £60, amount wrongfully and unlawfully acquired by defendant from a certain insolvent, or, alternatively, for delivery of two horses.

Order granted for the amount claimed.

MAIR V. MAIR.

Mr. Struben moved for judgment in terms of declaration in default of plea.

Order granted.

PURCELL, TALLOW AND EVERETT V. FORTUIN.

Mr. Close moved for judgment, under Rule 329d, for £21 3s. 10d., goods supplied, with interest and costs.

Order granted.

STEVENS V. THOMAS.

Mr. Russell moved for judgment, under Rule 329d, for (1) transfer of a certain lot of ground sold by defendant to plaintiff, or, alternatively, for (2) cancellation of sale, and repayment of amount paid.

Judgment under prayer (1), transfer to be given on or before the 1st September, failing which, judgment under prayer (2) as prayed.

LEWIS V. ROBINSON AND CO.

Mr. Russell moved for judgment, under Rule 329d, for £110, rent due, interest and costs.

Order granted.

APPEL AND ANOTHER V. APPEL.

Mr. Searle, K.C., moved for judgment in terms of consent paper, in terms of the plaintiffs' declaration, save and except sub-section (a), under which an order of ejectment was claimed.

Judgment as prayed.

REHABILITATIONS.

Mr. Upington moved for the rehabilitation of W. F. Blignaut.

Granted.

Mr. Benjamin moved for the rehabilitation of Isidore Bakst.

Granted.

GENERAL MOTIONS.

Ex parte THE DUTCH RE- { 1905.
FORMED CHURCH, PRINCE { Aug. 1st.
ALBERT.

Mr. De Waal moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

***Ex parte* TIDBURY.**

Mr. Lewis moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

***Ex parte* POTGIETER.**

Mr. Watermeyer moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

In re THE LANSDOWNE HOUSE ESTATE CO. (IN LIQUIDATION).

Mr. P. S. T. Jones moved for confirmation of the first report of the official liquidators.

Report confirmed.

HEYDENREYCH V. FRAME.

Mr. Burton moved for leave to issue writ of execution upon a judgment given by this Court for £48 and costs, the defendant having given notice of appeal.

Order granted.

Ex parte THE RED TRADING STAMP CO.

This was a petition for an order calling upon the Registrar of Deeds to hear an application by petitioners for registration of a certain trade mark.

The Registrar of Deeds, in his report, said that the objection to the registration of this mark was raised by the Trading Stamp Co., on the ground that it bore a close resemblance to the objectors' mark, and was therefore calculated to deceive. It was not necessary, he thought, to decide that point, seeing that it transpired, in the course of the inquiry he held, that the so-called mark was not in reality used as a mark at all. He found that the so-called mark was really used for a system of coupons used in the course of trade. These tickets or coupons were issued by dealers to their customers; those tickets represented a certain money value, and entitled the holders to exchange them for goods from the applicants. Under the circumstances, he exercised his discretion, and decided that the application was one that he need not determine.

Mr. Gardiner was for the petitioners, the Red Stamp Co., merchants, Johannesburg; Mr. Close opposed on behalf of the Trading Stamp Company, of Cape Town.

Mr. Gardiner submitted that the Registrar of Deeds was wrong in the position he had taken up. The first Act of 1877 did not actually lay down what a trade was. The next Act, No. 12 of 1895, did not specify what the use of a trade-mark should be, but it did, by section 2, specify what it should consist of. The Registrar, in his report, said: "The function, I take it, of a trade-mark is to give an indication as to the manufacture or quality of goods, and to induce the public to purchase those identified with such mark." The petitioners said that they intended to have the representation blown into the glass goods they sold, and printed on the wrappers they used. The applicants, he contended, had shown that they intended to use this mark in connection with goods.

Mr. Close said that the application originally was for the registration of coupons, and thus for a mark which would not be affixed to goods at all. The application now made was quite different. The applicants now said they were going to have the mark burned into crockery and affixed to various goods.

The matter was referred back to the Registrar of Deeds, to hear the application for a trade-mark in regard to certain goods specified in the application, no order as to costs; notice to be given to respondents of the hearing before the Registrar.

Ex parte THE ESTATES E. T. CHADDOCK AND E. J. CHADDOCK.

Dr. Rainsford moved to make absolute a rule *nisi* to assume death, granted May 11th, 1905 (15 C.T.R., 373). The Chaddocks were supposed to have been drowned at sea some years ago.

Rule made absolute.

SCHUTTE V. TURNER.

This was an application to make absolute a rule *nisi* authorising the attachment, in part satisfaction of a judgment of certain moneys be paid to the Resident Magistrate of Wynberg, and to be handed to the respondent from the War Losses Compensation Commission. Mr. P. S. T. Jones was for applicant; Mr. M. Bisset was for respondent.

Owing to certain affidavits of the respondents not being available,

The matter was ordered to stand over.

LEY V. JOHNSON.

Mr. Close moved to make absolute a rule *nisi*, calling upon the respondent to show cause why certain moneys should not be declared executable.

Rule made absolute.

Ex parte LESTER.

Mr. Watermeyer moved for leave to petitioner to sue her husband in *forma pauperis* by edictal citation. Counsel having certified.

Rule *nisi* was granted, returnable on the 17th August, to be served personally, failing which one publication in the "Cape Times."

Postea (August 24th). Rule made absolute.

Ex parte THE GRAAFF-REINET BOARD OF EXECUTORS.

Mr. De Waal applied for the attachment of property *ad fundandam jurisdictionem*.

to submit himself to a medical examination

[Buchanan, A. C. J.: And has he done so?]

Mr. Upington: Yes, my lord. Continuing, counsel stated that Mr. Walker had been cross-examined by Sir Victor Horsley and Dr. Ferreira, two very eminent specialists. They stated in their affidavit that they had visited and professionally examined Mr. Walker in reference to the state of his health and ability to undertake a voyage to Cape Town to undergo the ordeal of a trial in a court of law. They were of opinion that he was not unfit to undertake the voyage. Mr. Walker was well advanced in years, and was of gouty habits. Continuing, Mr. Upington said that if Mr. Walker's evidence was taken on commission it would entail considerable expense and great delay in the winding up of the affairs of the company, as many of the books required daily would have to go from Cape Town to England.

[Buchanan, A. C. J.: Is it necessary to have Walker's evidence to go to trial?]

Mr. Russell: He thinks so.

[Buchanan, A. C. J.: He is only one of the firm connected with the case. The others probably know as much as he does.]

Mr. Russell: Cameron Walker, his son, does not. He has made an affidavit to that effect.

Counsel having been heard in argument,

Judgment was reserved until Thursday morning.

Postea (August 3). Application for commission refused with costs.

The action to be proceeded with within the first week in October term.

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

VEDASZ V. VEDASZ.

{ 1905.
Aug. 2nd.

This was an action heard in which Lajos Vadasz, a commercial traveller, residing at Long-street, Cape Town, sought a dissolution of his marriage with his wife, Florence Mercy Vadasz, of 276, Lower Main-road, Observatory, by reason of her adultery with one Sydney Morrell, of Maitland. Plaintiff also claimed the custody of the children

of the marriage, and that the defendant be declared to have forfeited half share of the property held in community between them. He also claimed £500 damages from the co-defendant.

The plaintiff's declaration set forth that he was married to the first defendant in community of property at Hackney, England, on June 1, 1895. There were two girls, aged respectively 9 and 3 years, issue of the marriage. During the years 1898-1905, the first defendant committed adultery with the second defendant, but more particularly on the 9th, 10th, and 11th May, 1905, at 276, Lower Main-road, Observatory.

The defendants' plea denied all the allegations.

For a claim in reconvention, the first defendant applied for an order of judicial separation *a mensa et thoro* custody of the children, and payment of the sum of £12 per month for the maintenance of herself and children. She alleged that the plaintiff assaulted her on divers occasions, from which she had suffered severe injuries, and, in consequence, had been obliged on more than one occasion to summon medical attendants.

As a replication to defendant's plea, the plaintiff stated that he never ill-treated or assaulted defendant, but that on the 14th and 15th May last, whilst endeavouring to possess himself of certain correspondence material to the issue of the suit, the defendant closed with him, and during the struggle they both fell to the ground. He denied that she had suffered severe or any injuries in consequence of any action of his.

Dr. Greer appeared for plaintiff, and Mr. Burton (with him Mr. P. Jones), for the defendants.

After evidence had been led and counsel heard in argument on the facts:

Postea (August 4).

Maasdorp, J.: I don't think it will be necessary for me to go into great detail in the evidence which has been adduced. I think I shall be able to base my decision on some of the more outstanding portions of the evidence which will really establish the relationship which existed between the parties. The main question is, what was the character of the visits that were paid by the co-defendant to the defendant on the 9th, 10th, and 11th May last? The plaintiff alleges that on these occasions adultery was committed. The attitude taken up by the defendant and the co-defendant with respect to these visits is this, that they were the ordinary visits of a friend who had no reason to consider that he would be an unwelcome guest. If that position was true—if I were satisfied that up to that time the co-defendant was not unacceptable in that house—the case would bear one aspect. But it would be quite different if it is proved that previous to that the relationship that existed between them was to their

knowledge regarded with suspicion by the husband. Now, it was suggested by the defendant when Osberg reported these visits to the husband that these visits were made at the invitation of the husband and she said as much and all through the position is taken up that the husband was on friendly terms with the co-defendant, and there was no reason why he should not occasionally call on the wife at the house. Now, to establish that position, it must be shown that what is said to have occurred on the 4th—what is said by the plaintiff to have occurred on the 4th—is not correct. The plaintiff makes a statement, the result of which would go to prove that on the 4th certain occurrences took place, which brought matters to a head, and which revealed his feelings in respect to the co-defendant in this case. Now, the defendant says that up to the 10th she was not aware that the plaintiff regarded the co-defendant with suspicion. As a matter of fact, we find it proved that on the 5th—the day after the hot altercation between plaintiff and his wife, the plaintiff went to Osberg and made a statement with reference to his wife, and he directly connected her name with that of Morrell, and he placed the case in the hands of Osberg for the purpose of discovering the relationship he complained of between Morrell and his wife. I think that proves that on the 5th it was Morrell who was suspected, and it was Morrell who was regarded on the 5th by the plaintiff as the man whom he would not have in his house. Now, if that were so, why should he on the 4th, when he gave expression to his indignation, have kept that secret from his wife. She says he stated to her: "I don't believe it is Morrell—meaning to suggest, if it is Morrell, I have no objection—I want to find someone else." I am convinced that is not true. The plaintiff went directly to Osberg as against Morrell, and I am positive he mentioned the name of Morrell to his wife, and he charged his wife with having intercourse with Morrell. If this is established, then the wife knew Morrell was the person who was not a welcome guest in the house, and when she pretended that the visits on the 9th, 10th, and 11th May took place on the invitation of her husband, she said what was absolutely untrue. Now, the question arises as to what relationship had sprung up between Morrell and the defendant before that. It is not necessary to go back to what happened two or three years before. On those occasions, as far as Mrs. Vedasz and Morrell are concerned, no suspicion is attached to anything that had taken place between them until lately, when we find that the husband was away for some days before the 4th May, and upon his arrival he finds that some gentleman had been to his house, and had dinner with his wife. Well, he was

naturally displeased, and he had his suspicions. However, that throws no light upon the question as to whether adultery had been committed with Morrell. Subsequently, upon the night of that day, the plaintiff says he discovered a letter, and that letter has an important bearing on the case, and it is necessary to find whether that letter was written or not. We must contrast the evidence of the plaintiff with that of his wife. Is the wife a truthful witness? In this case she is brought into conflict with the plaintiff's evidence, and that of Bouker and of Osberg. As to the incidents referred to by Bouker and Osberg, I believe both of them, and I disbelieve the wife. Bouker says she came to the house after she left, and she removed certain letters from the fireplace. She denies that. I believe that the bundle removed was a bundle of letters, and I don't see any reason why Bouker, who showed her some kindness, should have given false evidence against her, and as I believe his evidence, I must reject the evidence of Mrs. Vedasz. I believe Osberg's account of the struggle over the telegram. Now the question arises, what is the conclusion to be arrived at with regard to the letter which the plaintiff says he saw in her possession, which she denies? The letter was written in the most warm and endearing terms to some person, and the improper feelings expressed showed some sort of illicit relationship between her and someone else, and the question is, who that someone else is? The only person proved to have been in communication with her at that time is Morrell. If she wrote that letter to Morrell, and Morrell did not at once repudiate his relationship with her, he puts himself in a compromising position. This warm relationship was existing between plaintiff's wife and Morrell, we find these visits paid by him at night at a time when the co-defendant was well aware that the plaintiff was away, because the plaintiff bade him farewell at the station, and immediately afterwards we find these two visits paid. While he was actually charged with having illicit relationship with the wife of this man, she says she goes to him as a friend to take advice, because her husband had been cruel to her. It is quite possible under such circumstances a woman might seek consolation from a good, honourable friend, but here she goes to the very man who is charged with committing an improper act. According to Osberg in one of these visits, a man was closeted with her for a considerable time, and when a summons appears at the door, which, under the ordinary circumstances would have been responded to, and which must have been heard, there is no answer. What were they engaged in that prevented them from opening the door? He re-

mains with this woman from nine o'clock to about 11 o'clock, and under all the circumstances previously existing I think it is not only an act of imprudence, but it shows a tendency to some illicit relationship, and I have no doubt they carried out their intentions. I believe Osberg when he says the co-defendant admitted he had been there the night before. I come to the conclusion, under all the circumstances, that adultery was committed, and that the plaintiff is entitled to a decree of divorce. He makes a further claim against the co-defendant for damages, but although there is no actual evidence of unpleasant life between the plaintiff and his wife, the damages must be based upon a consideration of the loss which the husband suffers through losing the society of his wife and the happiness of his home that had been destroyed. There is no positive evidence that they lived unhappily together, but on the letters I come to the conclusion, as far as her feelings towards him were concerned, they could not have been those of sincere affection, and in losing the society of a woman who made these virulent and abusive attacks upon him, it is not such a loss as to call for heavy damages against the co-defendant. It is necessary in an action like this that the Court should see that the plaintiff does not suffer any actual loss through the conduct of the co-defendant, and I think he is entitled to some damages. There is always in these cases certain costs that cannot be recovered as taxed costs, and the Court should see that no loss falls upon the plaintiff in that respect. I think if the damages are assessed at £30 it will cover these costs. I find, under the circumstances, that there is no evidence to show that the plaintiff is not entitled to the custody of the children. With respect to the property transferred to the wife formed one of the considerations received by her only in respect of this marriage, and she has forfeited that benefit. A decree of divorce will be granted, the plaintiff ordered to have custody of the children, the wife declared to have forfeited the benefits accruing to her through the marriage, and is ordered to transfer the land to the plaintiff, and the co-defendant is ordered to pay the damages in the sum of £30 and costs.

Mr. Burton: I suppose Mrs. Vedasz will be allowed access to her children.

[Maasdorp, J.: Oh, yes.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

GEPP V GEPP.

{ 1905.
{ Aug. 2nd.

Mr. Burton moved for a decree of divorce on the ground of malicious desertion. He said that the matter was before the Court some time ago, when evidence was taken, but the case was ordered to stand over pending production of the marriage certificate. The parties belonged to Somerset West and Woodstock respectively. The certificate, he understood, had now been lodged with the Registrar.

Decree of divorce granted; no order as to costs.

TUTT V. TUTT.

This was an action brought by Wm. Benjamin Tutt, tailor, Kimberley, against his wife, Jane Dinah Tutt, of East London, for restitution of conjugal rights, failing which, a decree of divorce, on the ground of the defendant's malicious desertion. Mr. Lewis was for the plaintiff; defendant did not appear.

Hopley, J., said that no notice of set down appeared to have been served on the defendant.

Mr. Lewis said that he would call evidence to show that notice of the trial had been given.

Reginald Metcalfe, attorney, in the office of Silberbauer, Wahl and Fuller, said that his firm had represented the defendant. Upon the plaintiff agreeing to waive the claim for division of property, it was arranged that they should withdraw from the case, and to save expense of serving declaration on the defendant personally, his firm accepted service in due course.

Hopley, J., said that he would, under the circumstances, allow the case to proceed, but at the same time it must be understood that proper notice in these cases must be given of the set-down, in accordance with the practice of the Court.

Wm. Thomas Birch, clerk in charge of the marriage registry, gave formal evidence as to the registration of the marriage.

Plaintiff said that he was married to defendant at the Metropolitan Church, Cape Town, in April, 1885. Two years afterwards they went to reside at Kimberley. About five years ago unhappiness commenced, because witness had cause to complain of his wife's infidelity. She admitted the accusation, but witness forgave her, on the ground of saying that the boy who had been born was illegitimate. In 1903 his wife left the house without his consent, and went

to reside at East London. He had asked her to return, but she had refused.

Decree of restitution granted, defendant to return to plaintiff on or before the 1st September, failing which, to show cause on the 12th September why a decree of divorce should not be granted, personal service to be effected.

BAIN V. HAMMERSLEY-HEENAN.

Defamation—Privilege—Express malice—Recklessness.

This was an action to recover £1,000 damages for alleged defamation.

Plaintiff, in his declaration, said that in the year 1902 plaintiff was employed by the Harbour Board as chief claims clerk, but in or about December, 1902, defendant, unlawfully, maliciously, and with intent to injure the plaintiff, wrote and published to the members of the Board the following false and defamatory words of and concerning the plaintiff: "He (Mr. Bain) is incompetent for the position he holds, and has not the necessary qualifications for the office." In consequence, the plaintiff was in January, 1903, superseded in his post of chief claims clerk, and in or about April, 1903, he was altogether dismissed from the employ of the said Harbour Board, and had suffered grievous injury and had sustained damages in the sum of £1,000, which amount he claimed.

The defendant, in his plea, admitted that he wrote and published the words set forth, but said that he did not do so maliciously or with intent to injure the plaintiff. He denied that the said words were false or defamatory, but said that the said words were written by him without malice and in the belief that they were true and correct, and in such circumstances as to make it a privileged occasion, being contained in a memorandum sent by him to the Board in the course of his duty as manager. As an alternative, in case the plea of privilege failed, defendant pleaded that the words were true in substance and in fact, and that the publication to the said Board was made without malice and for the public benefit. He admitted that the plaintiff was in January, 1903, removed from his post as chief claims clerk, and that in April he was altogether dismissed from the employ of the Board, but denied that this was in consequence of the aforesaid statements. He said, further, that prior to the issue of summons more than one year had elapsed since the words were written and published.

Mr. J. E. R. de Villiers was for the plaintiff; Mr. Gardiner (with him Mr. M. Bisset) was for the defendant.

Mr. De Villiers said that the words complained of did not come to the knowledge of the plaintiff until the 13th

May, 1904, and the summons was issued within one year of that date.

Mr. Gardiner said that his client admitted having said that the plaintiff had not the necessary qualifications for the post, and that, after considering his report, the Board sanctioned his dismissal.

Kenneth Alexander Bain (the plaintiff) was called. He said that previous to October, 1901, he was employed by A. R. McKenzie and Co., dock agents, as chief claims clerk. In October, 1901, the Harbour Board took over the delivery of all cargo at the docks; he was appointed by the Harbour Board to organise the claims department. He was afterwards appointed permanently chief claims clerk as from January, 1902, at a salary of £250 a year. Witness had to instruct a staff and to investigate all claims brought against the Harbour Board. From December, 1901, the department was divided, and Mr. Grave was appointed to look after the current claims, while witness had to look after the claims up to December, 1901. Witness objected to this arrangement. Mr. Grave had a totally separate office and staff from witness. This continued till the 19th July, 1902. In May, 1902, Mr. Grave had got in arrear with his claims; he was unable to cope with the claims from the beginning. About the end of May the arrear claims were sent to Mr. Close, accountant, for adjustment. Witness had nothing whatever to do with those claims. Mr. Grave received a salary of £30 a month. About 30 or 40 of witness's claims were also sent to Mr. Close; these had been partially investigated by witness. In July, 1902, Grave had again fallen into arrears. Witness had finished the old claims. He was offered an appointment under Mr. Grave, but declined, and eventually the two staffs were combined, and witness was put in full charge, while Mr. Grave was put in the accountants' department. Witness took over considerably over 1,000 old claims from Mr. Grave. Witness continued in charge until the end of 1902. The claims continued to come in at a great rate. Witness and his staff coped with all the claims that were received. In December, 1902 witness was superseded, and Mr. Girdwood who had been freight clerk in the Union-Castle Company's office was appointed chief claims clerk, at a salary of £600 a year. Witness's salary was not reduced. Witness worked in the office for four months longer on the old claims. On February 12, 1903, Mr. Girdwood got leave of absence, and was away for four or five weeks. During that time witness dealt with the whole of the current claims, except a bundle left by Mr. Girdwood bearing a note asking him to look into those. Witness did not investigate those claims. Witness put the bundle back. On the 30th April, 1903, witness received a letter from Captain Leigh, dispensing with his services as from the 31st May, and

saying that in view of the late hours he had worked he (Captain Leigh) had recommended that he should receive a bonus. Subsequently, he received another letter from Captain Leigh saying that he was advised that as he (Bain) had received three months' salary in lieu of one month's notice, the General Manager could not recommend that he should be paid a bonus of £100. Witness considered that he was on the fixed establishment, and that he was under a yearly appointment. Witness afterwards saw Mr. Pyott, M.L.C., with a view of having his case brought before Parliament. Mr. Pyott made verbal inquiries from the General Manager of the Harbour Board, and, in response, received a letter from the General Manager, in which he said: "Mr. Bain was placed in charge of the claims department by Mr. Underwood, but he proved unfitted for the position, for, although a zealous and painstaking officer, his manner with the public was not such as would conduce to amicable working, and he seemed unable to get the amount of the work out of his staff, which was necessary to enable him to keep pace with the claims." Mr. Heenan went on to say that these drawbacks, added to the incompetency of the outdoor staff, had led to the arrears of current claims, and to certain of them being sent to Mr. Close. Mr. Heenan also said: "Mr. Bain's honesty, integrity, and capacity for work the Board had every reason to be satisfied with, but he was quite unfitted for the position to which he had been appointed." Witness did not want to go to law, and he then wrote to the Treasurer-General, asking him if he could re-open the case, in view of the information which had come to his knowledge. The Treasurer-General, however, said that he could not re-open the case. Nine months after he left the Board he got a temporary situation with McKenzie and Co., and remained there until they failed. He was dispensed with in November last. He was paid £2 10s. a week by McKenzie and Co. Witness was afterwards out of employment for about five months, and he had since been in his present employ at Messrs. Murray and Stewart's at £3 a week. Witness had a wife and six children. Nobody knew how he had suffered both in body and mind since he had had to leave the Board's service.

Cross-examined: Witness was paid his salary by the Board by the month. He thought it was Mr. Heenan's duty to speak to him if he had any fault to find. He was inclined to think that Mr. Heenan was animated by personal spite. He thought Mr. Heenan did not believe what he wrote. Mr. Heenan rarely met witness. Mr. Heenan had always acknowledged in the correspondence that witness had worked hard and zealously in the interests of the Board. He did

not know that Mr. Heenan had endorsed Mr. Robb's recommendation that witness should receive a bonus of £100. He did not think that Mr. Girdwood was half as competent as himself. Mr. Girdwood was appointed in the interests of the shipping ring. He thought Mr. Heenan was working in the interests of the shipping ring.

Mr. Gardiner: You have no foundation for that statement?

Witness: Common report.

That is your only foundation?—No, not my only foundation. Claims have been passed by Mr. Girdwood which ought not to have been paid by the Harbour Board.

Further cross-examined: Witness was not at the office when these claims were passed. He was speaking from what he had heard. He knew the way Mr. Girdwood was working when he was at the Board. He pointed out what was taking place to Mr. Robb. Mr. Heenan wanted to get rid of witness and his chief clerk for the sole reason that he wanted to get a man in from the shipping ring. Witness did not repudiate a certain claim, which Mr. Girdwood had ordered to be paid with the result that the Board were summoned, and he never heard any complaints about his attitude to the public until Tuesday.

Captain R. A. Leigh said he was Dock Superintendent for the Harbour Board in 1902, and he was now assistant superintendent. Witness was Mr. Bain's direct superior officer. The staff Mr. Bain had was almost the same as now, and was quite competent. Mr. Bain worked nights, holidays, and Sundays, but witness did not think he had good results from his labour.

Cross-examined: Witness had no reason whatever to believe that Mr. Hammersley-Heenan had any personal spite against plaintiff, and he could not understand the suggestion that Mr. Heenan was working in the interests of the shipping ring.

Frank Robb, Assistant General Manager of the Harbour Board, said it was impossible for any mortal man in the beginning of 1902 to cope with all the claims. From about May, 1902, however, an improvement should have been apparent, as the conditions were better. Witness made the statement that, on the whole, Mr. Bain got good results from a financial point of view, and the General Manager agreed with him.

By the Court: In the circumstances, he would have dispensed with Mr. Bain's services, as the General Manager had done. He did not remember disapproving of Mr. Bain's dismissal, but he disapproved of Mr. Girdwood's appointment.

Cross-examined: Mr. Bain was not the man he would have selected for the post, but he worked under the very worst conditions, and never had

chance of showing what he was capable of. He was on the monthly staff.

Frank William Oliver said he was in the employ of the Harbour Board about the same time as Mr. Bain, as assistant clerk in the Claims Department. He never heard anything about Mr. Bain disobeying the orders of Mr. Girdwood, or complaints by the public against Mr. Bain. The whole office staff worked well under Mr. Bain.

Mr. De Villiers closed his case.

Mr. Gardiner said that he had thought of applying for absolution from the instance, but he thought it would be better to call evidence in order to obtain judgment.

Robert Henry Hammersley-Heenan (defendant) said that he had to cast about to get a good man, because there were claims outstanding at that time to the tune of about £32,000. He ultimately found a man in Mr. Girdwood. Bain was not competent for the position; he had not got the capacity to do the work, in witness's opinion. Bain failed in administrative and organising ability. Witness had invariably testified that Bain was a hard and zealous worker. There were complaints from the public. Witness's life was a perfect burden, owing to the complaints he received from the Chamber of Commerce, and merchants, and everybody else, that their claims were not settled. Bain was not a tactful man. Witness had no personal malice against Bain; on the contrary, he did all he could to assist Bain into a situation in another department. Witness considered that he had no alternative but to do as he did in the discharge of his duty.

[Hopley, J.: Is there any foundation for the suggestion that you got Girdwood in in the interests of the shipping ring, or any interest but the Harbour Board's?]

Witness: Absolutely none.

Cross-examined: The very fact of Bain trying to squeeze down the merchants and to drive unnecessarily hard bargains, wasted his time, and he exerted his energies on that, instead of on the general administration of his department. Mr. Robb had described Bain as "too much of a ferret and too little of an administrator." Witness thought that that just touched the point. Bain had not got the width of mind to grasp big questions. Witness found that the relations between Girdwood and Bain had become very strained, and of the two men, he had no hesitation as to which he should retain. He was satisfied that the action he took in dismissing Bain was the right and only thing he could do. He had satisfied himself, before he dismissed Bain, that the position between him and Girdwood was an impossible one. He admitted that Bain had worked nights, Sundays, and holidays,

and had saved money for the Board, but he considered that Bain's energies were misdirected. Witness had not said the words that "Bain was incompetent," but he admitted having said that Bain "had not the necessary qualifications for the post."

At this stage the plea was amended to read that defendant denied having said that the plaintiff was incompetent, but admitted having said that he had not the necessary qualifications for the post.

Cross-examination continued: Witness dismissed Bain from the Board's service, and afterwards reported what he had done to the Board. Witness found that Bain was not acceptable to the public. The complaints he had referred to were not against Bain personally, but against the results in the Claims Department. Witness admitted that the conditions at the Docks were bad when Bain was employed on the claims, but he did not think that he rose to the occasion.

Mr. Gardiner closed his case.

Mr. De Villiers having been heard in argument on the facts.

Hopley, J.: One cannot help feeling a certain amount of sympathy with the plaintiff, and one cannot help also regretting that he should have been advised, or that he should have insisted, on coming into this Court in order to try and right his imaginary or real wrongs in the circumstances in which he finds himself placed. He has a very hard and uphill fight to sustain an action of this sort. He has first to prove that the words, as having been made use of by a man in the position of Mr. Hammersley-Heenan, were false and malicious, and defamatory, and then he has to prove that if in the circumstances those words were privileged, they were used with express malice on the part of the defendant, so as to destroy the benefit of the privilege. We all have some idea of the state of things at the Docks at the time that plaintiff was engaged, and when he was carrying on his work. There must have been a state of great confusion and a large accumulation of claims against the Harbour Board: but then it is often said that the presence of such a state of things will bring out the best points in a good man. Plaintiff had a fair trial. There is no doubt from the evidence before me that he was a most zealous and most industrious man, and most zealous in more than one direction. Besides working whenever he could possibly be expected to work, he showed his zeal in another direction, by trying to cut down, as far as he could, the merchants' claims, and in other ways to save money for the department in which he was engaged. All this zeal is very well in its way, but it does not follow that a man who shows those qualifications has really got the qualifica-

tions necessary for the post he holds, any more than a head gardener, for instance, does if he persists in spending his time in digging. As to the question of what effect the words complained of had, it does not appear that the publication procured the plaintiff's dismissal, because, as a matter of fact, he had been dismissed by the General Manager before the words complained of had been written. But it may be that the words had, or must be held to have had some effect in procuring the Board's confirmation of the defendant's action, and I must consider them in the state of the pleadings as having been written before the final dismissal took place. Now, when a General Manager makes a report like this, he writes it on a privileged occasion, and all I have now to consider is whether the plaintiff has succeeded in showing that there was express malice actuating the defendant when he wrote the words in question, and as to that I confess that throughout the whole of this case I have not been able to find one shred of evidence which will show the slightest scintilla of malice against the plaintiff on the part of the defendant. Every written document that there is has shown that he was treated with great regard and that his good services were always eulogized. The defendant has made use of no expression indicating malice on his part, and none of his conduct points to a malicious state of mind; but it has been argued that he was reckless in making the charge he did. I can see nothing to substantiate this. He acted on the best information at his disposal, and on the reports of the officers subordinate to himself who had to deal with the plaintiff; and he also had had personal complaints from members of the public of plaintiff's want of tact in his position. Under all the circumstances, the plaintiff must fail, and judgment must be given for the defendant. One cannot help having some sympathy for the plaintiff, but that sympathy is, I must say, to a great extent removed by the fact that he himself has not scrupled, when in the witness-box, to make a very grave and unfounded charge against the defendant and others responsible for the appointment of Mr. Girdwood, which was virtually a charge of corruption on the part of the defendant and others associated with him. There is not the slightest evidence to support these charges. It is an improper thing for the plaintiff to take advantage of the privilege of the witness-box to make accusations of that sort, which he cannot bring any evidence to support. Judgment will be given for the defendant with costs.

[Plaintiff's Attorney: F. W. Foley;
Defendant's Attorneys: Reid and Nephew.]

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the
Hon. Sir JOHN BUCHANAN.]

REVIEW.

REX V. MEITJE SWARTZ. { 1905.
Ang. 3rd.

Concealment of birth—Ordinance
10 of 1845.

By Ordinance 10 of 1845, concealment of birth is not punishable with a fine.

Buchanan, A. C. J.: The case of Meitje Swartz came before me as Judge of the week, in which the accused was charged with contravening Ordinance 10 of 1845 by concealing the birth of a child was laid against the accused. The case was remitted under Act 43 of 1885, and the Magistrate sentenced accused to a fine of £25, or, in default, to imprisonment, with hard labour, for six months. The Concealment of Birth Ordinance gives no option of payment of a fine, so the option of a fine is struck out of the sentence. The sentence of imprisonment will stand, and the sentence as so amended will be confirmed.

PROVISIONAL ROLL.

MACLEOD V. EGBERS.

Mr. Sutton moved for provisional sentence on a mortgage bond for £500, due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable

Order granted.

LARMER V. PERELMAN.

Mr. Sutton moved for provisional sentence on a mortgage bond for £1,200, with interest, less £25 paid on account, and for £2 12s. 6d., premiums of insurance, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

JOHNSON AND CO. V. BURRELL.

Mr. Van Zyl moved for a decree of civil imprisonment against the defendant. When the matter was last before the Court (15 C.T.R., 414), defendant said that he would make an offer, but he had failed to do so.

Decree granted.

ROBERTSON V. REES AND CO.

Mr. Alexander moved for the final adjudication of the defendant's estate as insolvent.

Defendant said that had he been left alone by the petitioning creditor he would have been able to carry his business through, with the assistance of English creditors. Plaintiff would not allow him time, otherwise he would have been able to arrange all.

Buchanan, A. C. J. (to defendant): I am afraid that the man has his remedy; he has the whip hand of you, and I am sorry for you. Final order granted.

Mr. Alexander moved, as a matter of urgency, for the appointment of a provisional trustee, on the petition of Mr. Sherwood. It was stated that the business was that of a tin and sheet metal worker, and was the only one of its kind in the Peninsula. Counsel added that it was only fair to say that in 1903, Mr. Robertson advanced £1,100 to defendant, and had not received a single sixpence.

Mr. A. N. Foot was appointed provisional trustee of the estate.

LETTERSTEDT V. WENTZEL.

Mr. Russell moved for provisional sentence for £355 on certain conditions of sale, plaintiff tendering transfer of the property.

Defendant put in an affidavit saying that there had been some difficulty about obtaining securities.

Order granted.

ILLIQUID ROLL.

DURANT V. HAARHOFF.

Mr. M. Bisset moved for judgment, under Rule 32nd, for £67 7s., goods sold and delivered, with interest and costs.

Order granted.

GENERAL MOTIONS.

TURNBULL V. TURNBULL. } 1905.
 } Aug. 3rd.

Mr. Lewis moved for a decree of divorce on the petition of the wife, in

default of compliance by the defendant with an order for restitution of conjugal rights.

Rule made absolute.

MEYER V. MEYER.

Mr. M. Bisset moved for a decree of divorce on the petition of the husband, in default of compliance by the defendant with an order for restitution of conjugal rights.

Rule made absolute.

NATIONAL MUTUAL LIFE ASSOCIATION
V. ESTATE TILNEY.

This was an application, upon notice of motion, calling upon the respondent to show cause why he should not furnish security in the sum of £600, in order to meet the costs of defending an action instituted against the applicant company, and further, why he should not be debarred from proceeding further with the suit until he should have furnished such security due from him owing to his want of domicile in this colony.

From the affidavits, it appeared that the late Mr. Tilney insured with the applicant company for a sum of £1,000, and that he died at King William's Town in July, 1902, about eight or nine months afterwards. Mr. Bowen was appointed executor, and he proceeded to take out letters of administration in Rhodesia. He had applied to the company for payment of the proceeds of the policy, but they declined to pay the money, and the executor had commenced an action. The only asset in the estate was the insurance policy. The ground of the present application was that Mr. Bowen was domiciled in another jurisdiction, that large expense would be involved in a commission which had already sat in Cape Town and other commissions that it was proposed should sit in other parts of the country, and that applicants were entitled to some security for their costs. The Master of this Court further took up the position that the letters of administration should have been taken out in this Colony. The company, in their plea, set out two defences: (1) That the deceased committed suicide to get the proceeds of the policy for the benefit of a friend; and (2) that he made false representation at the time the policy was issued, as he was at that time intemperate, and he had already expressed an intention of committing suicide.

Mr. Searle, K.C. (with him Mr. Benjamin) for applicants. Mr. Upington (with him Mr. Swift) for respondent.

[Buchanan, A. C. J. (to counsel): That question might have been decided on exception.]

Mr. Searle: I was going to suggest whether it would not be worth while now to consider whether that point could not be decided. Mr. Searle went on to argue that his clients were entitled to their order for security for costs, seeing that, although the deceased was domiciled in this colony at the time of his death, administration had been taken out in Rhodesia, where the executor resided. He added that it might be necessary to take certain evidence in King William's Town, connected with the inquest proceedings.

Mr. Upington said that if the application were granted it would have the effect of absolutely stopping the proceedings. It was not a question of the estate being unwilling, because they were willing to do everything in their power to take up their domicile, which they had never lost, in this colony. The objection now taken was a purely technical one. He submitted that it was inequitable that the respondent should now be called upon to furnish security in the enormous sum of £500 to enable defendants to substantiate a ridiculous charge that deceased entered into this life policy to commit suicide for the purpose of benefitting a friend.

Buchanan, A. C. J., said that the respondent's attorney had already entered into a personal guarantee for the payment of costs up to what was called the exception stage when the applicants were given leave to amend their plea. There was now no undertaking for the costs since then. The Court would order that the proceedings in the matter be stayed until further security for costs was given. He (the learned Judge) thought it would be sufficient if, in addition to the attorney's personal guarantee security for a further sum of £250 was furnished, costs of the application to be costs in the cause, failing such security being given, costs to be paid by the respondent.

GAFFOOR V. HIGH SHERIFF AND HEYDENRYCH.

This was an application upon notice of motion calling upon the respondents to show cause why an order should not be granted discharging from attachment certain goods in the applicant's shop at the corner of Campbell-street and Polo-road, Observatory-road, which had been attached by virtue of a writ directed against the goods of one Gadje Abduraman.

The applicant's affidavit stated the goods were his bona-fide property, and denied that the shop belonged to Abduraman, or was in any way connected with Abduraman. Other affidavits were read from merchants in Cape Town stating that they had supplied applicant with goods.

The answering affidavit of William D. Herbert stated that he had proceeded to the shop of Abduraman, at the corner of Cooke-street and Polo-road, to levy execution, and had found that it contained no goods. He had reason to believe that the businesses in Cooke-street and Campbell-street were combined, and he found in the former shop handbills advertising the business in Campbell-street. Deponent added that he had had great experience in attaching the goods of Indians, and his experience was that Indians would adopt almost any course to prevent their goods being attached. Supporting affidavits by B. G. Heydenrych and the landlord of the shop at the corner of Campbell-street, stated that up to March of this year Abduraman had paid the rent, and that he (the landlord) still looked to Abduraman for payment of the rent. Replying to the Court, Mr. Molteno stated that the amount of the judgment was £100, and the value of the goods attached was about £75.

The replying affidavit of applicant stated that the reason why his shop was advertised on the handbill of Abduraman was because of the saving in cost of printing. He had received goods in the name of Abduraman, but it was only because he had been made to obtain goods on his own credit, and had used Abduraman's name as security. Counsel also read other replying affidavits.

Mr. Close for applicant. Mr. Molteno for respondents.

Counsel having been heard in argument on the facts.

Buchanan, A. C. J., said it was impossible to decide the ownership of the goods on affidavit, and an action would have to be instituted. On the documents before him, however, it was clear that the goods for Gaffoor went to Gaffoor's shop, and the goods for Abduraman to Abduraman's shop, and it would be an injustice to the merchants who supplied Gaffoor to allow goods they had supplied to him to be attached in order to pay Abduraman's debts. If the creditor wanted to show that these goods were executable under his writ he could bring an action, but meanwhile the attachment on the goods must be set aside, costs to be costs in the cause, or, failing an action, respondents must pay the costs.

SHUTTE V. TURNER.

Mr. P. S. T. Jones moved for a rule nisi to be made absolute, calling upon the respondent, Daniel Turner, of Constantia, to show cause why a certain sum of £50, to be awarded him by the War Losses Compensation Commission, and paid to the R.M. of Wynberg, on his behalf, should not be attached in

part satisfaction of a judgment of the R.M.'s Court, at Prieska.

Mr. M. Bisset, on behalf of respondent, opposed the application, and read an affidavit by Turner, stating that the award referred to certain animals handed over to the military for protection while he was at Upington during the late war, and that respondent was only entitled to two-tenths of the amount of the award, as the owner of only two of the animals. Deponent added that he had lost all his property through the war, and was now practically penniless. Affidavits sworn by respondent's sons were also read to the effect that certain of the animals were their property. Respondent did not oppose the application so far as £10 of the award of £50 made by the Commission was concerned.

Mr. Jones read replying affidavits to the effect that the applicant had good reason to believe that Turner owned the animals, and that Turner, as a matter of fact, put in the claim to the Commission in his own name as owner of the animals.

Counsel having been heard in argument,

The rule was made absolute to the extent of £10, respondent to pay costs of application.

GOOSEN V. GYSELAAR.

Mr. M. Bisset moved for leave to sign judgment against the plaintiff, who had failed to file his declaration.

Order granted as prayed.

Ex parte ESTATE MOSTERT.

Mr. Gardiner moved for leave to pass transfer of certain property, at Observatory, in the estate of the late Adrian Mostert, and his subsequently deceased spouse. It appeared that the matter was complicated by the fact that the late Mr. Mostert some time in the '60's surrendered his estate.

Ordered to stand over for further information.

CLACK V. CLACK.

Mr. M. Bisset (on behalf of plaintiff) moved for the removal of trial to the Eastern Districts Court.

Application granted, costs to be costs in the cause.

ESTATE HOFFMAN V. GOTTLIEB.

This was an application upon notice of motion, calling upon the respondent to show cause why he should not be ordered to disclose and deliver up to applicants, the trustees in the insolvent estate, Wm. Hoffman, all such books of account, documents, and vouchers, as are

in his possession, and control, relating to the business of the insolvent prior to his insolvency in connection with the Dominicon Tobacco Company, which business had been taken over and continued by respondent. Mr. Benjamin was for applicant; Mr. Upington was for respondent. The ground of application was that the books and documents were required for the liquidation of the insolvent estate.

Affidavits having been read,

Mr. Upington said that his client was prepared to hand over the vouchers and documents of Hoffman, but that it was most inconvenient to hand over the books of account, because he was using them in the business. He had not, however, any objection to allowing the applicant reasonable access to the books of account.

Mr. Benjamin said that Gottlieb had taken part in a very suspicious transaction, and it was only right that the trustee should have facilities for investigating the affairs of the business. The sale of the business from Hoffman to Gottlieb took place less than six months previous to the insolvency of Hoffman. He submitted that, at the very least, the applicants were entitled to the fullest inspection of the books. When the respondent was asked for an inspection of the books, he replied, "What do you want to see them for?"

Buchanan, A. C. J., said that there was absolutely no necessity for the applicants to come to the Court. The application would be refused, with costs, it being understood that the books were open to the applicants for inspection at all reasonable times.

Ex parte PROBART.

Mr. M. Bisset moved, on behalf of the petitioner, for an order on the executors for payment of a sum of £150 at present from the joint estate of her deceased husband and herself, and also for such other sums as may be required by her from time to time up to her one-half share.

Buchanan, A. C. J., said that the application was very much like asking the Court to give an opinion on a will. Instead of a barrister giving an opinion, an *ex parte* application was brought for the purpose of asking the opinion of the Bench. The difficulty, to his mind, was how he was to make an order. Why didn't the executors pay the money?

Mr. Bisset said that the executors were not prepared to take the responsibility.

[Buchanan, A. C. J.: The Court is not here to advise executors on these questions. Why not bring an action?]

Mr. Bisset said that the reason, he thought, was on account of the expense. The matter could be settled in a few

minutes if his lordship would look at the will.

Buchanan, A. C. J.: I am not here to give opinions. The petitioner may take the opinion of counsel, or bring an action. There will be no order on the present application.

LAW SOCIETY V. O'BRIEN.

Mr. Benjamin moved for directions as to service in an application for the removal of respondent from the roll of attorneys. O'Brien had been in practice in Cape Town, but his present whereabouts could not be traced.

Notice of motion was ordered to be given by publication, once in the "Government Gazette," "Cape Times," "Cape Argus," and "South African News."

SMITH V. ESTATE GROSS AND SMITH BROS.

Mr. Roux moved for a commission *de bene esse* to take certain evidence in Johannesburg.

Mr. Upington said that the respondent raised no objection to the application so far as two of the three witnesses were concerned. The action involved a question as to an alleged fraudulent transaction between David Smith (the plaintiff) and Joseph Smith (one of the insolvents), and it was desirable that one of the witnesses—Joseph Smith—should give his evidence in the witness-box.

Mr. Roux read an affidavit by David Smith, who said that he was a poor man, and it would be very convenient if the evidence of the three witnesses could be taken in Johannesburg.

Further affidavits having been read on both sides, and counsel having been heard in argument,

Buchanan, A. C. J., said that a commission would be granted to examine two of the witnesses, Nathan Chiarnas and Jacob Sohwanek, Mr. Krause to be commissioner.

DAVIDS V. DAVIDS.

Mr. Roux moved, on behalf of Magdalena Davids, a Griqua, of Kokstad, for the appointment of a commission to take the evidence of petitioner and her witnesses at Kokstad.

Application granted, the R.M. of Kokstad to be commissioner, failing him the A.R.M.

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

RILEY V. RILEY.

{ 1905.
Aug. 4th.

This was an action brought by Martha Johanna Jacoba Riley, a nurse, residing at Nelson Villa, Maitland, for a decree of divorce against her husband James Riley, an employee on the C.G.R., on account of his adultery.

The plaintiff's declaration stated that she and defendant were married in community of property at St. Mary's Church, Woodstock, in December, 1897. There was no issue of the marriage. During the early part of the year 1905 the defendant committed adultery with women at Cape Town and Claremont, and in consequence contracted a venereal disease.

Dr. Greer for plaintiff. Defendant in default.

William Thos. Birch produced the register containing the marriage of the parties.

The plaintiff stated she was married in 1897. She was a nurse by profession. Since marriage she had lived in Cape Town and Hex River. She had been very unhappy in her married life. Three weeks after marriage her husband assaulted her whilst under the influence of drink. He was a joiner by trade, but was now an engine-driver. The cruelty was mainly due to his drinking. In November last he threatened to shoot witness whilst under the influence of drink. Witness identified certain letters, in which the defendant admitted adultery on several occasions.

Dr. Greer: We ask for a division of property, but there is none to divide.

A decree of divorce was granted.

GRAY AND SON V. DEN DAUW.

This was an action brought by W. H. Gray and Son, of Cape Town, against Ellen Priscilla den Dauw, to compel her to return to them a bond for £300.

The plaintiffs' declaration was as follows:

1. The plaintiffs are William Harrison Gray and John William Gray, carrying on business in Cape Town as brokers and otherwise, under the style or firm of W. H. Gray and Son. The defendant is Ellen Priscilla den Dauw, now or lately of Cape Town, who is sued as duly assisted by her husband John Leonard Constant den Dauw to whom at some date subsequent to 1887 she was married in England according to the laws of England.

2. On or about 25th June, 1903, the plaintiffs, at the request of defendant's husband, J. L. C. den Dauw, and for his accommodation, endorsed a promissory note for £200 made by J. L. C. den Dauw in favour of H. M. Arderne, upon the express condition agreed to by the said J. L. C. den Dauw that the plaintiffs should, in return therefor as security, receive cession of a certain second mortgage bond for £200, then to be passed by Lewis Levin in favour of J. L. C. den Dauw, hypothecating in favour of J. L. C. den Dauw certain property (to wit, Lot 74 of original Lot No. 8, Woodstock, transferred to the late J. M. Wentzel on 20th April, 1841), purchased from him by the said Levin in or about June, 1903.

3. On the 12th August the said second bond was passed, but for the sum of £300 instead of £200, and in favour of defendant instead of her husband. The plaintiffs agreed to the said alterations on condition that plaintiffs' claim to receive cession of the said second bond should not be affected, and the defendant and her husband duly agreed thereto.

4. In or about October, 1903, the defendant, assisted by her husband, duly endorsed on the said bond a cession of all her right therein in favour of plaintiffs as security, as aforesaid, and plaintiffs duly obtained possession of the said bond.

5. The defendant's husband failed to meet his obligations on the promissory note aforesaid, and plaintiffs had to pay the full amount thereof, with interest, amounting in all to £216.

6. Subsequently the defendant became indebted to plaintiffs in further sums advanced by them to her from time to time, amounting in all to £105 19s. 3d.

7. In or about September, 1904, the defendant agreed to take over the liability of her said husband to plaintiffs, as aforesaid, and to make a complete and absolute cession of the bond in favour of plaintiffs in discharge of the indebtedness of herself and her husband to plaintiffs to the extent of the amount of the aforesaid bond, and the bond was delivered by plaintiffs to defendant for the purpose of signing the necessary endorsements of cession in plaintiffs' favour.

8. The plaintiffs repeatedly endeavoured to obtain the return of the bond from defendants, but were unable to do so, and on or about the 17th October, 1904, the defendant and her husband left this colony without the previous knowledge of plaintiffs, and the plaintiffs have not since then obtained possession of the said bond.

9. The plaintiffs have not received payment of any portion of the sums of £216 and £105 19s. 3d., aforesaid, amounting in all to £321 19s. 3d.

Wherefore plaintiffs claim: (a) An

order calling upon defendant to restore to plaintiffs forthwith the second bond for £300, as aforesaid; (b) an order calling upon defendant forthwith to take all steps necessary to effect the completion in writing of the absolute cession of the said bond to defendants as aforesaid, and of the registration thereof, and, failing compliance therewith, the plaintiffs pray that this Honourable Court will make such order as it shall deem fit to enable plaintiffs to secure and register their rights in respect of the said second bond; (c) payment of £321 19s. 3d., moneys paid by plaintiffs to, or on behalf of, defendant, and at her special instance and request, or for which she has taken over liability, as aforesaid, less the sum of £300 (the amount of the said bond), to be deducted as from the date of registration of the said bond in plaintiffs' favour; (d) interest *a tempore morae*; (e) alternative relief; (f) costs.

The defendant's plea was as follows:

1. The defendant admits paragraph 1 of the intendment save that she says that she was married in December, 1887.

2. As to paragraph 2 she admits that the plaintiffs at the request of her husband and for his accommodation endorsed the said promissory note; but she does not admit that her said husband agreed that the plaintiffs should in return as security receive cession of a certain second mortgage bond for £200 then to be passed by Lewis Levin nor does she admit that the plaintiffs endorsed the said note upon any such condition. She says that it was always intended that the said bond should be passed in her favour, and it was never intended that it should be passed in favour of her husband. If her husband did agree that the said bond should be ceded to the plaintiffs she was no party to the said agreement and is not bound thereby.

3. Save that she admits that the said Levin did on the 12th August, 1903, pass a second bond in her favour for £300, instead of £200, she denies the allegations in paragraph 3.

4. As to paragraph 4 the defendant denies that in October, 1903, or at any time she endorsed on the said bond a cession to the plaintiffs or that she ever agreed to cede the said bond to the plaintiffs as security or otherwise. She admits that on the said bond there appears what purports to be a cession above the names of herself and her said husband, but she says that what purport to be the signatures of herself and her husband are forgeries and were not written by herself and her husband respectively.

5. She admits that the said bond came into the possession of the plaintiffs, but says that this was in or about September, 1903. In or about the said month the defendant delivered the said bond to the plaintiffs in order that they might lodge it with the Bank of Africa and thereby

obtain moneys from the said bank for her husband. She denies that she delivered it to the plaintiffs as security for any moneys then owing to them.

6. As to paragraph 5 she admits that her husband was unable to meet his obligations on the said note, but she has no knowledge as to the other allegations in the said paragraph.

7. As to paragraph 6 she denies that she is or ever was indebted to the plaintiffs in the sum of £105 19s. 3d. or in any sum.

8. Save that she admits that the plaintiffs returned the said bond to her, she denies each and all the allegations in paragraph 7.

9. She says further that on the 17th December, 1903, in her capacity as agent for her husband who was then absent from this colony she passed in favour of the plaintiffs a certain first mortgage bond for the sum of £800 hypothecating certain land with buildings thereon situate at Green Point the property of her said husband. The said last-mentioned bond was passed as security for all moneys owing by her said husband to the plaintiffs and is still of full force and effect.

10. She admits that on or about the 17th October, 1904, she and her husband left the Colony and that she has possession of the aforesaid second bond and has refused and refuses to deliver it to the plaintiffs, but otherwise denies the allegations in paragraph 8.

11. As to paragraph 9 she admits that she has not paid any portion of the sums of £216 and £105 19s. 3d. claimed by the plaintiffs, but denies that she is liable therefor. Further with regard to the sum of £216 she refers to the allegations in paragraph 9 hereof. Wherefore she prays that the plaintiffs' claim may be dismissed with costs. And for a further plea, in case this Honourable Court should hold that at any time she agreed to cede the aforesaid second bond to the plaintiffs as security for any debt due by her husband, she says as follows:

12. She is not bound by any agreement to be surety for her husband or to cede the said bond as security inasmuch as she has not renounced the benefits of the *Senatus consultum Velleianum* or of the *Authentica si qua mulier*.

Wherefore she prays that the plaintiffs' claim may be dismissed with costs.

Mr. Close (with him Mr. Gutsche) for plaintiff Mr. Gardiner (with him Mr. P. S. T. Jones) for defendant.

The plaintiff, examined, stated that on the 25th June, at the request of defendant's husband, he endorsed a promissory note for £200 for him in favour of H. M. Arderne, upon the express condition that the plaintiffs should in return as security receive cession of a second mortgage bond for £200 then to be passed by Lewis Levin in favour of Den Dauw. At this time witness did

not know that there was a second bond on the property. Mr. Den Dauw did not tell witness of the second bond. Witness wanted the transfer deeds, and went to the deeds office to get them. There he found that there was a bond to Mr. Arderne for £600. Witness asked Den Dauw why he did not tell him about the bond. Den Dauw said he had not done so. They went to Mr. Arderne together, where Den Dauw admitted the second bond. An arrangement was arrived at by which Mr. Arderne agreed to take off his second bond on the Argyle-street property and take a third bond on the Green Point property for £500, on condition that witness signed a promissory note for £200 as collateral security. Mrs. Den Dauw was waiting in witness's chambers to know the result of the interview with Mr. Arderne. Witness told Den Dauw that he would not sign any promissory note unless he had a cession of the property to be transferred to Levin. This was agreed to, and the note was signed. The bond was passed by Mr. Levin on August 12, 1903. The note was for four months. It was torn up when subsequent ones were substituted. It was accepted by Den Dauw and endorsed by witness. On the 12th August the second bond came. Finding it impossible to get a bond for £1,000, they had to take £800 and raise a second bond for £300. It was arranged that the bonds on the Argyle-street and Green Point properties were to be in defendant's name. The reason this was done was to protect the property, as the husband was going through the money rapidly. Witness only said that certain papers connected with the case had disappeared from his office.

[Maasdorp, J.: Where were these papers kept?—In the files of papers in my private office.]

[Maasdorp, J.: When did they disappear?—I did not miss it until after this action commenced.]

[Maasdorp, J.: You made full search in your office?—Yes. Mrs. Den Dauw was in your office as an assistant clerk for some months, and she had full access to these papers. Of course, I do not mean to say that she took them.]

Mr. Gardner submitted that that was no proof of the disappearance of the papers.

Continuing, witness said that the agreement about changing the ownership of the property would not affect their rights. Witness got possession of the bond after it was passed. Mrs. Den Dauw knew witness had it. Witness kept the bond in the office some time. One day Mr. Den Dauw was in the office, when Mrs. Den Dauw also entered. Witness told them they had better sign the cession. They signed, and it was witnessed by "J. W. Gray and C. le Roux." At that date there were no stamps on the document, Wit-

ness had at that time opened an account with the A.B.C. Bank. Witness deposited the bond with the bank as security for an overdraft. Mr. Smith, the manager, said the bank were not satisfied with the signatures to the bond, and wanted a cession form filled up. He wanted Mrs. Den Dauw's signature to it. The signature "E. P. Den Dauw" to it was in defendant's handwriting. Witness changed his account to the Bank of Africa in July, 1904. Shortly afterwards witness got defendant to cancel the stamps on the bond. It became necessary for Mrs. Den Dauw to sign the document, and at the defendant's request witness allowed her to take the document home on a Saturday to get it signed, and she promised to return it on Monday. On Monday she did not turn up, and witness sent to inquire about the bond. She sent back word to say she was sick. As the bond was not returned, witness wrote to defendant stating that as the bond was held by the bank as security for an overdraft, that if it was not returned he would have to realise on his property to meet the overdraft. He was very anxious to get the bond back. Witness went to see Mrs. Den Dauw about the bond. She was in bed. Witness asked her about the bond, and she said she had left it with a lawyer. Witness said he wanted it back, and she replied that as soon as she could get out she would take it back. Witness went away then. He repeatedly sent for the bond, and the reply was always that Mrs. Den Dauw was too ill to attend to business. Mrs. Den Dauw left for England a little later on. She wrote to witness the day before she sailed, but witness did not get the letter until six days had elapsed. She said nothing in the letter about the bond. The defendant did not communicate with witness during her absence. Witness swore to the signatures on the bond. They were not forged.

In cross-examination by Mr. Gardiner, the witness stated he purchased the Green Point property for £1,400. He got nothing on his bond which he held over that property. Mrs. Den Dauw consented in March, 1904, to make an absolute cession of the bond. Witness released Mr. Den Dauw when the wife became security. Witness was positive that Mrs. Den Dauw signed the documents produced bearing her name. He emphatically denied that he signed them for her.

Maasdorp, J., at this stage said he really thought both parties should consider their position.

Mr. Gardiner said he would consider it.

Mr. Gardiner said his client took up the position now that while she had no recollection of putting her signature to the document, she did not feel justified in insisting on the charge of forgery.

[Maasdorp, J.: I think she could not have done otherwise, knowing the signature was supported by two or three witnesses.]

William Gray, in reply to Mr. Gardiner, said he informed the defendant in March, 1904, he must have an absolute cession of the bond. He did not know that the bank manager had put on a cession as security. Sometime in September he wanted the defendant to strike out the words "as security," and make it as a complete cession, and sign it along with her husband. The bond was to be ceded as security for Mr. Arderne's promissory note. He would not have advanced Mr. Den Dauw a single penny, except through his wife, who guaranteed it. Mr. Den Dauw was to go to Belgium to get some money left to him by his mother, and witness believed him when he advanced the money to Mrs. Den Dauw for his passage. The advance made to Mrs. Den Dauw on the Ashted-road property was a personal matter, and not to her in her capacity as holder of her husband's power of attorney. The cash payments were not made to Mrs. Den Dauw on behalf of her salary as a clerk in witness's office, where she received £5 a month, and her tram fares. The £800 bond had nothing to do with the liability in respect of Arderne's promissory note.

Re-examined by Mr. Close: He did not know at the time that there was a second bond in favour of Mr. Arderne; Mr. Den Dauw led him to believe there was not. He lent the money to Mrs. Den Dauw to give to her husband in order that he might go to Belgium.

John Gray, son of the last witness, stated he was present when the arrangement was made about the passing of the bond which was given as cession to his father. There was no question of an advance of money to her husband after the Belgium incident. It was fully understood that the bond was to be an out and out cession when the money was advanced. Mrs. Den Dauw never raised the defence that she raised now that plaintiff had no right to the bond as against the promissory note.

Cross-examined by Mr. Gardiner: He was present when the memorandum was drawn up, and it was at that time the question came up about putting the Green Point property in her name. In suing by edictal citation, it said that it was suggested to the defendant to cede the bond in September, 1904, but witness thought the suggestion was made in December, 1903, or March, 1904. He told the bank manager that the cession of the bond was an absolute one, and not as security. While he knew that Mrs. Den Dauw was holding her husband's power of attorney the advances were made to her personally, and not in her other capacity.

Frederick William Brooke, manager of the Bank of Africa, Cape Town, stated that in July, 1904, he was at the market branch when some securities were deposited by Grays with him. He wanted to get the cession registered, and on the 16th September the Deeds Office threw it out on account of the words "as security" appearing on the bond.

Cross-examined by Mr. Gardiner: Witness told Mr. Gray that he would have to have another cession.

Lewis Levin, a prospective purchaser of the property, said that the broker's note showed that the purchase was to be from Mr. Den Dauw.

Mr. Close closed his case.

Mrs. Den Dauw (defendant) stated she was married in England. She came to the Cape in 1897 and had some £500. Her husband had between £300 and £400 of her money, which was used for the purchase of certain ground. She never persuaded her husband to put the bond in her name because he was a spendthrift; it was simply on account of her money advanced. In September, 1903, her husband wanted more money, and it was arranged that Gray should deposit some other securities along with the bond, and get an overdraft. Witness did not agree to be responsible for her husband's passage money. One of the conditions was if she passed the bond for £800 her bond would be returned. It was never understood, although Mr. Gray had repeatedly asked her to do so, that it was an absolute cession. She was not prepared to say that the signature on the bond was a forgery, but she did not remember signing it. When she left the country it was with no intention of evading any liability; she simply left on account of her health. She never agreed to take over her husband's liabilities. She had no knowledge where her husband had gone to. When she went to Europe she left her husband here, and on her return he left the address of P.O., Kimberley, but the letters had been returned.

Cross-examined by Mr. Close: She had not a banking account, and that was the reason she passed the bond through Mr. Gray. The bond at length got into her possession, and she was not satisfied with certain signatures on it. Gray asked for it, but as she had not signed it she refused to hand it over. When she left for England she left her address with Mr. Steer. She left the bond with a Mr. Kerr in case of a sale. She could not say why Steer or Kerr refused to answer the letters to Gray's attorneys. She never took away the bond for her husband to sign it.

Alfred S. Kerr, with whom the defendant and her husband lived for a time, stated that when Mrs. Den Dauw went to England the bond was left with him.

Both of the Grays came to him and asked him for the bond, which he refused to give up pending an order of the Court. He did not give her address because the Grays knew the address of her family in England.

Cross-examined: He was positive that the Grays knew where the defendant was.

Mr. Gardiner closed his case.

Counsel having been heard in argument on the facts.

Maasdorp, J., said that in order to determine the questions at issue between the parties it was necessary to determine what took place in June, 1903, when the property was sold by Mr. Den Dauw to Mr. Levin. It was said on the part of the plaintiff that when the sale of the property in question took place between Den Dauw and Levin it was found that some difficulty would stand in the way of passing transfer, because there was a bond on the property in favour of Mr. Arderne. It became therefore necessary to obtain the consent of Mr. Arderne to the transfer taking place, but he refused to give his consent unless his liability was reduced or secured to the extent of £200. In order to overcome that difficulty it was quite clear, there being no contradiction, that Mr. Gray consented to become a party to a promissory note made by Mr. Den Dauw in favour of Mr. Arderne. The liability was taken by himself for the purpose of facilitating transfer. It was natural to suppose that he would require some security for such liability, and it was agreed that the bond to be passed by Levin should be handed to him as security for the liability he undertook. Up to this point there was no dispute as to the facts. Then Mr. Gray said the question arose as to whether the bond should be made in favour of Mr. or Mrs. Den Dauw. Mrs. Den Dauw wished to protect both herself and her husband, because of the latter's spendthrift habits, by getting the bond out of her husband's possession, and having it in her own name. Mr. Gray said he was a consenting party to that as long as it was handed over to him as security for the £200. The conflict on this point was that raised by Mrs. Den Dauw, who said that no question arose as to securing herself with respect to the retention of the bond in her own name, and that she secured the bond by a debt that was due to herself. He quite agreed that if that was so then an important question would be raised as to the liability of Mrs. Den Dauw with regard to her suretyship for her husband, for which she received no benefit. It was therefore important to decide the facts upon this point. There was this conflict between Mr. Gray and Mrs. Den Dauw, and it was very necessary to see what position Mrs. Den Dauw had taken up in this case, in order to

decide whether her evidence was quite reliable in the matter. The first defence raised in the case was that her alleged signature was a forgery. That had been withdrawn with an explanation, that even now she was not satisfied that it was hers. He would go no further. He was satisfied that it was hers, and that the signature was made in such a way that she could not have forgotten it. The signature was supposed to have been made in August, 1903. It was quite possible that if that was all, it might have escaped her memory, because it was a signature in blank, but they found that in August, 1904, the matter was conspicuously brought to her mind, because she was called upon to cancel stamps on a document containing a full cession of the bond as security. That was a circumstance that could not have escaped her memory. Then there was another point. It was undoubtedly a fact that this document was handed to her to submit to her husband to obtain his signature for a full cession. She got the document out of Mr. Gray's hands and took it away, and she now said that she thought she had a perfect right to do as she liked with it, and she cancelled the cession and struck out her own signature and that of her husband. That was most improper conduct. That being so, the question was whether Mr. Gray had not given his evidence in such a manner now as to raise a likelihood or an absolute conviction that it was correct. He found that although the bond was placed in favour of Mrs. Den Dauw's name, it was simply for the purpose of securing both her and her husband, and it was really her husband's property that was given at that time as security for debt due by the husband to Mr. Gray. Up to this point it appears that a contract was entered into between the parties for giving the bond as security. The plaintiff alleged that the position was subsequently altered, and that a further contract was made to the effect that an absolute cession should be passed. The plaintiff stated that this occurred in March. Now, he (his lordship) was rather doubtful at one time whether the question of absolute cession had been raised, until the bank appeared on the scene, but Mrs. Den Dauw admitted that the question was raised, and that she would not consent to it. He was satisfied that if it was raised it was consented to, because the defendant was in some difficulty and required subsequent assistance in financial matters, after her husband left for Europe in a business in which she and her husband were interested. Therefore the Court had to accept Mr. Gray's statement that it was agreed in September to pass an absolute cession. The question was raised as to whether there was power under the English law in the

wife to bind herself, but counsel had admitted that under the circumstances during the absence of her husband she had a perfect right to enter into such a contract. The contract was a *bona fide* one, and it amounted to this. She agreed, instead of giving this bond simply as security for the payment of £200, to give absolute cession of it as payment for £210 due on the promissory note, and further payment of moneys advanced amounting to nearly £300. It had been said that at the time the agreement took place the liability did not amount to £300, and that consequently it was unlikely that a cession would be agreed upon for the payment of a debt of that amount, when it did not exist, but from the accounts he was satisfied that the debt was very nearly £300. There was no doubt that it was agreed that the cession should be out and out. It seemed that in September, 1904, this bond was handed to Mrs. Den Dauw for the purpose of carrying out the subsequent agreement. She received possession of this document, and kept it. She struck out the cession as security. The document was therefore in such a condition that in order to restore the rights to the plaintiffs it would be necessary to have a proper cession executed, and the plaintiffs were entitled to specific performance of their agreement by full cession of the bond. An order would therefore be given in terms of prayers (a) and (b) of the declaration. It appeared that the full debt now due to the plaintiffs amounted to £21 19s. 3d. The Court would therefore give judgment in favour of the plaintiffs for that amount.

Mr. Gardiner said he understood the plaintiff only claimed the £300.

Mr. Close: That is so.

Maasdorp, J.: Then judgment on those terms will be given. The bond will now be handed to the Registrar, and from him to the plaintiff, and defendant is to give full cession of the bond to the plaintiff by noon to-morrow. The defendant is to pay all costs.

[Plaintiff's Attorneys: Fairbridge, Arderne and Lawton. Defendant's Attorney: J. O'Reilly.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

STERN AND CO. V. HARRIS. { 1905.
Aug. 4th.

This was an action brought by Stern and Co., of Upington, against Harry Harris, of Cape Town, to recover damages in the sum of £2,000 for an alleged breach of agreement arising out of the purchase by the plaintiff firm of the

business formerly carried on by defendant at Upington under the style of Harris Bros.

Plaintiffs' declaration was as follows:

1. The plaintiffs are William Stern and Leopold Nussbaum, trading together in partnership at Upington under the style of W. Stern and Co.

2. The defendant Harry Harris now resides in Cape Town, but heretofore, before the 16th day of July, 1900, he carried on business at Upington, under the style of Harris Brothers.

3. On the 16th day of July, 1900, the parties entered into the agreement in writing, whereof a correct copy is hereto annexed, to which the plaintiffs crave leave to refer as though the same were here set forth in full.

4. By the said agreement the plaintiffs purchased, *inter alia*, for £1,500, the different forms of business, with the goodwill thereof, carried on by the defendant, and the defendant, by clause 5, specially undertook not to start, open, or support any business such as store, shop, bar, liquor, produce, etc., within fifty miles of Upington, in opposition to the plaintiffs.

5. In connection with and as part of the business heretofore carried on by the defendant and purchased by the plaintiffs, he was accustomed to contract for the supply to the Colonial Government of such produce, mealies, oats, oathay, and the like, as was required from time to time and year to year, for the public service in connection with the gaol and in connection with the police engaged in the town of Upington, the district of Gordonia and neighbouring localities, and it was the duty of defendant, in conformity with his said agreement, neither personally nor as a member or partner of any firm to tender or offer to contract for the supply of such produce at or from the town of Upington, or within the radius of fifty miles from the said town.

6. In breach of his duty and acting in concert or partnership with another or others, and using the style of Harris Brothers, the defendant wrongfully and unlawfully in 1903 tendered for and obtained the contract with the Colonial Government for the supply of such produce to the police throughout the district of Gordonia for the year 1903 to 1904, and thereafter in 1904, in like manner, acting with another or others, and again using as aforesaid the style of Harris Brothers, the defendant in breach of his duty wrongfully and unlawfully tendered for and obtained the contract for the like supplies for the town of Upington, the plaintiffs on this occasion being also tenderers, and being successful in obtaining the contract for such supplies for the neighbouring field-cornetries, but not for the town of Upington.

7. During the year of the contract for police supplies for 1903 to 1904, the defendant by his agents used the town of

Upington as a base or central place of business for the distribution of the required produce, and both during that year and since that contract expired he has wrongfully and unlawfully started, opened, and supported a business as a merchant or purveyor of produce within the town and within the radius of fifty miles from the town of Upington.

8. The plaintiffs have sustained serious injury in their business and the goodwill thereof by reason of the wrongful and unlawful acts of the defendant committed as hereinbefore set forth in opposition to them, and the defendant to the detriment of the plaintiffs has made great profits in business out of the contracts aforesaid, which he has wrongfully and unlawfully obtained in violation of his agreement with the plaintiffs, and the plaintiffs estimate their damage in the sum of £2,000, and claim accordingly.

Wherefore the plaintiffs pray for judgment for the sum of £2,000 sterling, or for other relief and costs of suit.

Clause 5 of the agreement was in the following terms: The said Harris Bros. and the said Harris undertake not to start, open, or support any business such as store, shop, bar, liquor, produce, etc., within 50 (fifty) miles of Upington, in opposition to the said Wm. Stern and Co.

Defendant, in his plea, said that plaintiffs did not now and had not for some considerable time traded at Upington, or within fifty miles thereof. In January, 1900, his (defendants') business premises were burnt down, and he carried on no business thereafter at Upington, and in July he entered into the said agreement. He had theretofore tendered for the supply to Government of produce, etc., as might be required for the public service in connection with the gaol and police engaged at Upington, and the neighbourhood and such tenders were sometimes accepted, but the defendant said that when the said agreement was entered into he had no contract with the Government. He admitted that in 1903 the firm of Harris Bros., of which he was a member, and which carried on business in Cape Town, sent in a tender to the Colonial Government for the supply of produce to the police throughout the district of Gordonia for the year 1903 to 1904, which tender was accepted by the said Government, and thereafter the said firm, as aforesaid, trading in Cape Town, sent in a tender for the like supplies for the town of Upington, which tender was accepted by the Colonial Government. He denied that that was a breach of the agreement that he entered into with the plaintiffs, or that it was wrongful or unlawful. He said that plaintiffs did not tender for the said supply to the said police in 1903 for the year 1903-4. During the said contract for police supplies the aforesaid firm of Harris Bros. sent

the said required and ordered supplies under the said contract with the Government, by rail and otherwise, to Upington, from whence their agent, for that purpose only, sent the various supplies, which arrived at Upington to the outlying stations. Defendant said that neither of the contracts for the supplies for the police in Gordonia and the town of Upington was a breach of the agreement with the plaintiffs. He, therefore, prayed that the claim may be dismissed, with costs.

Plaintiffs, in their replication, admitted that on the 1st September, 1904, they sold their business, but said they continued to carry on business at Upington, especially in the way of purchasing produce and other requisites, to be supplied under contract with the Colonial Government, and the Government of German South-west Africa. They said that the tendering and contracting to supply produce was part of the defendant's business, which they purchased. They admitted that they did not tender for the supplies for 1903-4, but said that they did not see any notices calling for tenders for such contracts. They admitted that defendant carried on business at Cape Town, but said specially that he had carried on business at Upington in respect of the matters complained of in this suit, both personally and by agents, and had not only distributed produce, but had purchased supplies in the neighbourhood of Upington.

Upon this issue was joined.

Mr. Searle, K.C. (with him Mr. Russell) for plaintiffs. Sir H. Juta, K.C. (with him Mr. Burton) for defendant.

Mr. Searle said that since the pleadings were filed, the plaintiffs had discovered, he believed only yesterday (Thursday), that not only did the defendants tender for the 1903-4 contract, but also for the 1902-3 contract, and he applied for an amendment of the declaration accordingly.

Sir H. Juta objected to the amendment asked for, and said that it would raise a point that he had no evidence at present to meet. He added that if it were merely a question of whether the contract with the Government was a breach of the agreement, then that could be discussed without any evidence. That point would decide contracts for 1902-3-4, or any other years.

[Hopley, J.: It almost seems to me that, unless there be a considerable dispute on the facts, the matter might have been settled by a special case.]

Sir H. Juta said that he did not know why an exception was not taken to the plea.

Mr. Searle urged that the amendment to the declaration should be allowed.

Hopley, J., said that the amendment would not be allowed at present, but it would be open to him to allow the amendment at a later stage if he

thought no prejudice would accrue to the defendant.

William Stern (one of the plaintiffs) was called, and gave evidence in support of the case set out in the declaration. He spoke of the way in which the prices of produce were forced up in 1903 by reason of the way in which Jacobson bought up the local produce. Witness had as a consequence to send to Port Elizabeth for mealies and bedding. In 1904-5 goods came in direct to the police camp. Witness sold his business in September, 1904, to take effect from November. Robinson and Hugo came into possession in November, 1904. Witness had prepared a schedule showing how his damages were made up. On the 1903 contract he estimated he lost in his trading about £1,000, on account of farmers whom they would have bought mealies from not having traded at his stores.

[Hopley, J.: Why didn't you throw a sprat to catch a herring, and bid higher than Jacobson?]

It would have been too big a loss on the other side. He tendered for forage in 1903 at 45s. per 100 lb. The cost would have been 30s., so that if he had got the contract he would have made 15s. a bag. The profit on 1,000 bags would have been £793 15s. The bags were reckoned at 150 lb. each.

By the Court: He could not say that if Harris had not got the contract he (witness) would have got it. Nobody else seemed to know about it. The contract was let at 60s.

[Hopley, J.: Do you suggest a police scandal commission?—If there were no notices and no other tenders were called, the Government should certainly inquire.]

Sir H. Juta said that, on behalf of the Government, he might say that the contract was advertised.

Mr. Searle said that the contract was not advertised in the "Victoria West Messenger," which was the recognised organ for Government notices in the district of Gordonia.

Witness, replying to the Court, said that he could not have tendered for the contracts in 1903. He tendered to the Kimberley police district later on. As regarded the contract for 1904-5, he obtained the contract for the out-stations, but Harris obtained the contract for Upington. Witness tendered for both Upington and the out-stations at the same figures, viz., 24s. 6d. for oats, 24s. for oathay, 21s. for mealies, 5s. for bedding, 24s. for bran, per 100 lb. in each case. The margin of profit was very much smaller on the out-station contracts than on the Upington contract in consequence of the cost of transport riding. Witness estimated his damages on the Upington contract at £759 15s., being the difference between the tender prices that he sent in and the cost of the produce landed in Upington. In addition, he claimed dam-

ages because he could have bought the mealies and oatbaj required in Upington, and would have done trade with the farmers which he estimated at £450, yielding a profit of £150. The profit on the out-station contracts would have been very small. He also claimed that he had lost in Upington on the first contract £1,000 worth of trade, on which he estimated the profit at £333.

Cross-examined: He had sold the goodwill for the contracting, general stores, and bottle stores for £250. He denied that he assumed that Government contracting was not included in his contract with Harris. He did not look at the "Government Gazette" at the time of the 1904 contract, and he did not ask the Magistrate or the Quartermaster. That was not because he knew that contracting was not included in the contract between himself and Harris. Henry Harris was not several times at witness's store trying to buy chaff for this very contract.

Re-examined: Harry Harris and Henry Harris were different persons. Henry Harris was brother of Wolf Harris. Henry Harris never told witness that Harry Harris was in the contract.

Thomas Jacobson said he had carried on business at Upington for five years as a general dealer. He knew Harris Bros. He entered into a sub-contract with them in March, 1903, to supply produce to the police.

Hopley, J., said that he proposed to allow the amendment in the declaration asked for by Mr. Searle, and at the conclusion of that day's hearing adjourn the case till Tuesday, thus enabling defendant to prepare to meet any new points.

Sir H. Juta protested, and said that, as he had already pointed out, if the tendering and contracting in 1903-4 were a breach of the agreement, then it would make no difference to the main issue whether there had been this contract in 1902-3.

Hopley, J., said that he would not allow the amendment at present, under the circumstances.

The witness Jacobson said his first agreement with Harris Bros., was that he should supply at 45s. per 100, Harris Bros., to take the difference between that figure and the contract price. Witness afterwards had an agreement with Harris to supply at 40s. per 100. These agreements lasted six months, at the end of which time he became an agent of Harris Bros. at 8s. 6d. per 100 for transport for the first three months, rising to 9s. in the following three months. In March, 1904, Henry Harris came to Upington, and hired witness's store at £10 a month. Witness had then ceased to be agent of Harris Bros. Witness had sold bedding for the police contract to both Harry and Henry Harris. Witness did not

tender for the contract in 1903, because he did not see any notices. He had tendered for the contract in 1904, and also in 1905, but had not got the contracts.

Cross-examined: He discussed this police contract with Stern in 1903, when the goods were arriving at his store. Witness and Stern had shops opposite each other. He was certain that Stern knew in 1903 that Harris Bros. had got the contract, and that Harry Harris was Harris Bros.

Hendrik Pieter Steyn, farmer, Upington, said that in the winter of 1903 Jacobson came and told him that he would give 2s. a bag more than any other shopkeeper for mealies that he wanted for Mr. Harris, who had to supply the police at Kenhardt and Upington. Jacobson said that he could tell the other farmers of this offer. Jacobson purchased nearly all the mealies grown that season. It was usual for the farmer to deal with the shopkeeper who bought his produce.

Cross-examined: In the year 1903 he did not sell his mealies to Jacobson, but to his own children. He charged his children £2 a bag.

Jacob Jacobus Hugo, of the firm of Robinson and Hugo, general dealers, Upington, said that he entered into an agreement with Stern that they should join equally in the proceeds of any contract they entered into.

Cross-examined: This arrangement did not refer to the police contract that his firm had taken over from Stern.

Certain Cape Town witnesses remained to be called for the plaintiffs.

Major F. A. Elliott, C.M.P., called for the defendant, said that in 1902 he was Acting Commissioner for Cape Police, District No. 2, at Kimberley. He also occupied that position in 1903. It was customary to send notices to the various districts for supplies. In 1903 a tender by Harris Bros. for supplies to Gordonias was accepted. He did not remember a tender having been sent in by Stern. The notice was inserted in the "Government Gazette." He thought the notice might not have been inserted in the local paper owing to an oversight. When the tender of Harris Bros. was accepted, he did not know anything of Harry Harris; he simply looked to Harris Bros. He remembered having seen Wolf Harris.

Cross-examined: All the tenders in 1902 were rejected, because they were too high. He did not know how many tenders were received. Harris Bros. afterwards sent in a tender for £902 3s. He thought that tender was lower than those that had been received. They looked to the surety attached to the tender. He thought the rejected tenders of 1902 would be obtainable from the office of the Quartermaster of the C.M.P.

Re-examined: After the contracts had been let, the police at Upington were advised who the tenderers were.

Hopley, J., on Mr. Searle's application, allowed the amendment of the declaration already mentioned.

[The case was settled out of Court.]

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice (the Hon. Sir JOHN BUCHANAN) and the Hon. Mr. Justice HOPLEY.]

COMMISSIONER OF TAXES v. 1905.
DE BEERS CONSOLIDATED } Aug. 7th.
MINES. " 21st.

Income tax—Share of profits made by a foreign syndicate on diamonds found in this Colony—Sec. 42 of Act 36 of 1904.

The D.B. Diamond Mining Company, carrying on business in this Colony, had arranged to sell their diamonds to a London syndicate, on condition, inter alia, that they should receive a certain percentage of the profits made by the syndicate. Upon this percentage the Colonial Commissioner of Taxes now claimed income tax under Act 36 of 1904.

Held on appeal from the Court of Review, that as the company's share of the profits made by the syndicate was derived from diamonds found in this Colony, Sec. 42 of Act 36 of 1904 was wide enough to cover this, and that it was, therefore, subject to income tax.

This was virtually an appeal (in the form of a special case stated) from a decision of the Court of Review on questions of Income-tax as to the liability of the De Beer's Consolidated Mines to pay Income-tax on a certain

share of profits derived by them from the operations of a certain London Syndicate.

The case was stated in the following terms:

1. The De Beers Consolidated Mines, hereinafter called the company, carries on, *inter alia*, the business of mining in this colony.

2. The company was assessed by the Commissioner of Taxes (hereinafter called the Commissioner) under Act 36 of 1904 for income tax purposes on its general sources of income for the year ending 30th June, 1904.

3. The company objected under section 72 of the said Act to the Commissioner's assessment of £8,135 9s. as income tax in respect of a certain sum of £162,709, this latter sum being an amount received by the company as its share of profits on certain dealings in diamonds hereinafter referred to. The objection was made on the ground that these profits were made in London, and not in this colony. The company did not object to the remainder of the assessment by the Commissioner in respect of the rest of its income, and has paid income tax thereon.

4. The company appealed against the assessment, and on the 6th and 7th March, 1905, the appeal was heard at Kimberley by the Court of Review, constituted under Act 34 of 1904. The appeal was allowed.

5. The Commissioner, being dissatisfied with the decision of the Court of Review, has, under section 74 of Act 36 of 1904, requested that a case be stated for the decision of the Hon. the Supreme Court on the question of law involved in the decision given by the Court of Review.

6. On the 2nd December, 1901, certain persons (hereinafter called the syndicate) entered into an agreement with the company relative to the disposal of the company's diamond output.

7. Clause 1 of the agreement provides as to the purchase of the output for a period ending February, 1902. Clause 12 gives an option to continue the agreement as to the output for the period ending June, 1902; while clauses 15 and 16 give further options for periods extending finally to 30th June, 1906.

8. The agreement was during the year ending 30th June, 1904, of full legal force and effect between the company and the syndicate, in terms of, and to the extent covered by clause 20 thereof, the right of election and option under clause 16 aforesaid having been regularly and duly exercised.

9. Some of the members of the syndicate, with large interests therein, also hold a large number of shares in the company. Some are directors in the company. Mr. Hirschhorn, who is an alternate director of the company with Mr. Beit (who is largely interested in the syndicate), is the valuator, who, act-

ing on behalf of the syndicate, fixes with Mr. Brink (acting for the company) the valuation at which the company actually takes over the diamonds which it purchases.

10. Some of the members of the syndicate were not shareholders of the company.

11. The quantity of diamonds purchased by the syndicate during the year of assessment largely exceeded the minimum provided for under the agreement.

12. The price of the diamonds purchased by the syndicate under the agreement was, during the year in question, arrived at under clause 13 of the agreement. The price was an adjustable one, and the adjustment was made every six months for the ensuing six months.

13. In practice the actual value of and amount to be paid for each parcel of diamonds bought by the syndicate under the agreement was determined by two valuers, one acting for the syndicate and one for the company. There is nothing to show that such price was not the fair market price in the Colony.

14. The syndicate purchased the diamonds as rough diamonds at Kimberley, and the price to be paid for any parcel of diamonds having been ascertained and defined at Kimberley by agreement between the valuers as above mentioned, the syndicate took delivery at Kimberley from the company, making payment there at the price fixed as against the delivery of the diamonds, and the syndicate's insurance of the diamonds took effect on such delivery.

15. No further business in connection with the diamonds was done in the Colony. The syndicate would forward the rough diamonds to London, there re-sort them for the various markets of the world, and sell the diamonds still as rough diamonds, save that occasionally an exceptional stone would be cut.

16. The entire contract for the dealing in the diamonds after delivery to the syndicate was in the hands of the syndicate, and the company had no control of such dealings.

17. The company, however, had, under clauses 10 and 11 of the agreement, in addition to the payments made for the diamonds as aforesaid, a right to a share in the profits made in the dealings of the syndicate with the diamonds after it received delivery thereof. The company was also bound to share in the losses incurred in such dealings.

18. The company, in its books, kept two separate accounts in connection with these diamonds. One account was for the dealings in Kimberley, the other was for the share of the profits received from the syndicate thereafter. In this latter account, the company would enter for each half-year the amount of profit received for such half-year, but

there was nothing to earmark the profits earned in the half-year as being for the diamonds bought by the syndicate in such half-year.

19. In its annual published profit and loss account, the amounts received on both accounts are brought up under one heading, to wit, the "diamond account," standing at £4,918,567 18s. 5d.

20. The amount received by the company from the syndicate as its share of the profits for the year of assessment (the year ending 30th June, 1904), and included in the sum mentioned in the preceding paragraph, was £162,709—the sum on which the income-tax assessment now in dispute was made, as set out in paragraph 2 hereof.

21. The Commissioner contends: (a) That in its own accounts the company treats the amount received from the syndicate as part of the proceeds of the diamonds produced in the Colony during the year; (b) that, although the sale in Kimberley to the syndicate is an out-and-out one, the price to be paid to the company is not finally fixed until the diamonds have been disposed of by the syndicate; (c) that the wording of clause 10 of the agreement shows conclusively that the additional payments made are portion of the purchase-price for which the company disposes of the diamonds to the syndicate, and therefore that the whole amount received by the company is income derived from the production and disposal of diamonds in this colony, and is liable to taxation.

22. The company contends: (a) That the agreement (annexure "b") is in two parts—one an agreement as to the dealings in Kimberley, the other an agreement in which the company and the syndicate are partners in the dealings in London; (b) as to the dealings in Kimberley, as soon as each parcel of diamonds is definitely taken over, and the fixed, agreed on price paid, and delivery of the parcel taken, a complete out-and-out sale is effected under the agreement, and the transaction in the Colony is finally concluded, the company, as miners, are the sellers, and have no further control over the dealings; (c) the profits made abroad are on a distinct transaction, and form no part of the purchase price, and in law cannot be part of the purchase price, as the price cannot be left open to be determined at indefinite times, and by indefinite persons; (d) the dealings in London are matters only for partnership between company and syndicate, and are not taxable in the Colony.

23. It was admitted for the Commissioner that if profits also on the dealings abroad are not to be treated as deferred payments on account of the purchase by the syndicate in the Colony, such profits are not taxable, as the dealings would then be part of the business carried on outside the Colony.

24. The company did not dispute the correctness of the figures set forth in paragraph 2 hereof.

25. The Court of Review held that the dealings with the diamonds by the syndicate in London must be treated as distinct from the transactions in Kimberley, that the profits received in connection with the syndicate's transactions abroad formed no part of the purchase price, the full amount of which, the Court held, was the amount paid at Kimberley, and that the company was not liable to pay income-tax on such profits.

Mr. Searle, K.C. (with him Mr. Nightingale) for the Commissioner of Taxes. Sir H. Juta, K.C. (with him Mr. Phear), for De Beers Company.

Mr. Searle said that this matter came before the Court by way of a special case, stated under section 74 of the Income-tax Act, No. 36, of 1904. The only exception taken by the company was as to the amount of £162,709, being portion of a larger sum of £4,918,567, and upon which amount of £162,709 the income-tax assessed by the Commissioner was £8,135. The amount of £162,709 in question was received in connection with a certain contract entered into at Kimberley between De Beers Company and a certain syndicate. The agreement was that eight firms of diamond buyers contracted with De Beers Company to purchase the diamonds produced up to a certain point. The syndicate of buyers had the option to take all the diamonds produced, but they only bound themselves to take the diamonds up to a certain quantity. De Beers could not sell to anyone else without giving the syndicate the option first upon the same terms upon which anyone else was willing to purchase them, so that the syndicate got the right to the whole quantity. They paid when the agreement started at a certain fixed price for certain classes of stone. This agreement had been carried on from year to year. The important clause of the agreement was the following: 10. In addition to the payment to be made by the syndicate to company pursuant to the preceding clauses, the syndicate shall account for and pay to the company one-half of all net profits that may be made by the syndicate on realisation, or dealing with the said diamonds under this contract as appearing from the said accounts. All risks in the realisation or dealing with the diamonds under the contract shall be on joint account, and borne by the company and the syndicate in equal shares, and the syndicate, whenever it covers any risk, shall cover it on joint account, but the provisions of this clause are subject to the stipulations in the following clause. Counsel went on to say that the sole point in the case was whether the income-tax Court was right, and whether they could possibly distinguish between

the two amounts due under this contract. This was not an out-and-out agreement. De Beers would never have entered into this agreement with the syndicate unless they were going to get these profits afterwards. They entered into the agreement with the syndicate in order to keep up the price of diamonds. They got a certain payment down, and they had a certain payment in the future. There was 12 per cent. deducted to be put into the account later on. It was merely a six months' adjustment. It could not for a moment be urged that the payment down was the full amount. The whole arrangement showed that this was merely a provisional payment down of what would be certain to come afterwards, and they said that the rest would come in at the end of six months. If that full amount did not come under the Act, then it was really difficult to see how companies could be got at. It would be a wholly unfair assessment otherwise. It would be unfair to both parties. To say that only the amount paid down should bear income-tax, and not the full amount, would be contrary to the spirit of the Income-tax Act, which was intended to tax sources of wealth in the Colony. Mr. Searle went on to put the case of an ostrich farmer who might send all his feathers for disposal on the London market.

[Hopley, J.: How would you treat a wool farmer who shipped all his wool to London and had it sold there?]

I submit that he could not, by shipping all the valuable clip to London, get out of this tax by the selling of the wool in England. Counsel went on to say that this agreement between De Beers and the syndicate only continued until 1906. If at the end of that time they had shipped all their diamonds to England, as they did formerly, and sold the whole of the diamonds in England, was it to be said that the whole produce of the diamonds would go free of tax because they were sold in England? Surely such an argument would not hold water. The object of the Act was to tax the wealth produced in this country.

[Hopley, J.: You say it is income arising out of trade or business carried on in this colony, whether they sell the produce of that trade in London or anywhere else.]

That is so. Counsel went on to quote from Dowell on income-tax laws in reference to what was called the area of charge. He submitted that the English cases of *Colquhoun v. Brooks* (14 appeal cases, 493) and *Sully v. Attorney-General* (5 Erskine and Norman, 511), were not parallel with the present case, because here they were dealing solely with one business, and the income from that business. Counsel proceeded to refer to the cases of the *San Paulo Railway Company v. Carter* (1895 ap-

peal cases, Q.B.D., 580), and *Denver Hotel Company v. Andrews* (11 "Times" Law Reports, 238). In those cases it was held that where a business was partly carried on in England income-tax was payable on the whole of the income. The case of *Kodak v. Clarke* (vol. 2, 1902, Law Reports, K.B.D., 450), referred to in the Court below, did not, counsel submitted, bear on the present case. He submitted that none of the English cases laid down any principle which could be said to help the respondents. The matter was clear under our own Act, and, he submitted, should be decided under our own Act.

Sir H. Juta said that this was a special case under our Acts. What his learned friend had been arguing was not a special case at all. The case put before their lordships by the commissioner was this, that there was an out and out sale of these diamonds at Kimberley, and it was admitted by the Government—and it was part of this case—that unless the share of the profits obtained in England should be deemed to be part of the purchase price of the sale here in the Colony the Government had no case. So that their lordships had not to enter into these new questions which his learned friend had raised upon the Income Tax Act; they had only to deal with the case which had been submitted by the commissioners upon the admissions of the Government, and he submitted that by the case which had been stated and by the admissions the Court would be bound. It was found, first of all, by the commissioners, that there was an out-and-out sale. It was admitted by the Government, although the sale in Kimberley to the syndicate was an out-and-out sale, the price to be paid to the company was not finally fixed until the diamonds had been finally disposed of by the syndicate, and his simple submission to their lordships was going to be this, that if there were an out-and-out sale at Kimberley, by our law the price must be fixed. They could not have an out-and-out sale, the price of which was to be determined Heaven only knew when, by something which was going to happen hereafter, it might be months and months afterwards. As far as the transaction in England was concerned, there was a partnership. It was impossible to conceive a clearer partnership. The parties were to share in the profits and the losses, and no better criterion of what a partnership could be could be brought forward. If there was this partnership in England between De Beers and the syndicate, then the sale to the syndicate could only be a sale in Kimberley, and could not be a transaction that took place in England, which was a partnership transaction between two parties. How else could there be an out-and-out sale to the syndicate in Kimberley. That was what the case was found-

ed on, and that was the admission. It was impossible to say that the partnership sale in England constituted portion of the sale in Kimberley. Supposing that the sale to the syndicate was whatever was obtained from the diamonds over and above the valuation placed on them in Kimberley. If that was so, then where did the partnership transaction come in by which De Beers had a share in the losses. His learned friend had not explained what became of that portion of the agreement by which De Beers became the partners of the syndicate. Supposing that the two persons shared in the profits, and in the losses a very inconvenient state of affairs would arise. Supposing that in the year 1904 a certain number of diamonds were purchased by the syndicate, and disposed of in England at a profit, according to his learned friend, De Beers would have to pay on that. Supposing the realisation of these diamonds did not take place for 18 months, and there was a heavy loss on the surplus, how would that be adjusted with the Government. That loss would be a loss on the trading of 1905. In 1904, there was a sale. If that was a trading under the terms of the Act, then if that sale had a profit, De Beers would have to pay for it. It could not be ascertained until 1906 whether there was a profit or loss on that transaction.

[Buchanan, A.C.J.: Do you say that this £160,000 is on the trading of 1904?]

Sir H. Juta: No. Continuing, he said that what he held was that until 1906 they could not tell whether there was a profit or a loss on the whole transaction. Supposing that during 1904 portion of these diamonds were sold at a profit, De Beers had to pay income tax on them, and supposing that in 1906 it was found that on the whole thing there was a loss the Government would not pay back to De Beers what had been paid. They held that there was an out-and-out sale of diamonds at Kimberley. His argument of the sale was that it was finished and agreed upon in Kimberley, and that it did not go further. There was a sale to the syndicate in this colony, and if De Beers went into partnership with somebody in England, with regard to that they had nothing to pay. According to the agreement the syndicate had the full control of everything that had to be done with regard to the diamonds in England. If there was a sale to this syndicate, and there was another *persona* which dealt with these diamonds in England, the Commissioner of Taxes, who knew his business exceedingly well, knew that they would not be entitled to claim on these diamonds sold in England.

[Buchanan, A.C.J.: All through the point that recurs to my mind is, is not this part of the sale price in Kimberley? If the De Beers Company had absolutely nothing to do with the profits real-

ised from the sale of diamonds, of course, the syndicate that bought the diamonds in Kimberley would not be liable to income-tax here.]

The *persona* who dealt with the diamonds in London was not the same *persona* as the one in Kimberley. The one *persona* was De Beers, and the other was the syndicate, whereas the sales which were made in England were made on behalf of a *persona* consisting of De Beers and the syndicate. The sale took place in London by an entirely different *persona*. If this was only one transaction, and the transaction in England was part of the trading in this colony, then the syndicate must be liable for income-tax. But there was no machinery for such a state of affairs, and the want of machinery was pointed out in one of the cases to which he had referred as showing that the Act could not be intended to apply to such a state of affairs in this country. There was no means by which we made the syndicate liable to income-tax in this country. The only person who could fix the price of diamonds was the syndicate, and the vendor was, so far as London was concerned, absolutely helpless as to the fixing of the price. It was a fluctuating price at the will of the purchaser. Counsel went on to refer to the case of the *Bartolomey Breking Co.* (1893, Q.B.D., vol. 2), and, in closing, submitted that the sale was one at Kimberley, and the only price at which their lordships could arrive at was the price there fixed upon and determined.

Mr. Searle, in replying, said that the case of *Bartolomey* had clearly been overruled. The principle which was contended for by De Beers was subversive of the whole Act, and they would be able to say if that principle were correct they could drive a coach and six through the Act. It would deprive the Government of a large part of its revenue if a firm could use a device such as was contended for in this case. He did not say that this was a device by De Beers to evade payment of income-tax, because the arrangement was entered into long before the Income-tax was passed. He pointed out that the Colonial Act was wider than the English Act. There was no section in the English Act exactly the same as sub-sections 3 and 4 of section 50 of the Colonial Act. He submitted that this was merely a deferred payment under the contract, as contended for by the Commissioner. It was impossible to distinguish between the two amounts in Kimberley and London. On the ground of trading, according to the principles of the English cases, the company would be liable to tax on this amount of £8,000 odd. He added that it did not seem to him that the case of *De Beers v. Surveyor of Taxes*, recently decided in England, had any bearing on the

present case. He also quoted from Murray and Carter's Income-tax guide.

Hopley, J., remarked that by the recent case decided in England the unfortunate De Beer shareholders who resided in the Cape Colony had got to pay income-tax twice.

Sir H. Juta: On the bulk. We are trying to save a small portion of it.

Cur. Adv. Vult.

Postea (August 21).

Buchanan, A. C. J.: This is in the nature of an appeal from the decision of the Court of Review appointed under the provisions of the Additional Taxation Act, No. 36, 1904. The Commissioner of Taxes had assessed the respondent company, *inter alia* in the sum of £8,135 9s., as income tax payable in respect of certain £162,709 received by them as their share of profits on certain dealings in diamonds in London. The Court of Review discharged this assessment, whereupon the Commissioner applied, under the 74th section of the Act, to have a case submitted for the decision of the Supreme Court. All material facts have been clearly set forth in the statement of case which has been filed, and in the documents annexed thereto. From these it appears that the respondent company carry on the business of diamond-mining within the Colony. The report and balance-sheets of the company showed the amount realized on their diamond account during the period covered by the assessment, the whole of the receipts being lumped in one item, and in this amount was included the £162,709 in question. No objection was taken to the rest of the assessment, but exemption was claimed for this £162,709 on the ground that it had been received from a certain syndicate as the company's share of the profits made by the syndicate on certain dealings in London. It was contended that these were not gains derived in the Colony, and therefore were not taxable here. The company relied upon the written agreement annexed to the statement of case, which had been entered into in London between the company and a syndicate of diamond merchants. The agreement was a lengthy one. The first clause indicated the object of the contract as it commences by saying that the company shall sell, and the syndicate shall purchase, the output of rough diamonds as it is produced by the Company. The agreement dealt with a number of subjects, such as the classification and valuation of these diamonds, the minimum quantity the syndicate was required to take monthly, the proportions of stones to be taken from one or other of the company's mines, and similar matters which do not enter into this case, and need not be further referred

to. The 4th clause stipulated that delivery of the diamonds should be made at Kimberley against cash, and subsequent clauses provided for the manner in which what is called the purchase price was to be determined. The 9th clause required the syndicate to keep in London proper books and accounts of all their transactions relating to the diamonds purchased from the company, which books and accounts were to be open to the inspection of the auditors of the company. Then came the 10th clause, upon which the contention of the company was mainly based. It reads as follows: "In addition to the payments to be made by the syndicate to the company pursuant to the preceding clauses, the syndicate shall account for and pay to the company one-half of all net profits that may be made by the syndicate on realisation or dealing with the said diamonds under this contract, as appearing from the said accounts. All risks in the realisation or dealing with the diamonds under the contract shall be on joint account, and borne by the company and the syndicate, in equal shares, and the syndicate, whenever it covers any risk, shall cover it on joint account." The contract then provided how the accounts were to be kept, and what charges were to be allowed before profits were taken. Subsequent clauses gave the syndicate the right of pre-emption over the whole output of the company. Upon these provisions it was argued for the company that the agreement should be read as containing two separate contracts, the first for an out-and-out sale of the diamonds when delivered at Kimberley and the price paid; and the second a contract of partnership between the company and the syndicate to carry on a venture in London in dealing with these diamonds, as distinct from the company's business in this Colony as miners; and this view was taken by the Court of Review. A clause in the statement of case was much relied upon in argument as being an admission on the part of the Commissioner, that if the profits on the dealings abroad were not to be treated as deferred payments on account of the purchases by the syndicate, such profits were not taxable, as they would then be derived and form part of a business carried on outside the Colony. While recognising that the decision of the Court must be restricted to the issues raised in the special case, it may be pointed out that this clause does not contain any statement of fact, but rather a conclusion of law drawn from the facts of the case by the Commissioner, it stands much in the same position as the paragraph which contains the contentions of the Commissioner, and which was also relied upon as admitting that the transaction in Kimberley constituted a completed

sale and purchase. True, the Commissioner in this paragraph, setting forth his contention, speaks of an "out-and-out sale," but he goes on to say that the price to be paid was not finally fixed until the diamonds had been disposed of by the syndicate. Neither of these paragraphs of the statement of case, in my opinion, preclude us from drawing our own conclusion from the facts put before the Court. On the partnership question, it was argued that the company which carried on the mining business in the Colony was a distinct *persona* from the confederation of diamond dealers in London, the *persona* of which was the syndicate plus the company. I fail, however, to find sufficient ground in the contract to justify the finding that the company and the syndicate ever intended or desired at any time to amalgamate themselves into one body. On the contrary, I think that all through the agreement the company and the syndicate intended to keep themselves, and did keep themselves distinct. The elaborate document begins by calling itself a memorandum of agreement between the De Beers Consolidated Mines, Limited, called "the company," of the first part, and a number of merchants who are named, called "the syndicate," of the second part; and then goes on to say that it is agreed between these respective parties, the one to sell, and the other to purchase the property in question. There is nowhere any expression of an intention to create a partnership. On the contrary, it is significant of the absence of any such intention that provision is made, in case of a European war, that the syndicate should no longer be bound to continue its purchases, but that it might act as the agent of the company to sell the diamonds on commission. Neither do the usual consequences of a partnership result from the contract. If, as is contended, there was an absolute sale, and the property in the diamonds passed to the syndicate upon the delivery and payment of the price determined by the valuers at Kimberley, there was no subsequent contribution by the company to the common stock of either property or of services. The syndicate was given the sole control of the realisation of the diamonds, the company having no say therein. The company could not as a partner bind the syndicate in any way. Indeed, if this agreement was anything more than a contract of sale and purchase, it might better be argued that it created the relationship of factor and principal rather than that of co-partners. It was contended that the agreement could not be held to be only a contract of sale, because no definite price was fixed for the diamonds sold. Our law undoubtedly requires in a contract of sale that the price should be *certum*, but this requirement of definiteness may

be either *per se*, or by relation to some condition by which a definite price was ascertainable. The clauses to which I have referred provide the means of determining the price to be paid for the property sold. A portion of the price was to be ascertained by valuation, and, as the 10th clause provides, "in addition" to the valuation the balance was to be ascertained from the result of the dealings of the syndicate. On the resale in the diamond market the adjustment of the price to be paid for the diamonds became a simple matter of account. Taken as a whole I think it is clear that the object of the contract was the realisation of the diamonds won by the company to the best advantage. The business of diamond-mining was one of a very special character, and required special arrangements to be made to realise the property acquired. This realisation could probably best be effected with the assistance of others. But, however, the legal relationship of the parties might be described as far as the liability to taxation was concerned, part of the proceeds received by the company for their property was the share of profits accruing from the retail of the diamonds to smaller dealers. These profits were directly derived from the diamonds produced in this colony. These profits were remitted to the company in this colony, and were taken into the general account upon which the company ascertained the result of its transactions and declared the dividends payable to its shareholders. If instead of a profit the realisation resulted in a loss, it would proportionately decrease any amount available for dividends. Now the 50th section of the Act No. 36, 1904, imposes a graduated tax in sub-section (1) upon income arising or accruing to any person (and by the interpretation clause a "person" includes a company) wheresoever residing, from any trade of whatsoever nature carried on in this colony, whether the same be carried on by such person or on his behalf wholly or in part by any other person; and in sub-section (4) upon income derived by any person from any source whatever within this colony. By section 42 "income" is defined as meaning "any gains or profits derived or received by any company or persons in any year or by any means from any source within the Colony," and includes "all profits derived from mining or quarrying." The English decisions to which we have been referred cannot, unfortunately, afford much assistance in determining the question before us, owing to the different phraseology of our Act and of the English Statute. While our law limits taxable income to gains from a source within the Colony, 16 and 17 Vic. c. 34, schedule D, extends the English tax to gains accruing to

residents from property or employment whether in the United Kingdom or elsewhere. Admitting that in a taxing measure like the Act before us, it must be clear that a charge is imposed on the taxpayer by the language of the statute, I think the intention of the legislature to render liable to duty such receipts as are in question in this case, is sufficiently expressed. These receipts are part of the company's income, derived from a source within this Colony, and to realise that income, it is immaterial whether or not the business of the company be wholly or in part carried on by any other person than the company itself. I am of opinion, therefore, that decision of the Court of Review cannot be supported, and that the assessment, as originally made by the Commissioner, must be sustained. As to costs, I think that as far as the proceedings in this Court are concerned, they are in the discretion of the Court. The 73rd Section of the Act provides that the Review Court may only make an order as to costs when the claim of the Commissioner shall be held to be unreasonable, or the grounds of appeal therefrom to be frivolous. The issue in this case was a fair one to be argued, and we may well follow the line indicated by this section, and make no order as to costs.

Hopley, J.: For the purpose of the matter with which this Court has to deal, the facts are sufficiently set forth in the first twenty paragraphs of the special case submitted by the President of the Court of Review. That Court decided that the agreement of 1901, and the practice of the parties thereto, constituted two separate businesses, or divisible sets of transactions, of which the one was purely a sale and purchase in this Colony of the company's output of diamonds in such quantities as they had won month by month, or week by week, which transaction was completed when the diamonds were delivered to the syndicate at Kimberley, and when the syndicate had paid the price fixed by the valuers at Kimberley, which price was determined and fixed for each parcel, according to the qualities of the stones of which it was made up on the lines laid down in the agreement. Upon such conclusion of the first portion of the bargain, the Court held that the parties then entered upon its second branch, which was a partnership carried on abroad for the resale of these same diamonds: and the Court held that the profits made, or the losses incurred in the course of such branch of the business, did not proceed from any source within this Colony, and were consequently not liable to assessment as income in terms of Act 36, 1904. Now, the contract between the parties is complete and binding when on the stipulated date, which I take to be the 20th of June, or of December, during

the continuance of the contract, the syndicate signify that they have elected to continue it for another six months. At such time they contract to purchase from the company, who are bound under the agreement to sell to them, the whole of the production of diamonds for the ensuing six months. When the contract is thus concluded the exact thing bought has not yet been disclosed or ascertained; but it is certain in the ordinary course of events to be ascertained; and the exact price to be paid, which cannot possibly be stated when the contract is made, will, by following the directions and methods laid down in the agreement, also become certain in an inevitable way. The procedure is that experts separate each parcel of diamonds as it is produced from the mines into the various classes known to the trade and place upon them, class by class, their values as directed by clause 13 of the agreement. When this process had been gone through, as prescribed, the diamonds are in terms of the agreement handed over in Kimberley to the syndicate, who thereupon hand over the amount of money arrived at by the valuation made as above stated. It is, however, quite clear, that when the company so part with their diamonds, they have not then received the final pecuniary settlement which they expect, and which their contract exacts in respect of the goods so handed over by them. The agreement distinctly sets forth that the price paid in Kimberley is not the final reckoning in the matter. At that stage the company have parted with the possession, and with the control as to the disposal of the diamonds; but their rights in respect thereof are by no means extinct, and do not expire until the goods are realized and until the annual audit and adjustment of accounts disclose how the syndicate have fared in their dealings therewith and until payments of the amounts so shown to be due have been made. If a profit is disclosed one half thereof is to be paid over to the company "in addition to the payments" theretofore made in Kimberley. Should there be no profit or one not amounting to 5 per cent. then no additional payments are to be made; and in the unlikely but still conceivable event of a loss in any year then the company is to bear half thereof. The entire contract seems to me indivisible, and in whatever way I view the matter it appears to amount to no more and no less than a contract of purchase and sale. The whole object of the company is to sell their diamonds, and of the syndicate to buy them. In order to effect this as equitably and as profitably as possible a certain element of risk is undertaken by both parties; but when all the risks are past and all the transactions and ex-

penses incidental to realisation are accounted for, the final sum of money which reaches the company's coffers—being the money paid in Kimberley either added to by subsequent profits or diminished by losses—still seems to me to be the price for which the company agree to part with the ownership of their diamonds and which the syndicate agree to pay for obtaining them. The dealings for the year under review in the present case showed a large profit to the Syndicate, and in terms of the agreement £169,709 were paid over to the company in addition to the payments previously made in Kimberley, which amount the company in their annual statement of accounts properly included in the total sum of money received by them on account of their sales of diamonds. Whatever intermediate steps there may have been, such a sum of money when received is clearly a portion of the profits made by the company from mining in this colony, it comes from a source and flows out of a business carried on in this colony, and is assessable as income within the true scope and intentment of Act 36, 1904. I am, therefore, of opinion that the contention of the Commissioner of Taxes should prevail, and that our judgment should be in his favour.

[Appellants' Attorneys: Reid and Nephew; Respondents' Attorneys: Syfret, Godlonton and Low.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDOEP.]

INSOLVENT ESTATE PLEHN. { 1904.
Aug, 7th.

Mr. Gutsche moved on behalf of the trustee in the insolvent estate of Plehn for a commission *de bene esse* to take the evidence of one Meyer Stepney, a material witness in the case, who had accepted a position up-country, and would lose it if detained as a witness in the action instituted by the trustee in the estate.

Application granted, Mr. Lewis to act as commissioner, costs to be costs in the cause.

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

ESTATE VAN NIEKERK V. { 1905.
SANDILANDS. { Aug. 8th.

Sheep lease—Pledge—Insolvency
— Preferent and concurrent
claims.

This was an action brought by Abraham Pieter de Villiers, of Richmond, as sole trustee in the insolvent estate of Gilham van Niekerk, against Wm. Sandilands, farmer, late of Rietvlei, in the division of Richmond, to have certain proof of debt amended and declared concurrent.

Plaintiff, in his declaration, said that in the month of August, 1904, insolvent entered into an agreement with the defendant, whereunder the defendant agreed to receive and to keep upon his farm 300 ewes, the property of the insolvent, on condition that the wool and increase of the same should be divided in equal shares between insolvent and defendant, the agreement to last for three years. There were actually delivered by the insolvent to defendant 291 ewes. Defendant advanced certain sums of money to plaintiff. Insolvent subsequently surrendered his estate, and defendant thereupon set up a preferent claim in respect of the said stock, and claimed for £342 10s. preferably in the insolvent estate, alleging that he held the stock and their increase as security for the said claim. Thereafter the defendant delivered up the said stock without prejudice to his claim to a preference. The trustee moved this Honourable Court to have the defendant's claim, which had been admitted as preferent by the Magistrate, reduced to a concurrent claim, on the ground that defendant had no pledge of the said stock, but this Court refused such application, applicant to proceed by action if so advised. Plaintiff claimed (a) that the defendant's proof of debt be reduced to a sum of £320, and be declared to be a concurrent claim; (b) that the defendant be declared to have no pledge over the said stock, but that the plaintiff be declared entitled to sell the same for the benefit of the general body of creditors; (c) alternative relief; and (d) costs of suit. As an alternative to the foregoing, plaintiff said that the alleged pledge should be set aside, inasmuch as at the date of the pledge the insolvent contemplated insolvency, and by the said pledge intended to prefer defendant over and above his other creditors.

Defendant, in his plea, said that the stock remained in his possession, pledged as security under an agreement, in consideration of the defendant lending to the plaintiff a sum of £300 until March, 1905, defendant further to pay a sum of £22 10s. interest. He also lent insolvent a sum of £22. Alternatively, he denied that at the time of the said pledging of the stock insolvent contemplated insolvency or intended to prefer him, and specially said that the pledge was duly and lawfully effected, and was *bona fide* and for valuable consideration. He prayed that the claim should be dismissed, with costs.

Plaintiff's replication was general.

Mr. Close (with him Mr. Douglas Buchanan) was for the plaintiff; Mr. McGregor was for defendant.

Mr. Close said that the plaintiff's position was that the money was advanced to insolvent as a loan out and out, and that the reason why the sheep came into the possession of the defendant on a sheep lease was that, about the same time, they were negotiating for a loan. Insolvent gave defendant an acknowledgment of indebtedness for £300. The plaintiff was prepared to admit that the amount of indebtedness was £342 10s., as stated by defendant, instead of £322 10s., as set out in the declaration.

Gilham van Niekerk (the insolvent) said that in July, August, and September, 1904, he had transactions with the defendant about sheep, goats, and money. Witness had a farm on lease, and had 900 sheep. He was a speculator. In July, 1904, he had a transaction with one Jacobs, and after that Sandilands came to see him about his sheep, asking him if he would bring him sheep and goats. He let Jacobs have 600 goats on the "halves." He had received £400 from Jacobs on loan. He also gave Jacobs a promissory note for £420 or £450. Witness had paid off £100 of the loan. Sandilands wanted to make a similar arrangement with him, offering to lend him £300, on condition that witness let him have 50 sheep and 250 goats on the "halves." The agreement was made in July or August, 1904. About eight days after the delivery of the sheep he received £100 from Sandilands; about a fortnight later he delivered 250 goats to the defendant, and signed a document (produced). He received £200 from Sandilands between a fortnight and a month afterwards, signing a promissory note subsequently. On the 22nd November, 1904, he drew up his schedules for the surrender of his estate as insolvent, final sequestration being granted on the 10th December, 1904. In his arrangements with Mr. Sandilands he at no time promised to give him the stock as security for the loan. Witness first heard that Sandilands wanted the stock as security about

a month after he had surrendered his estate. Sandilands said that he must not allow him to suffer because he had surrendered his estate, and that he must say he handed over the stock to him as security. Witness did not intend Sandilands to suffer. He believed that the actual number of goats and sheep handed over to Sandilands was about 285.

Mr. Close (in answer to His Lordship) said that about 300 head of stock had since been handed back to the trustee and sold.

Maasdorp, J., said that if the document signed by the insolvent was an agreement to let Sandilands have the stock on the "halves," he would be entitled to retain some of the stock. The document produced did not contain all the conditions of an ordinary sheep case.

Witness (in further evidence) said that he never sold the stock to Sandilands. He had some doubt about bringing up the 300 head of stock in his schedules; he went to see Mr. Paul to ask him if he would be allowed to bring up the sheep in his schedules, because he was afraid that he might get into trouble. He had given over the stock on the "halves" for a period of three years, and he was in some doubt whether he could have them back in a shorter time. About March, 1905, Sandilands and his brother came to see witness about the proceedings which were pending. David Sandilands said that he must not allow him to suffer any loss, and he must say that he had pledged the stock with defendant.

[Maasdorp, J.: When was the lease up?]

Mr. Close: It is not up yet.

[Maasdorp, J.: Then what right has plaintiff to take these sheep away?]

Mr. Close: The position is that defendants may claim possession of the sheep in one of two ways. He may claim under the contract possession as lessee. According to his own account, which we deny, he is entitled to claim as pledgee. He elects to claim as pledgee, and that is the case we are now meeting.

Witness (continuing his evidence) said that the document (produced) showing his affairs in August and September, 1904, was correct. If he had been sued at the time he made the arrangement with Sandilands he would not have been able to pay.

Abraham P. de Villiers (the plaintiff) said that he knew nothing about any pledge with Sandilands at the time insolvent surrendered his estate. The so-called pledge was first brought under his notice by the proof of debt handed in by Sandilands' attorney at the second meeting. The stock was recovered from the defendant and sold by auction, realising, less expenses, £136.

By the Court: He sold the stock with the consent of the defendant.

Johannes H. Viljoen, clerk in the plaintiff's office, said that in March last defendant stopped him and said that he had taken the goats from the plaintiff, and that they were on the "halves."

Barend Jacobus Burgers, farmer, Richmond, said that Sandilands, after he had brought the goats on the farm, admitted to him that he had got the goats and sheep on the "halves." Sandilands first told him that he had bought the goats, and that he had lent Van Niekerk £300. Sandilands did not mention anything about the stock having been pledged to him.

William Sandilands (the defendant) said that he bought 52 Cape sheep from insolvent, and paid him 25s. each for them, making £65. He gave Van Niekerk £100 about a month after he had bought the stock. Van Niekerk was to bring him goats for the balance of £35; he had to bring witness 300 goats. Insolvent later on brought him 252 goats, for which he agreed to give him prices which came out to close upon £230. Witness gave Van Niekerk £200 for the second lot of goats. When he commenced shearing he noticed that the goats were in bad condition. He called Van Niekerk's attention to the goats, and it was agreed that the sale should be cancelled, and that Van Niekerk should bring him better goats in the month of March, and that the money should be returned in that month. A contract for the sheep and an acknowledgment of debt for £322 10s. were written out by witness's sister-in-law, and signed by Van Niekerk. Witness asked Van Niekerk what about a surety. Van Niekerk said, "Aren't the goats good enough?" Witness said that they were. He denied that he had told the witnesses for the plaintiff that he had not got the stock as a pledge.

Cross-examined: He did not have the security of the sheep set out in writing, because he did not think it was necessary, and he thought he was dealing with a honest man.

Johanna Jacoba Sandilands, wife of David Sandilands (defendant's brother), said that she wrote out the contract at Van Niekerk's dictation. She also wrote out the acknowledgment of debt on the same afternoon.

David Petrus Sandilands (brother of the defendant) said that, after the sale of the animals had been cancelled, it was arranged that the defendant should keep the goats on the "halves" until March, when Van Niekerk was to take back the old goats and replace them with young and better goats that defendant was to retain for a period of three years.

By the Court: Van Niekerk said that he would leave the goats there as security until he got fresh goats for defendant in March.

Carl Lodewicus Paul, attorney, practising at Richmond, also gave evidence.

Mr. McGregor closed his case.

Mr. Close (in answer to his lordship) said the insolvent stated that he agreed to pay £22 10s. interest every six months upon the loan of £300, working out at 15 per cent. per annum.

Mr. McGregor having been heard in argument on the facts.

Maasdorp, J., said that Sandilands, having set up an express contract under which he claimed a preference for his debt of £342 10s., the burden of proof fell upon him to establish that contract, and if he failed to do so, then the Court would have to hold that the pledge did not exist. He (the learned Judge) must admit that this case was not free from difficulty in respect of the facts which had been brought out in the evidence, and if, in the difficulty created, any doubt existed in his mind as to whether this contract of pledge was ever entered into, then necessarily Sandilands, upon whom the burden of proof fell, must fail. In reviewing the evidence his lordship remarked that the first doubt which crossed his mind in connection with the testimony of Sandilands, was in respect of the alleged payment of £300 as the purchase price of stock not valued at £300. Again, he did not believe that a sale which was said to have been entered into would have been so readily set aside, as it was alleged to have been afterwards when it was found that certain of the goats were old and poor. Under all the circumstances, he was inclined to accept Van Niekerk's evidence that from the very first it was a loan, and that from the first the goats were handed to Sandilands on lease. The whole evidence of a pledge given by Sandilands consisted of some casual remarks which passed between him and Van Niekerk. He had come to the conclusion that a sale had not been proved, and as the evidence of Sandilands was not reliable on the other matters, he could not accept it with respect to the pledge. He had come to the conclusion that this pledge had not been proved. In regard to the alternative claim, it was not necessary really to deal with it now, but in view of any questions which might possibly arise hereafter, he found that there was no contemplation of insolvency on the part of Van Niekerk when the transaction took place. The Court would declare that Sandilands was entitled to prove for the amount of his claim as a concurrent claim, but not as a preferent claim. One must, he added, sympathise with Mr. Sandilands upon the loss of his money, but he entered into a foolish arrangement with Van Niekerk. Defendant must pay costs of the action, and proceedings on motion, the

trustee to be allowed his expenses as a necessary witness.

[Plaintiff's Attorney: P. De Villiers; Defendant's Attorneys: Fairbridge, Arderne and Lawton.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

REX V. ISRAEL COHEN. { 1905.
Aug. 8th.

Act 10 of 1895, Sec. 3.—Smelting pot.

To be in possession of any implement capable of being used for melting or defacing metals, without permission in writing from the R.M., exposes any person to a conviction under Sec. 3 of Act 10 of 1895, provided there is reasonable evidence that the implement was used for such purposes.

This was an appeal from a decision of the A.A.R.M., of Cape Town, by which the appellant, a second-hand goods dealer, was sentenced, under section 3, of Act 10, of 1895, to three months' imprisonment, with hard labour, for keeping on his premises without a permit from the Magistrate a smelting pot for defacing gold, silver, and other metals. Mr. Alexander was for the appellant, and Mr. Nightingale was for the Crown. The appeal was instituted on the ground that the conviction was not supported by the evidence, and not in accordance with real and substantial justice. Counsel having been heard in argument,

Hopley, J.: In this case the appellant is charged with contravening the 3rd section of the Second-Hand Goods Dealers' Act of 1895; in that he kept, or knowingly permitted to be on his premises without a permit in writing from the Magistrate a smelting pot or implement for altering or melting gold, silver, lead, or other metals. Now, it is argued that I must restrict the interpretation of that section to a smelting pot and nothing else, but it does not seem to me that the section is so narrow in its meaning or operation. I think that if a person uses or keeps a smelting pot, or has any other implement for melting or altering or defacing these metals, he would be contravening this section, and that is what the Crown says the appellant was possessed of. He had

a thing which is not very uncommon, an old oil drum, ventilated with holes, and so cut as to make it capable of being used as a stove, with a strong draft, and the Crown says that he used it for the purpose of melting lead or other metals. That it was actually used for the purpose of changing metals is amply proved, as he was actually seen to be doing something of the sort. He had a fire, and was holding a tin over it, which he said he was cleaning. There was a fire, and it was not alleged that he was cooking anything, and it is further proved there was metallic wire and molten lead in this stove or implement. Therefore, the Magistrate came to the conclusion that he kept the implement for melting lead or other metals, and I cannot say that the Magistrate was wrong, and the sentence must be confirmed and the appeal dismissed.

REX V. FINDLAY.

1905.
Aug. 8th.
" 21st.

Landlord—Agent with power of attorney—Divisional Council—Sanitation—Nuisance—Act 23 of 1897, Sec. 50.

One A. had built some 20 cottages on his property, which was not within a municipal boundary, for none of which he had provided sanitary accommodation. He was not resident within the Colony, but had left his power of attorney with F. F. having been summoned in the R.M. Court at the instance of the Divisional Council of W. under Secs. 50 and 51 of Act 23 of 1897, was ordered to provide the accommodation required.

Held on appeal, that as the Divisional Council, as the local authority, had a locus standi in judicio, and that as the absence of the sanitary accommodation demanded led directly to a common nuisance, the appellant was bound to carry out the order of the Court below.

The appeal was from a decision of the A.R.M., Wynberg, by which the appellant was fined in one shilling for failing to comply with a notice from the Divisional Council to abate a certain nuisance on his property at Diep River.

Mr. P. S. T. Jones was for the appellant, and Sir H. Juta, K.C., was for the Crown.

Counsel for the appellant said, although technical objections could be taken to the summons, he would refrain from doing so, as his client wished to have the whole matter thrashed out. His client held a qualified power of attorney over a certain cottage at Diep River, outside the Wynberg Municipality, and had received notice from the Divisional Council to have twenty-four proper sanitary closets with cement floors erected within forty days. The appellant, holding a qualified power of attorney from the owners, in Johannesburg, had no authority to effect the repairs. An exception had been taken that the Divisional Council was not the local authority for the purposes of the section under which the appellant was summoned, and the fine of one shilling was imposed in order that the defendant might appeal. Counsel submitted that Mr. Findlay had no authority to effect repairs. He was not the person who should have been proceeded against.

Sir H. Juta, in reply, said the point was whether the Divisional Council was a local authority, and whether his learned friend was right in saying that the Divisional Council had no right under Act 26 of 1897. He submitted that he was not correct. While, with regard to the other point raised he thought there was no doubt but that Mr. Findlay was liable.

Cur. Adc. Vult.

Postea (August 21).

In this case the facts are that the appellant is the agent for the absentee landlord of certain property at Diep River in the Cape Division, situated beyond the boundaries of any municipality or other urban authority. On the land in question there are twenty cottages inhabited by about 130 people. These cottages are let by the appellant for his principals, and he remits the rents to them. By his power of attorney he has the fullest powers of management over the said property, and no point is made in the present case of the fact that he has appointed as his substitute or sub-agent a gentleman in his office, it being admitted that he still has the power to interfere and remedy any evils upon the property in question. For none of these cottages have any closets or sanitary conveniences of any kind been provided, and all the inhabitants use the land surrounding their cottages, especially such parts thereof as are screened by trees or bushes, for their purposes, with the result that such land is extensively littered with human excreta. These excreta are chiefly on the western side of the property, and the slope of the land is such that any drainage from where these deposits are made

would find its way into the Diep River, whence the inhabitants of these cottages draw their water supply, and whence other people lower down no doubt also get water to drink. I am satisfied that such a state of things constitutes a danger to public health for the reasons stated in his evidence by Dr. Murray, and that it is a nuisance at common law. I am also satisfied that it is a nuisance for which the appellant is responsible in that by not supplying any conveniences to his tenants he has made it impossible for them to behave in any other way than the one they have adopted, and it must, therefore, be taken to be a nuisance arising or continuing through his default or sufferance. In these circumstances the Cape Divisional Council as the local authority concerned set proceedings in motion under section 50 of Act 23, 1897, requiring appellant to abate the nuisance and to provide a proper closet for every cottage. The appellant having failed to take any steps the Divisional Council proceeded to complain against the appellant before the Resident Magistrate of Wynberg, who thereupon issued a summons in accordance with the procedure laid down in section 51 of the said Act. The Magistrate found the charge proved, and imposed a nominal fine, and issued an order that proper closets should be provided. For the appellant it was argued that the action of the Divisional Council was *ultra vires*; that they were not the local authority intended to deal with such a matter, which should have been regulated by proper proceedings, as laid down by section 13 of the Act; and that as there had been no proclamation making such acts, or such a state of things as were here complained of, illegal, the Council could not interfere. I am, however, of opinion that no proclamation was necessary to make such a mis-use of proprietary rights illegal wherever it was found to exist. A danger to the public health was thereby set up amounting to a nuisance at common law. As soon as such a nuisance is found to exist the local authority must stop it: and it seems to me quite clear on the proper construction of section 35 of the Act and on the authority of *Rez v. Joss* (15 C.T.R. 272) that the Divisional Council of the Cape, in whose jurisdiction the land lies, is the only and proper local authority to act in the matter. The part of the case which has given me some trouble is the order that closets should be built for all these cottages. This, in view of the fact that the Divisional Council admittedly has no existing machinery for dealing with sanitary matters of this description, might not have the effect of doing away with the nuisance; for it is obvious that merely building and fitting up the closets will not put a stop to the cause of complaint. It is, however, clear that with-

out such closets no improvement can take place, and it must be left to the Council to see that the closets, when built, are properly and decently used and cleaned. The duty of the appellant, however, is to see that his houses are so constructed that ordinary rules of decency, cleanliness, and health can be observed, and that will be done by his carrying out the order made. The appeal must be dismissed.

[Appellant's Attorneys: Findlay and Tait.]

Ex parte LOUBSER

Mr. Alexander applied as a matter of urgency for the transfer of certain property at Somerset West Strand, in the estate of the petitioner's late mother. The urgency arose from the fact that there were creditors to the extent of £12,000, who were pressing. The Master had reported favourably, and the Registrar of Deeds, who reported as well as the Master, stated that an order of Court was necessary. The property, consisting of an hotel and four cottages, was left to the petitioner and his brothers, and by a notarial document petitioner was taking it over at a valuation of £12,000, and paying the debts of the estate.

The petition was granted, the Registrar of Deeds being authorised to pass transfer.

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDOEP.]

BENEKE AND OTHERS V.	{	1905.
VAN DER VYVER AND		Aug. 9th.
OTHERS.		" 10th.
		Sept. 1st.
		" 4th.

Will, joint—Massing—Debts due to estate.

By a joint will, V. and his wife bequeathed to their daughter A. a life interest in £1,000, with fidei commissum to their other five children and the legitimate issue of these per

stirpes. They also bequeathed to these five children certain land, the survivor of the testators to enjoy a life usufruct thereof. After the death of the survivor, each of these heirs was to mortgage his portion for £200 to the said A., the interest to be paid to her half-yearly. The testator and testatrix instituted each other mutually, together with their children, as heirs of the residue of the joint estate. Mrs. V. predeceased her husband, who adiated under the will, and subsequently made a will confirming the bequest of land to his children, but imposing certain conditions not embodied in the original will. There was a bond on the land bequeathed, and it was contended for the plaintiffs that this represented a debt on the joint estate. The defendants contended that it represented the accumulated debts of the plaintiffs.

Held, that as these debts had been taken over by the testator previous to the death of his wife, the mortgage must be regarded as a burden on the joint estate, and that the legatees were entitled to the farms free of mortgage.

Held further, that a debt incurred in respect of a sum of money paid for stock for one of the sons must be regarded as an asset of the joint estate; and that the executrix must pay costs.

This was an action brought by Johanna Louisa Petronella Beneke, Maria Gertruida van der Vyver, Jan Abraham van der Vyver, and Isaac Johannes van der Vyver, all children of the late Isaac Johannes van der Vyver, of Riversdale and his predeceased spouse, against Josina Frederika Petronella van der Vyver, individually, and in her capacity as executrix testamentary of the estate of the late Isaac Johannes van der Vyver and Jacobus Frederik Badenhorst, in his capacity as executor dativo in the estate of the late Anna Christina van der Vyver, predeceased spouse of the said Isaac Johannes. Plaintiffs claimed an account of the joint estate of Isaac Jo-

hannes van der Vyver and his predeceased spouse. The first defendant was second wife of Isaac Johannes van der Vyver.

Plaintiffs declaration was as follows:

1. The plaintiffs are children of the late Isaac Johannes van der Vyver, of Riversdale, and his predeceased spouse, Anna Christina van der Vyver, herein after called the testators. The defendants are the widow (second wife) of the said testator, in her individual capacity and as executrix testamentary of his estate, and Jacobus Frederik Badenhorst in his capacity as executor dativo of the testatrix' estate.

2. On the 18th of November, 1882, the testators, who were married in community, duly executed a joint will, by which, before appointing heirs, the testators bequeathed to their children, the plaintiffs, and one Marta Barendina van der Vyver, after the death of the first-dying, their landed property, Klein Rivier, Annex Klein Rivier, Wegwyzers Rivier, and Groot, alias Zwartjongens Fontein, situated in the district of Riversdale (and in case of predecease of one or more of them, then their lawful descendants by representation), with this provision that the survivor should remain for life in the full and undisturbed possession and usufruct of the said land, and that transfer was not to be given to the said children until after the death of the survivor. The testator appointed his wife and children by this marriage his heirs, and the testatrix appointed the testator and the said children as her heirs in all the estate movable and immovable (save the aforesaid legacies) left at the death of the first dying. They also declared that it was their wish that their whole joint estate should remain in possession of the survivor until his or her death. The rest of the will is not material to this case.

3. The testatrix died in May, 1884, without having revoked the said will, leaving six children—namely, the plaintiffs, Anna Christina, an imbecile, and Marta Barendina, who was married in community to Isaac Frederik Johannes van der Vyver, and died on the 29th January, 1885, without leaving issue.

4. At the death of the testatrix the joint estate, apart from the predelegated land, consisted of bonds and promissory notes due to the estate of the value approximately of £1,450 (in which are included certain debts due to the estate hereinafter mentioned, in amount £1,125), of movables and live-stock of the value of £1,400, and of an erf, No. 4, Block K, in Riversdale. The liabilities of the said joint estate amounted approximately to £717 10s.

5. In order not to disturb the assets of the joint estate, and for the purpose of paying the said debts, it was agreed between the testator and the plaintiffs that they should consent to the land

bequeathed to them being mortgaged for £717 10s., and that the testator would thereafter pay off the said mortgage, and thereupon the testator, with the consent of the plaintiffs, mortgaged the said land for £717 10s. by three bonds of £413, 107 10s., and £197. The two latter bonds have been paid off by the testator, but the bond of £413 has not been paid off, and still remains.

6. The testator adiated under the said will, accepted the benefits thereunder, and remained in possession of the joint estate until his death on the 25th August, 1904.

7. (a) On the 9th of January, 1886, the plaintiff J. A. van der Vyver and one J. A. C. van der Vyver passed a bond in favour of the testator of £500, which was cancelled on the 23rd September, 1903, and on the same day the property hypothecated was transferred to the testator for £500, but no money was paid.

(c) On the 31st December, 1885, the plaintiff Isaac J. van der Vyver passed a bond for £300 in favour of the testator, which was cancelled on the 5th of August, 1899, on payment thereof to the testator.

(d) On the 28th January, 1887, M. L. Saaiman passed a bond for £50 in favour of the testator, which was cancelled on the 16th of October, 1899, on payment thereof to the testator.

8. The amounts of £500, £275, £300, and £50, in the preceding paragraph mentioned, were all debts due to the joint estate, and not to the testator alone, and formed part thereof. The land so transferred or land received in lieu thereof is still registered in the testator's name.

9. With the moneys belonging to the joint estate the testator, after the death of the testatrix, bought certain land called Wegwyzershoek, for part of which he subsequently obtained other land.

10. The testator married the first-named defendant in community of property, and on the 8th of July, 1892, they executed a joint will, and thereafter certain codicils. By the said will and codicils the testator purports to confirm the praelagecy of the joint will of November, 1882, on condition that the legatees pay the mortgage thereon, and the testators purport to bequeath the aforesaid erf No. 4, Block K, and the land transferred as set out in paragraph 7, sub-sections (a) and (b), and the land called Wegwyzershoek and the land obtained for part thereof, to their children by the second marriage and to certain grandchildren, and the testator appointed as his heirs the testatrix and his children by his first and his second marriages, and the testatrix appointed as her heirs the testator and her children by a former and by this marriage. By the codicils also certain interests

have been bequeathed to the plaintiffs or some of them.

11. The testator at no time has paid or accounted to the plaintiffs for their shares or any part thereof in the said joint estate as the heirs of their mother.

12. The plaintiffs have elected to abide by the terms of the joint will of November, 1882, and have repudiated and given up aid surrendered, as they hereby again do, all right, title, or interest under the joint will and codicils of their father and his second wife of the 3th July, 1892, and of subsequent dates.

13. The plaintiffs contend that by virtue of the joint will of their parents and the adiation and acceptance of benefits thereunder by the testator, the latter could not make another will altering or revoking the provisions of the said joint will so far as the said praelegacies of the landed property are concerned; that the debts of the joint estate—to wit, £717 10s.—were payable out of the assets of the joint estate and were not legally payable by the plaintiffs, and that the bond of £413 should be paid out of the said assets or out of the assets belonging to the testator; that the joint estate of their parents as it existed at the death of the testatrix should be ascertained and valued, and that after payment of the debts due by the joint estate, one-half thereof should be divided between the testator and the children of the testators, that in the valuation of the said joint estate the debt due thereto, as set out in paragraph 7, and the land transferred to the testator in settlement thereof shall be taken into account, and further that the land Wegwyzershoek and the Land Annex Klein Rivier, exchanged for a part thereof, shall also be taken into account, and that the Erf No. 4, Block K, also forms part of the joint estate.

Wherefore the plaintiffs claim:

(a) An account of the joint estate (excluding the landed property praelegated of the testators as it existed at the death of their mother on the 30th of May, 1884, and that in the said account the Erf No. 4, Block K, be included, and that the landed property transferred to the testator on the 23rd September, 1903, and 23rd March, 1887, as aforesaid, and the land received in lieu thereof, and the two sums of £300 and £50 received by the testator, as alleged in paragraph 7 of the declaration, be included therein, and that all property, movable and immovable, and the proceeds thereof, in particular the property Wegwyzershoek and the land obtained by the testator for part of the said property be included in such account.

(b) That the bond of £413 shall be paid off out of the assets of the said joint estate or out of the assets of the testator.

(c) That the amount of the bonds paid off—namely, £197, £107 10s.—shall be

taken into account as a debt of the said joint estate.

(d) That after deduction of the debts due by the said estate the balance thereof shall be distributed in terms of the said joint will of November, 1882—namely, one-half to be divided into seven parts, and each of the plaintiffs to be paid one such part.

(e) That the land specially praelegated to the plaintiffs by the said joint will shall be transferred to them in terms of the said joint will and without any encumbrances or burdens other than those imposed by the said will.

(f) Alternative relief.

(g) Costs out of the estate of the late Isaac Johannes van der Vyver, the testator.

To this declaration the plaintiff pleaded in the following terms:

Before pleading to the merits of plaintiffs' claim the first-named defendant pleads in abatement as follows:

1. Certain parties mentioned in paragraph 3 of the declaration, to wit, Anna Christina van der Vyver, an imbecile, and Isaac Frederik Johannes van der Vyver, formerly married to Marta Barendina (now deceased), are interested in this suit and should be before the Court.

2. One Joseph Johannes van der Vyver, minor son of the late Isaac Johannes van der Vyver (the testator) by his second marriage with the first-named defendant, is also interested in this suit, and should be joined in the said action.

Wherefore the defendant prays that the said parties be joined by themselves or by a *curator ad litem* or guardian, as the case may be, or that the said suit be dismissed with costs.

As for a plea to the declaration in case the above plea be overruled, but not otherwise, the defendants say:

1. She admits paragraphs 1, 2, and 3 thereof, save that she says there was no "massing" of the whole of the joint estate, and save that she craves leave to refer to the will when produced for the terms thereof.

2. As to paragraph 4 thereof, she admits that after the testatrix's death there were in the joint estate bonds and promissory notes due to the said estate, and that there was also movable property, but she does not admit that the values thereof were £1,450 and £1,400, as alleged: The Erf No. 4, Block "B" in Riversdale, was not specially bequeathed by the said will: the amount of £717 10s. represented the liability of certain of the heirs to the testator, on account of the debts of the said heirs taken over by him.

5. As to paragraph 5 thereof the defendant says that in order to pay the said debts, the plaintiffs agreed to the testator mortgaging the land praelegated as aforesaid, for the said sum of £717

10s. by three bonds of £413, £107 10s., and £197: the testator during his lifetime paid out his half-share of the joint estate and child's portion bequeathed to him and out of the usufruct so bequeathed, the sums of £167 10s. and £197: but the said sum of £413 was not paid by him and remains a liability of the legatees.

6. She admits paragraphs 6 and 7 thereof, subject to what was stated above as to there being no "massing" of the whole joint estate: under the said will the testator was entitled to one-half of the joint estate and to a child's portion.

7. As to paragraph 8 thereof, she denies that the sums therein mentioned (save the sum of £275) were debts due to the joint estate or formed part thereof: the land acquired by the testator and referred to in paragraph 7 thereof was acquired by him subsequent to the testatrix's death and not out of any assets belonging to plaintiffs, and the plaintiffs have no claim thereto: she admits that the land is still registered in the testator's name, and says that he was entitled to deal with it as he did by his second will.

8. She denies paragraph 9 thereof, and says that the testator raised the money to pay the purchase price of the said land (Wegyzershoek) to Government, and thereafter repaid it out of his share of the joint estate.

9. She admits paragraph 10 thereof, save that she craves leave to refer to the will and codicils for the terms thereof.

10. As to paragraph 11 thereof, she says that the testator in or about July 31st, 1885, did frame and file with the Master of this Honourable Court a liquidation account, to which she craves leave to refer:—The said account was never disputed by the heirs or legatees under the will, and in or about February 1st, 1889, the legatees consented to the testator mortgaging the property for the payment of the aforesaid debts, and the defendant submits that the plaintiffs are not now entitled to dispute the said account.

11. As to paragraph 12 thereof, she says that no formal deed of repudiation has to her knowledge been entered into by the plaintiffs, and she has had no notice of the same.

12. As to paragraph 13 thereof, she says that the testator has not by subsequent testamentary disposition altered or revoked the first will, so far as the said praelegacies are concerned. The sum of £717 10s., whereof the amount of £413 mentioned is a part, was and is a debt of the plaintiffs; the said sum of £717 10s. having been reduced by payments of £304 10s. made by the testator for the account of the plaintiffs, leaving a sum of £413 still to be paid by the legatees, as provided in the second will, to which defendant craves leave to

refer: Save as above, she denies paragraphs 11, 12, and 13.

Wherefore she prays that plaintiffs' claims may be dismissed with costs.

Sir H. Juta, K.C. (with him Mr. Roux, for plaintiffs. Mr. Searle, K.C. (with him Mr. Van Zyl), for the first defendant. Mr. Du Toit for the second defendant.

Sir H. Juta applied for leave to amend the declaration.

This was granted.

Mr. Du Toit intimated that, on behalf of the second defendant, his instructions were not to participate in the proceedings, but to abide the judgment of the Court.

Jan Abraham Christiaan van der Vyver (one of the plaintiffs) said that he was married in 1868 to one of the daughters of old Mr. Van der Vyver. His mother-in-law died in 1884. At that time there were seventy cattle in the joint estate. Cattle were then selling at £6 each. There were 600 full-grown sheep and 150 small sheep. Full-grown sheep were making 15s. on the average; the lambs 6s. or 7s. There were also 40 goats, the average price of which would be 10s. Mr. Van der Vyver also had ostriches. Ostriches were then dear, and were "booming." He had 60 ostriches, 20 chicks, and two pairs of breeding birds. Chicks a month old were then fetching £10 or £11. His father-in-law sold chickens to Van Wyke at £10. A plucking of three cock birds at that time made about 10s. He estimated the value of the 60 ostriches at that time at £30 each. As to the breeding birds, his father-in-law would not have sold them at £100. He had heard of breeding birds making £300 the pair. Witness would have given £200 for "Old Sol and his wife," and £150 for the other pair. There were six horses—three mares worth £7 10s. each and three horses worth £20. There were also carts and wagons and other movables.

Cross-examined by Mr. Searle: For seven years after his first wife's death the testator carried on farming operations successfully. In 1899, however, things were not going so well. The testator was a particular man in his business transactions relating to promissory notes and so forth.

Willem van Wyk, examined, stated that until about 10 years ago he lived at Kleyn River. Witness was well acquainted with old Mr. Van der Vyver and his wife, and knew his stock fairly well. Witness agreed with the evidence given by the Van der Vyvers on that point. Witness remembered when Mrs. Van der Vyver died. He owed the estate money for ostriches. He paid the amount due (£100) shortly after the death of Mrs. Van der Vyver. Witness gave eight oxen, four cows and a horse in settlement of the account.

In cross-examination by Mr. Searle, witness said he counted Mr. Van der Vyver's stock, because he used to shear for him. Witness could not give the exact number of stock on the farm for any specific year, but there were generally about 600 sheep. The stock owned by the sons used to run with that owned by the father; but the sons each had separate kraals. The sons had no small stock. There were three sons living on the farm. They all had cattle. The cattle and horses were taken in settlement of the account for the ostriches, because witness had not the ready money.

Re-examined by Sir H. Juta: The stock belonging to the whole family ran together during the day, but when kraaled each lot was separate.

Isaac Frederick van der Vyver, farmer, stated that he married a daughter of Mr. Van der Vyver in August, 1884. Before witness married he lived at Kleyn River. Witness went to live with his father-in-law after the marriage. Witness agreed with the evidence given by the other Van der Vyvers. When Mrs. Van der Vyver died witness owed the estate nothing. Witness's wife died in January, 1895. The father-in-law paid the doctor's fees. Witness recollected in 1889 his father-in-law wanted to mortgage a portion of the farm, and asked the sanction of the children to such a course. He said he did not want to sell his stock, although there was plenty on the land. The house on the place mortgaged was worth about £100. A farmer named Simon was also indebted to the estate. He knew this because Simon told him so, and gave him money to pay the interest.

Cross-examined by Mr. Searle: The amount Simon gave witness to hand to his father-in-law was £50. Mrs. Van der Vyver was at that time quite well. Mr. Van der Vyver paid a bill of £33 for witness. Witness never paid it back.

Sir H. Juta asked his case.

For the defence, Mr. Reitz, of the firm of Reitz and Versfeld, stated he knew old Mr. Van der Vyver. In 1889 Mr. Van der Vyver was unable to meet some bills which he owed himself, and some for which he went security for his family. Witness told him the accounts had to be paid, and advised him to mortgage the property, and pay what was owing to the estate. That was agreed to. The liquidation account of that time appeared to be erroneous. Witness pointed out to Mr. Van der Vyver that there would have to be a settlement with the estate. They did not take up the position that they had settled because of the bond they had passed. Witness made it clear to the parties that by signing the consent they were settling their own debts.

In cross-examination witness said it was difficult to remember a conversation that occurred 21 years ago.

Josina Fredrika Petronella van der Vyver, the principal defendant and the executrix testamentary of the estate of the late Isaac Johannes van der Vyver, stated when she was married there were about 450 sheep, 40 head of mixed cattle, 5 horses, and about 50 ostriches on the farm. There were also cattle belonging to the children on the farm. Witness knew nothing of the liquidation account of Mr. Van der Vyver's first wife. After witness married the farming was continued, but it went back during the following years. Her husband was getting feeble, and his eyesight was beginning to fail him. He was an old man. He never sold any large quantities of stock. Witness remembered her husband making the codicil to his will shortly before he died. The two "Johns" were consulted as to how the estate should be divided. Witness took an inventory of the things in the second estate. The furniture belonged to witness. All the things were sold except 75 sheep, 2 cows and calves, a cart and horses, and the furniture, all of which was bequeathed to witness.

In cross-examination witness said although things went bad on the farm, her husband was able to pay his way by selling wool and ostrich feathers. Some of the stock died of old age. He sold none.

Mr. Searle closed his case.

Postea (September 1st). Counsel having been heard in argument:

Cur. Adv. Vult.

Postea (September 4th).

Maasdorp, J.: On the 18th day of November, 1882, Isaac van der Vyver and his wife made a joint will by which they bequeathed to their daughter Anna the sum of £1,000 after the death of the survivor. Of this she was only to enjoy the interest during her lifetime and after her death the said sum of £1,000 was to devolve on their five children or their lawful descendants by representation *per stirpes*. They bequeathed, after the death of the first dying, to their five children certain land, upon this understanding: that the survivor shall remain in possession and enjoy the usufruct for his or her life, and the said children shall only receive transfer after the death of the survivor. And it was directed that when that time arrived the land should be placed under mortgage. Each of the five heirs was to mortgage his or her share to the said Anna for the sum of £200, to bear interest at 6 per cent., which was to be paid half-yearly to her. Then the testator appoints as his heirs the testatrix together with their children, and the testatrix appoints as her heirs the tes-

tator together with the children. The testatrix died and the testator married again. He subsequently made a will confirming the bequest of the land, but imposing certain conditions not appearing in the earlier will. It is admitted that in the case of the £1,000 bequeathed to Anna there is such a massing of the fund that the testator after adiation could not alter the disposition, but it is contended that it is not so in respect of the land bequeathed to the children, mainly on the ground that by the terms of the will the latter bequest takes effect upon the death of the first dying, and not upon the death of the survivor. But, in my opinion, the will must be construed as a whole, and not with regard to any single clause thereof, and if that is done, it seems clear that the intention of the testators with respect to the £1,000 cannot be carried into effect without taking the land as consolidated for the purposes mentioned in the will. It is clear that it was the intention of the testators that the bequest of all the land should take effect after the death of the survivor, when transfer should be given, and the necessary mortgages should be executed. In my opinion, all the conditions exist which are necessary to prevent the testator, after adiation, from altering by subsequent will the bequest of this property. As to the rest of the property, there was no massing of the joint estate, but it was provided that during the lifetime of the testator he was to enjoy the usufruct thereof. Upon his death the heirs of the joint estate became entitled to half the property belonging thereto. The Court has now to ascertain what that half consists of. Upon the death of his first wife, the testator lodged an inventory of the property, which is so obviously and admittedly insufficient and incorrect that it must be set aside at once, as of no assistance in arriving at the condition of the estate at the time it was made. It was argued at the trial that the conduct of the testator in framing this inventory was such that he became liable to the penalties provided under section 15 of Ordinance 104 of 1833, but that issue is not raised in the pleadings, and a question of forfeiture cannot be raised in this incidental manner. For the purpose of making up an account of the joint estate of the testator and his first wife, certain questions on disputed facts have been raised for the decision of the Court in regard to certain specified items. The largest item is that of a bond on the bequeathed land. On the one hand, it is said to be a debt of the joint estate; and on the other, to be the accumulated debts of the plaintiffs in this case. The evidence of Reitz and Versveld upon this point is by no means conclusive. It may be that at some time the debt may have been spoken of as debts of the heirs,

because no doubt the heirs did at one time owe certain amounts, but these debts were taken over by the testator before the death of his wife, and there is evidence of settlements made by the heirs from time to time, leaving the debts as a burden on the estate. The settlements by the heirs are matters to be considered when their respective debts are dealt with. The importance of the power of attorney and consent paper for raising the mortgages which were executed by the heirs are very great in deciding the point raised in respect of the bond for £413. They were executed before Mr. Versveld, and in them the debt is described as a debt of the joint estate, and upon the evidence in the case I come to the conclusion that the debt must be paid off out of the funds of the joint estate before a division can take place. It is admitted that the sum of £275 is an asset of the joint estate. The plaintiffs further claim that three amounts of £500, £300, and £50 should be brought up as assets of the estate. It is alleged that the sum of £500 was a debt due to the estate by J. A. and J. A. C. van der Vyver, and that it was settled by land transferred to the testator by them. It is quite clear that the greater portion of the £500 was owing in respect of debts taken over by their father which they owed to others, and formed part of the indebtedness of the heirs spoken of by Reitz and Versveld. Only with regard to £191 is it clear that it was due to the estate for ostriches purchased by J. A. C. van der Vyver. That sum of £191 must be brought up as an asset in the estate. With regard to the debts of J. A. and J. A. C. van der Vyver, I find that they were duly settled, although it appears that some promissory notes of theirs are still amongst the papers of the estate. As to the £300 debt of Isaac, which was also paid, the evidence is not clear whether this was owing to the estate, for consideration received from the estate, or for moneys paid by the testator on behalf of Isaac, and it cannot be declared to be an asset in the joint estate. Coming now to the value of the movables in the estate, it appears that they consisted, at the death of the testator's wife, of stock, vehicles, and furniture. It is quite clear upon the authorities cited at the bar, that the testator as usufructuary was bound to keep up the number of the flocks and herds out of the increase yielded from time to time. It is only in respect of the ostriches that any difficulty arises on this score, as regards the remainder of the stock from which any increase could be expected, I am not satisfied that any great diminution has taken place. And as to the ostriches, no practical benefit can arise from going very narrowly into the matter, considering the condition

of the estate. There is no doubt that the value of the articles should be taken at what it stood on the death of the testator, and not at the time when his wife died. The goods sold in the estate of the testator realised about

£100, and upon the evidence, I am prepared to take it that such was about the value of the joint estate at the time of his wife's death. And practically it cannot benefit the plaintiffs to place it higher. The evidence on this part of the case is so vague that no precise result can be arrived at. I may mention that two of the three bonds over the bequeathed property were paid off by the testator, but they were paid out of money payable by him to the heirs, as the purchase price of the opstal, and cannot be brought up to the credit of the testator's separate estate. The result is that it is declared that the legatees are entitled to the farms free of all mortgages, and the bond of £413 must be paid out of the joint estate. The sums above mentioned of £275 and £191 must be accounted for by the testator's separate estate to the joint estate. For the purposes of an account, the movables in the joint estate are declared to be of the value of £766. The defendants are ordered in bringing up their accounts to adopt the findings of the Court upon the above points. I may mention that I have found that two bonds were paid off out of the purchase price of the opstal, in the event of the heirs being unable to fulfil their part of the agreement, they would be liable to account to the testator's estate for the amount of the bonds. But while I give that as my opinion, I cannot give a decision upon the point, because the question is not specifically raised. The first defendant, in her capacity as executrix, is ordered to pay the costs of the plaintiffs. No order is made as to the costs of the second defendant.

[Plaintiffs' Attorneys, Michau and De Villiers; Defendants' Attorneys, Tredgold, McIntyre and Bisset.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

STONE V. MCKENZIE. { 1905.
{ Aug. 9th.

Brick-making machinery — Misrepresentation—Article supplied for a special purpose.

S. had supplied certain brick-making machinery to M.,

guaranteed to be capable of doing certain work. M. tested the machine, but found that it could not do the work guaranteed. Plaintiff now sued for the price of the machinery and cost of its erection.

Held, that he was not entitled to recover.

This was an action brought by William Stone, of Cape Town, against A. R. McKenzie, of Cape Town, to recover £350 in respect of certain brick-making machinery supplied to the defendant, and £20 for erecting it.

The declaration set out that about 19th May, 1904 the plaintiff entered into a contract of sale with the defendant, by which the defendant was to pay to the plaintiff £200 for certain brick-making machinery, and £20 for erecting it on its being tested to work according to the representations of the plaintiff on the defendant's field, and a further £150 after a season's satisfactory work. If the machine was not a success, the plaintiff was to remove it at his own expense. The machinery had been duly erected, tested, and found to work satisfactorily during the season, and plaintiff claimed £350 and £20 for erecting it, with costs.

The plea admitted the erection of the machinery, but denied that the machinery was tested and found to work satisfactorily, or proved itself to be what the plaintiff represented it to be during one season's work. The plaintiff well knew the nature of the clay on the defendant's field, and represented the machine to be capable of turning out from ten to fifteen thousand good bricks per diem, but it was only capable of turning out eight thousand indifferent bricks per diem. The machinery could not properly crush the clay, and the wire-cut bricks were bad. The machinery frequently broke down. Subject to the claim in reconvention, the defendant admitted that the plaintiff was entitled to claim the sum of £20. In reconvention, £96 was claimed for money advanced, and £39 6s. 6d., being expenses incurred in connection with the machinery. Defendant further claimed an order compelling the plaintiff to remove the said machinery at his own expense and risk, and a cancellation of the agreement.

The plaintiff in his replication admitted that the machine was not a crushing machine, and said that the defendant was well aware of this. He tendered certain items for work and labour done claimed by the defendant, to be set off against his claim.

Mr. Upington for plaintiff. Mr. Gutsche for defendant.

Wm. Stone, plaintiff in the case, said he had twelve years' experience of practical brickmaking, which he was carrying on a little before April, 1904. For the purpose of that business, he imported a "Murray's Patent No. 1 Machine," and had purchased from the Harbour Board one of their traction-engines to work the machine. He had to give up the work at Mount Prospect on account of the difficulty in getting coal up, and he was anxious to dispose of the machinery. He paid for the machine £160, it cost him £25 to get it erected, and £200 cash for the engine. The machine worked satisfactorily while he had it—about three months. Witness told McKenzie the machine would turn out from ten to fifteen thousand bricks per diem on his brickfield. The defendant sent a couple of bags of clay up to the machine at Mount Prospect, and the rough bricks which were turned out from the rough clay were not objected to by the defendant. Through the carelessness of the driver, the cog-wheel broke, and the defendant ordered a new one, but there was never any question of the plaintiff paying for it. The defendant paid the foundry for the cog-wheels. Witness erected the machine, and put it in good working order. Complaint was made to him about the roughness of the bricks, but not about the shape. The roughness was the result of the rough clay, and it was pointed out that a crushing pan would obviate that. When 8,000 bricks a day were turned out, it was when the defendant was burning dust; but when the fuel was good, 12,000 were turned out. The machine had often to be stopped on account of a shortage of labour. At the time of the agreement with the defendant, there were other offers for the machine. On several occasions he asked the defendant for the money, and in May he issued summons. Witness had nothing to do with the erection of a Scotch kiln on the defendant's field. The kiln was for burning the bricks that the defendant disposed of.

Cross-examined by Mr. Gutsche: He thoroughly knew the nature of the clay on the defendant's field. The brick turned out by the machine was a good brick; the roughness was due to the clay. The defendant was told if he wanted to have a fine brick he would have to purchase a pan. The cogwheel was ordered by witness for the defendant. He denied that he was told that the bricks were unsatisfactory. He was not stopped in December.

Re-examined by Mr. Upington: Mr. McKenzie's men inspected the traction engine.

It would have been futile for him to have used his own clay instead of McKenzie's in the test, as the materials were very different, and easily recognizable.

John Pearson, manager of the Kloof Pottery Works, said, he had a life experience of brickmaking machinery. He knew the machine in question, and in his opinion there was not a better machine as a brickmaking machine on the market. Some eighteen months ago witness was desirous of purchasing the machine, but the plaintiff had already entered into an agreement with the defendant. Witness would have been prepared to give £350 for the machine and engine. There were about 200,000 bricks on the defendants' farm, and as to the quality, he put them down as a first-class second. The rough brick took the plaster better than the smooth brick. Witness had also inspected the machine, and the traction engine, and by putting a cogwheel in the machinery would be in working order.

Cross-examined: The clay on McKenzie's field would make a good brick if well crushed.

Samuel Holt, a brickmaker, of 35 years' experience, said that the Murray machine was the best machine on the market. On March 4 he saw the machine in question working on McKenzie's field. He stayed there 15 minutes, and during that time it made 1,500 bricks. It was then stopped, because there were not enough people to take the bricks away. The bricks made were like the one produced, which was a good "second." He had managed a place where the bricks made had been too smooth, and for that reason had been rejected, as they would not take the plaster. To make a smooth brick in this clay, a crushing appliance was necessary. Any brickmaker would know that such was necessary. There was no machine in existence that could make a smooth brick from the clay to be found at McKenzie's field.

Mr. Upington closed his case.

Andrew Ritchie McKenzie, the defendant, said that in March last the plaintiff told him that he was anxious to dispose of the machine. The plaintiff showed him a photo of it, and witness said that he thought the machine would not be suitable for his field. The machine was a perfect one, and the plaintiff said that the rollers of his machine would deal with the rotten stone on witness's field. Witness sent him to his field to get a load of clay through the mill, and then to report to him if the machine worked well, but witness was not satisfied, and told plaintiff to take the mill up to his (witness's) field. Witness said that he would pay plaintiff £20 for erecting the machine, and if it had proved satisfactory, witness would have bought it. The bricks were "filthy, soft seconds," not fit for cottages, and the majority of them were "slop bricks." If witness had 100,000 bricks like the one produced he could sell them. Witness had never expressed satisfaction with the machine. The machine had not come up to the re-

presentations made by the plaintiff. Knowing that the plaintiff had no means witness voluntary gave £20 to the plaintiff in order to erect the machine. The plaintiff had bought the cheap cogwheel on his own responsibility; witness had guaranteed the payment for the wheel. With regard to the payment of 30s. a week to Stone, witness had made that out of kindness, because his foreman had told him that Stone was starving. Witness had also given the plaintiff sums of £3 and £5, for which he had not claimed, to send to his (plaintiff's) wife, who, plaintiff had told him, was starving.

By Hopley, J.: The Scotch kiln was put up at the request of the plaintiff. Warner had brought the matter forward.

Mr. Upington: I object.

By Hopley, J.: Warner had a judgment against the machine, and had written to the effect that he wanted to execute judgment on the field.

Cross-examined: He had been making bricks for 35 years. He was simple enough to believe that the machine could deal with his claim. He could turn out better bricks than the plaintiff had at Mount Prospect. He would not have entertained the idea of buying the machine if he had been told a crushing pan was necessary. He was getting for the £350 the machine, and an old "pet" of his. Early in 1905 witness told the plaintiff he could go and take his machine with him. The plaintiff had never been in his employ.

Mr. Upington: Will you produce your pay-sheets?

[Hopley, J.: He has been using your clay and labour all this time?]

Yes.

[Hopley, J.: Then why did you keep him on after his machine was found to be no good?]

Now you've come to the crux.

[Hopley, J.: I know I have, that's why I'm here.]

Each time I spoke to him about the matter he had some plausible tale about what he could do if he had a Scotch kiln or a pan, and each of these operations took six or more weeks.

Mr. Upington: Whose handwriting is this? It is in pencil, and says "Advanced to Mr. Stone"?—I cannot say; I cannot see it, my eyesight is failing. He had used 15,000 of the bricks made by the plaintiff for building some cottages. With all his experience, he did not know that it was impossible to make a machine-made brick from the class of clay found in his field without rollers. He did not know that machine-made bricks could not be made with the clay on his field without a crusher. The plaintiff never asked for a crusher, which would cost between £500 and £600.

Witness: You have asked me a good many questions, let me ask you one. If you went to a tailor's shop and asked

for a suit of clothes, and they gave you the trousers and told you to go to another shop and get a coat, would you be satisfied?

Mr. Upington: He did not contract to supply you with a crusher.

Witness: He contracted to make bricks with the machine.

Mr. Upington: He assumed you were a man of common sense, and knew that bricks could not be made out of your clay without a crusher.

Proceeding, witness said he could prove that the working of the machine cost him between £300 and £400, and the production of the bricks, of which he had now some 200,000 on his field. The machine was to be tested between August, 1904, to the middle of May, 1905. The Scotch kiln was a permanent thing. He had disposed of some of the bricks out of that kiln. When he claimed for that expense, he never intended to take judgment against the plaintiff; it was merely put in to show the amount of expense that defendant went to. The machine had turned out bricks, but it was constantly going wrong. Some time in December the plaintiff was told to take the machine away, and at his request the Scotch kiln was built, to give him another chance.

Re-examined by Mr. Gutsche: The plaintiff was given 30s. a week as an advance, and not as wages. The plaintiff assured him that the rollers would finish what the knives had missed.

Theodore McKay, manager in McKenzie's brickfields, stated that in March or April the plaintiff went to him and said he had a wire-cutting brick-making machine for sale. Witness advised him to see Mr. McKenzie. He did so, and Mr. McKenzie showed him the land he wanted clearing, and Stone replied that his machine would crush anything. By agreement, four or five bags of clay were sent to the machine, but when they got there, the machine would not work, and it was agreed to postpone the trial. Subsequently, Stone told witness the clay would make good bricks. Portion of the machinery was moved down. Mr. McKenzie sent for the traction engine, but the cog-wheel broke. Stone then ordered another cog-wheel. Witness took it up in a cart, and had it fixed on. That also broke. Another wheel was obtained, for the payment of which witness had to go security, and that was fixed on, and the engine was taken down to the field. It was decided to allow the plaintiff 30s. a week for board and lodging, pending the trial of the machine. Witness kept an account of the payments made. In December, witness found that the bricks, after they had been burned, were unsatisfactory. Witness told the plaintiff that the bricks were useless, and he suggested making a Scotch kiln. As this would cost a good deal of money, witness consulted with

Mr. McKenzie, and it was erected under the supervision of plaintiff. The bricks thus produced were unsatisfactory.

[Hopley, J.: But the kiln was a permanent building, and would do for other bricks.]

Oh, no. If you do not make bricks with a wire-cutting machine, it is no good.

[Hopley, J.: Why?]

You don't burn hand-made bricks in it.

[Hopley, J.: Is there any scientific reason for it?]

Not that I know of. No tally of the bricks made was kept, but he thought there were about 300,000, of which 150,000 had been sold. There were about 170,000 left. The defendants had a contract with a man named Berger to supply machine-made bricks. They had been unable to complete the contract, because he would not take the bricks made by the machine, but took the balance in hand-made bricks. If all the bricks were like the ones produced by the plaintiff, witness would not grumble. The bricks produced were picked out of the lot made. The bricks produced by the defendant were fair samples of the produce of the machine. Witness handed in the cost incurred in making the bricks by the machine.

Cross-examined by Mr. Upington: The bricks produced by the defendant had been taken from the balance left on the field. The original material used tended to make or not to make a good "red hard." Good mixing was also required, and burning also had something to do with it. The defendant supplied all the labour, etc., for the burning. The bricks used by defendant had been charged for by the defendant against himself at cost price.

Mr. Upington: His (plaintiff's) clay is better than McKenzie's?—Yes; it is clean clay, and has no shale in it.

And he can make better bricks than the defendant with that clay?—I don't know; if he did, I don't know why he could not sell them.

Did you sell any for him?—Yes.

How much did you get for them?—£1 per 1,000.

£1 per 1,000! Who did you sell them to—a friend of yours?—No, to Smith and Schultze.

And who carted them?—Smith and Schultze.

Ah! £1 per 1,000 at the brickfields. That's a different thing?—Yes; and they said they were sorry they ever bought them. He had no prior experience of brick-making machinery. There was no entry in the defendant's book showing the price at which the 105,000 bricks used by the defendant for his buildings has been charged.

A. R. McKenzie (recalled) said that he had valued the bricks at 18s. per 1,000 on the field. He would not have given

18s. for them if he had been buying them.

John Denton, a foreman in the employ of the defendant, and Thomas Wilfers, an engine-driver in the same employ, also gave evidence of a corroborative nature.

Mr. Gutsche closed his case, and council for the plaintiff having been heard in argument on the facts,

Hopley, J., said that in this case the plaintiff came into Court on a declaration, stating that he sold to the defendant, under certain conditions, a pug mill and a traction engine for the purposes of brick-making, and he produced a letter which the defendant wrote to him on May 19, as setting forth the terms of the contract. Now, it rested on the plaintiff to show that the terms of the contract as set forth in the letter had been fulfilled by him, and that everything had happened to enable him to make good his claim against the defendant. It appeared that the letter was not the first thing that had passed between the plaintiff and the defendant with regard to this matter. The plaintiff was the owner of a pug mill and a traction engine, and he was anxious to abandon brick-making work, at which he had been engaged. Under these circumstances he approached the defendant, who was a man of means, and also in the brick-making line. The defendant had at that time a large brick-field, in which the best of the clay had apparently been worked out, and what was left was an earthy deposit of a more difficult nature to treat than soft clay. The defendant's wish was to clear that field as much as possible, to turn what he could into bricks, and clear the rest so as to build on it. There was room in the letter for a conflict of evidence, because the question might arise as to the work the plaintiff guaranteed the machine to do, and consequently the defendant has pleaded that the plaintiff misrepresented its capacity. It would appear that the plaintiff did represent that it was capable of doing the work in a satisfactory manner, and it is said by the defendant that the plaintiff specially guaranteed that it could treat the shale on the ground and turn it into bricks of a good class. This is denied by the plaintiff, but whatever the representations may have been, it seems clear that the defendant was not satisfied with them alone. He sent up some of his ground to where the machine was then standing, with a view to a test. Now, this was very significant, because it had been argued throughout by the plaintiff that anybody purchasing such a machine could not get a machine to do this work without a crusher. The mere fact that defendant sent up a quantity of clay to be tried proved that he intended the test to be made without a crusher attached to the ma-

chine. After the clay had been operated on the defendant did not seem quite satisfied, because he wrote to the plaintiff, stating that if the machine was satisfactory after a season's trial he would take it, and limited his liability for the time being to £20, the amount charged by the plaintiff for erecting the machine. It did not seem to him that there was any wish on defendant's part to get out of the contract or to import anything into it which the evidence does not justify. It seemed that he was perfectly willing to admit the virtues of the machine, but he said the machine was not capable of doing the necessary work on the clay. Bricks had been produced in Court, and it was admitted that if the quality of all the bricks were the same as the quality of one of those, then the bricks turned out by the machine would be acceptable; but that was not so. The season's working apparently produced some 50,000 good bricks, and 105,000 bricks which were called "seconds"—bricks good enough to build cottages with, and there were left about 170,000 bricks which were either worthless or of very little value. Now, that could not be looked upon as a satisfactory season's working, because it was obvious that that would not pay for the amount of money spent in producing the bricks. It was impossible for the Court to say that the defendant should be satisfied with the way in which the machine had done its work. It had been argued for the plaintiff that the defendant's opinion should have been notified sooner. That was not feasible, because the machine was on a season's trial, and if the defendant had condemned the machine the plaintiff might have contended that the machine was on a season's trial, and that he should get a further chance. All those things made him feel that the defendant had very good grounds for saying that he was not satisfied with the machine, and that the plaintiff had not carried out his portion of the contract, and therefore judgment would be given for the defendant. On the claim in reconvention, judgment would be given for the plaintiff for £40, and against him for £20, the amount due to plaintiff for erecting the machine. Plaintiff would have to pay all costs of the suit.

[Plaintiff's Attorneys: Fairbridge, Arderne and Lawton; Defendant's Attorneys: Silberbauer, Wahl and Fuller.]

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the
Hon. Sir JOHN BUCHANAN.]

ADMISSION. { 1905.
 { Aug. 10th.

Mr. Russell moved for the admission of Jacob Rudolph de Villiers as an attorney and notary.

Application granted and oaths administered.

PROVISIONAL ROLL.

HODGES AND CO. V. PUTTERGILL AND
HEFFORD.

Mr. Benjamin moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

JONES V. MITCHELL.

Mr. Benjamin moved for provisional sentence on a judgment of the Court of the Resident Magistrate at Wynberg for £8.

Buchanan, A.C.J., said he did not see why the defendant should have been brought into this court. He did not think this Court should be turned into an engine of oppression.

The matter was ordered to stand over for a week, his Lordship adding that he was not inclined to go out of his way to assist the plaintiff. If the plaintiff's object was to get a longer term of imprisonment for the defendant, the Court would not help him.

KANNEMEYER V. SHAW.

Mr. Gutsche moved for provisional sentence on a promissory note for £23 11s. 10d., with interest.

Order granted.

FRASER AND SON, LTD. V. SHAW.

Mr. Gutsche moved for provisional sentence on a promissory note.

Order granted.

ESTATE YOUNG V. HEYNS.

Mr. Gutsche moved for provisional sentence on a mortgage bond for £800, due by reason of the non-payment of interest; counsel also applied for the

property specially hypothecated to be declared executable.

Order granted.

GINSBURG V. BOTHA AND BOTHA.

Mr. M. Bisset moved for provisional sentence on a mortgage bond for £400, with interest, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

ESTATE WORDON V. EVANS.

Mr. Gutsche moved for provisional sentence on a mortgage bond for £1,000, due by reason of three months' notice having been given; counsel also applied for the property specially hypothecated to be declared executable.

Order granted, subject to stamping of affidavit put in.

FLETCHER V. BARTLETT.

Mr. Gutsche moved for provisional sentence on an unsatisfied judgment of the Resident Magistrate's Court at Cathcart for £103 odd.

Order granted.

VAN WYK V. LLOYD.

Mr. Burton moved for a provisional sentence on a promissory note for £18 1s. 8d.

Order granted.

ILLIQUID ROLL.

WEGE V. MEIRING. { 1905.
 { Aug. 10th.

Mr. De Waal moved for judgment under Rule 329d for £11 18s. 5d., for professional services rendered and moneys disbursed, with interest *a tempore morae* and costs of suit.

Order granted.

SMITH V. KREYER.

Mr. Russell moved, under Rule 319, for judgment in terms of declaration in default of plea.

Order granted.

STARKE AND CO. V. STEVENSON.

Mr. Bailey moved for judgment, under Rule 329d, for £57 7s., rent due.

Order granted.

FREEMAN V. BROWNE.

Mr. Bailey moved for judgment, under Rule 329d, for £140, balance of purchase price of certain four lots of ground at Muisenberg, plaintiff tendering transfer.

Order granted.

CAPE TIMES, LTD. V. IRVINE.

Mr. Sutton moved for judgment under Rule 329d for £34 11s. 6d., advertising charges, with interest, *a tempore morae* and costs.

Order granted.

EPIHLHAUS AND CO. V. HARPER.

Mr. Watermeyer moved for judgment, under Rule 329d, for £168 4s. 8d., balance of account for goods sold and delivered.

Order granted.

REHABILITATION.

Mr. De Waal moved for the discharge from insolvency of Jan Albert van der Walt.

Granted.

GENERAL MOTIONS.

BAILEY V. DRUMMOND. { 1905.
 { Aug. 10th.

Mr. P. S. T. Jones moved as a matter of urgency for an interdict restraining the respondent from removing certain furniture from the Villa Marabella, Claremont. It was stated that an action was pending in which applicant was suing respondent for rent.

Interdict granted pending result of action to be instituted by applicant for recovery of rent due.

CAPE ELECTRIC TRAMWAYS V. COLONIAL GOVERNMENT.

This was an application for an interdict restraining the Colonial Government from continuing in possession of certain property known as the Sea Point Railway. Mr. Burton was for the applicants; Mr. Morgan Evans was for respondents.

Mr. Morgan Evans said that this case was one of considerable importance, and the Government were anxious that Mr. Searle should appear in the matter. His learned friend was, however, engaged in another court, and the matter stood so low down in the list that it seemed impossible for it to be reached that day.

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[Buchanan, A.C.J.: I think it is very likely that it will be. Do you wish to apply for a postponement?]

Mr. Evans said that was so.

Mr. Burton said that his clients were prepared to go on with the matter, which was somewhat urgent. However, seeing that the Government wished Mr. Searle to take the case, he did not object to a postponement.

The matter was ordered to stand over until next motion day, the 17th inst.

LEWIS V. REPSTONE AND OTHERS.

Mr. Swift moved, as a matter of urgency, for an order of ejectment in reference to certain property in Jarvis-street, Cape Town.

Order granted, defendant to quit within 24 hours, failing which writ of ejectment to issue.

BRILL V. NEW YORK MUTUAL { 1905.
INSURANCE CO. { Aug. 10th.

Inspection of documents—Attorney and client—Privilege.

B. applied for an order to inspect certain letters which had passed between one D. and the New York Mutual Insurance Co. D. was both agent for the Company and also their local attorney.

Held, that as certain of these letters were written by D. as attorney to the Company and contained statements as to evidence to be produced on their behalf in a pending action, the applicant was not entitled to inspect such letters.

This was an application by the plaintiff in action for an order calling upon the manager in South Africa of the respondent company to allow plaintiff or his attorneys inspection of certain papers, documents, and writings enumerated in the schedule (b) of the defendants' affidavit. Mr. Burton was for applicant; Mr. Upington was for respondents.

Mr. Burton said that the matter had previously been before the Court, and had been ordered to stand over. The case was one in which a cessionary of a policy of life insurance claimed payment of the policy. The pleadings had been closed, and plaintiff now asked that he should be allowed to inspect certain documents. The defendant set forth two schedules. He said he would not mind the plaintiff seeing one sche-

dule, but he objected as regarded the other, and said it was of a departmental and confidential nature.

Mr. Upington said that respondent had given discovery and inspection of all documents, except certain documents, which were set out in an affidavit. It was now objected to produce certain letters on the ground that they contained the evidence procured for the purposes of the case, or in view of pending litigation.

Mr. Burton said that the applicant now moved for leave to inspect certain further documents, and also for an order upon respondent to pay costs. Counsel said that the position was somewhat complicated by reason of the fact that Mr. Drake, of East London was both attorney and local insurance agent of the respondent company. He submitted that applicant was entitled to inspect all letters up to the 22nd November, 1904, relating to the health of the assured, and so forth. They did not want to see the papers that passed between the company and their legal advisers, but they claimed the right to see the statements made by Drake, in his capacity of agent to the company, and the statements of persons who had seen the deceased prior to his death. These statements, he contended, were in no wise privileged.

Mr. Upington held that the question as to whether Mr. Drake was an attorney or not did not seem to be very material to this case. It would be contrary to the whole principle which underlies discovery if a person who procured information for the purpose of defending himself in case of a claim being made against him, was to be compelled to allow an inspection of such information. He submitted that the plaintiff was not entitled to inspect these papers, as it would be contrary to the course of justice for him to do so.

Mr. Burton contended that, even if the plaintiff should lose his case, that the defendant should pay the costs of the application.

Mr. Upington (in reply) held that his clients had given all possible assistance to the plaintiff, and therefore they should not be asked to pay the costs.

Mr. Burton said they had to come into court, because they did not know what letters they were to get. This application was rendered necessary only because of the respondent's unjustifiable refusal.

Buchanan, A.C.J.: The application was for an order to allow the plaintiff or his attorneys inspection of certain papers and documents in the custody or control of the defendants. In answer to this, the manager or principal officer in the defendant company has filed an affidavit containing two schedules, and with reference to these, he said they were willing to produce the documents specified in schedule (a), but they

refuse to allow inspection of the documents in schedule (b), on the ground that they were of a confidential nature. The documents for which the privilege was claimed were letters which had passed between the solicitor and the company and the local manager and the head office in New York. These letters contained statements of evidence which had been collected for the purpose of proving the defence in the case. No doubt, if an attorney acted in several capacities, he could not always claim the privileges of an attorney in every branch of his work. In this case the attorney was the agent at East London for the defendant company, and any communications which passed in that capacity relative to the contract with the plaintiff would probably not be privileged. But the communication that passed between him and the office from witnesses, in view of the pending litigation, he had a right to refuse to disclose. On no principle of justice was a party entitled to force another's hand to disclose what his witnesses had to say. He knew of no case which justified the applicant in this case having authority to see these documents. The only other matter was that of costs. It had been admitted that the affidavit of disclosure did not give sufficient information to the applicant, and he thought justice would be met by making the costs incurred in the case costs in the cause.

Ex parte THE HEX RIVER SCHOOL.

School—Sale of former public school buildings.

This was an application by the committee of the Hex River School for the confirmation of a sale. The school was established in 1865, and from the transfer it seemed that the property, the land and school buildings, were transferred to the committee for the time being. The petitioners were duly elected as members of the School Committee at a meeting of those interested in the school, held on October 17, 1904. The school had ceased to exist as a public school for the past 25 years, the requirements of the public having been met by other schools established in the neighbourhood. Since the school ceased to exist, the buildings and land had been looked after by George William Gee, and there was no prospect of the desirability of establishing a school there. A meeting of the guarantors, etc., of the school was called, whereat the petitioners were elected, and acting on the instructions of the meeting, after realising that it would be impossible to sell the place by public auction, had

disposed of it to Mr. George William Gee for £570. They now wished to pass transfer of the property.

Mr. Burton moved.

[Buchanan, A.C.J.: What do they propose to do with the proceeds?]

Mr. Burton: To distribute it amongst other educational establishments in the neighbourhood.

[Buchanan, A.C.J.: What schools are there in the neighbourhood?]

I cannot give your lordship the list, but there are several schools in the neighbourhood. Continuing, counsel said the application was rendered necessary because the Registrar refused to pass transfer without the order of the Court. It was intended, if there was any trouble with regard to the distribution of the funds, that the decision of the minister of the Dutch Reformed Church should decide the matter.

Mr. Nightingale, who opposed the application on behalf of the Superintendent-General of Education, read the affidavit of Mr. Murray, Acting Superintendent, drawing attention to the fact that, although the Government did not contribute towards the purchase of the school buildings, yet the actual teaching of the school was dependent on the Government grant. He did not oppose the application if the distribution of the proceeds was left to the committee, in consultation with the Superintendent-General of Education.

Mr. Burton said the whole point of the case was that the Superintendent-General of Education claimed the right to veto the wishes of the local committee in regard to the distribution of the money. If the committee wished to devote the money to something other than education, then the action of the Superintendent-General could be understood.

Buchanan, A.C.J., said that, as the Government had contributed to the school, they should have something to say as to the distribution of the money. He thought it would be advisable to pay the money into the hands of the registrar of the Court.

Mr. Burton said that what he would suggest was that the sale be sanctioned, and that the committee make its decision with regard to the money, and submit it to the Superintendent-General of Education, and if he approved, the matter need not come into the court.

Mr. Nightingale said this suggestion was quite acceptable to the Superintendent-General of Education. The distribution of this money was already at sixes and sevens, and the Superintendent-General was the best person to consult on the matter.

Mr. Burton said the committee did not recognise the right of the Education Department having anything to say to the disposal of this building.

The Government had no more right in this property than they had in a farmer's private school, to which they contributed.

Buchanan, A.C.J., said the school in question had been established some years ago, but it was no longer required, and the School Committee, which had been elected under Government regulations, decided to dispose of it. The Superintendent-General of Education raised no objection to this, but he wished to see the proceeds of the sale properly applied to the purpose to which it was proposed to devote it. The Court would order the Registrar of Deeds to transfer the property to Mr. Geo. William Gee, on condition that the proceeds of the sale, after the expenses had been paid, should be disposed of in a manner agreed upon between the committee and the Superintendent-General of Education, and, failing that, the Court would determine the matter. He hoped the parties would be reasonable in the matter. He saw no reason why they should not.

Ex parte KEMM.

Mr. Douglas Buchanan moved on behalf of Mrs. Kemm as a matter of urgency, for an interdict restraining her husband (Robert Kemm, of Wynberg) from disposing of or alienating the moveable and immoveable property in the joint estate, pending an action to be instituted by petitioner for judicial separation and payment of alimony, on the ground of the respondent's gross cruelty towards her.

Rule nisi granted, to operate as a temporary interdict, restraining defendant from alienating or mortgaging the landed property in question, the rule to be returnable on the 11th inst.

Ex parte VAN NIEKERK.

Mr. P. S. T. Jones moved for an order authorising the transfer of certain property, further information required by the Court at the first hearing being now supplied.

Order granted.

WALKER V. RECEIVERS GRAND JUNCTION RAILWAY.

Mr. Russell moved, under section 50 of the Charter of Justice, for leave to appeal to the Privy Council from an order of this Court refusing to grant a Commission to take the evidence of the applicant in London. Mr. Uppington was for the respondents.

Buchanan, A.C.J., said that the order given by the Court was an interlocutory order.

Mr. Russell submitted that the order, although interlocutory, had the effect of a final or definite sentence, as set out in the section.

Buchanan, A.C.J., said that the order was given on what was purely a matter of procedure. The question decided was whether a party to a suit should be required to appear at the trial and give evidence in person, or whether he should be examined on commission *de bene esse* before the trial. The Court was not satisfied there were sufficient grounds for excusing the attendance of the witness. It could not be called a final or definite sentence. The application would be refused, with costs.

Ex parte ESTATE BOTHA.

Mr. Benjamin moved for a temporary interdict restraining the trustee in the insolvent estate of the late J. Nicolaas Botha from passing transfer of certain landed property at Oudtshoorn, pending an action to be brought by the petitioner, executrix in the estate of her late husband. It was alleged that there had been a sale by the trustee, which was not of a *bona-fide* character.

Rule *nisi* granted, to operate as an interim interdict, and to be returnable on the 24th inst.

Postea (August 24th). Rule made absolute.

Ex parte VENTER.

Mr. P. S. T. Jones moved for registration of transfer of certain property in the division of Britstown, the matter having stood over for further information, which was now furnished.

The petitioner was one of two tutors testamentary to certain minors. The father had advanced money to him on condition of his passing a bond in favour of the minors. There was an endorsement for cancellation on the bond, but no consideration seemed to have passed. The Master recommended that the petitioners be authorised to purchase certain sheep for certain of the minors and to pass a new bond in favour of the others, and that upon their doing this they should be allowed to cancel the original bond.

Order granted in terms of the Master's report.

Ex parte CAROLUS.

Mr. Swift moved for leave to raise certain money on mortgage.

Order granted.

[Before the Hon. Mr. Justice HOPLEY.]

MALCOMES AND CO. AND
TRUSTEE INSOLVENT ES-
TATE H. B. CARY V. T. B. } 1905.
CARY. } Aug. 10th.

Mr. Burton moved for leave to sign judgment for the plaintiffs in terms of the referee's report. The referee (Mr. Maynard Nash) reported in favour of plaintiffs for the sum of £1,052 4s.; viz., £414 2s. in the first action and £638 2s. in the second action. Counsel added that he was instructed to ask the Court to certify witnesses' expenses for Mr. Reimers, and also witnesses' expenses to those witnesses examined before the referee.

Mr. Gardiner moved upon notice to applicants for the reopening of the case on the point as to whether a settlement was entered into between the parties in regard to what was known as the Conrad settlement. Counsel read an affidavit by Mr. Watermeyer (Tom Cary's attorney) stating that the applicants disclosed books and documents, but not specifically, and now since the Court had given judgment in relation to the question of the Conrad settlement distinct evidence had come to light of payment of a certain cheque for £20 to T. B. Cary. Counsel argued that there were precedents for the application, because the judgment already delivered by his lordship was in the nature only an interlocutory judgment, and evidence on a material point had since come to light bearing on the question of the Conrad settlement.

Hopley, J., said that he had already decided that there was a Conrad settlement up to a certain point, but that it was afterwards set aside. He did not feel at all inclined to reopen the case upon the point now raised. There was only the slightest ground shown for the application. The Court would give judgment in terms of the referee's report, with costs against defendant and Mr. Reimers be declared a necessary witness, as well as witnesses called before the referee, defendant to pay costs of the present application.

BENYA V. MAGUGWANA.

Mr. Benjamin, on behalf of Magugwana, moved, as a matter of urgency, for the suspension of an order for the restoration forthwith of certain cattle. He said that the cattle had been distributed under an order from the Magistrate at Butterworth. He contended that if the Court had known in the first instance the real facts of the case, the order in question would not have been granted.

Hopley, J., said that, had he known the full facts at the time of the original

application, he would probably have made a somewhat different order. An order would now be granted that the applicants, Magugwana and others, who were originally respondents, be directed either to return the said stock or to give security for the safe custody and eventual production of the said stock, pending an action for a declaration of rights as to their proper ownership to be forthwith instituted by the said Magugwana and others who took them away, respondents to abide result of the action, security to be given, should the stock not be returned, to the satisfaction of the R.M. of Butterworth.

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

HOPKINS AND CO. V. COLONIAL GOVERNMENT. — 1905.
Aug. 11th.
" 14th.

Railway Department — Contract
—"Coastwards."

Plaintiffs had contracted with the Cape Government Railways for the carriage of certain stone from Queen's Town to Cape Town. The rate specified by the Department was 1½d. per ton for stone consigned inland, and ½d. per ton for stone consigned coastwards. The Department claimed at the higher rate on carriage from Queen's Town to Stormberg, inasmuch as that portion of the journey was "inland." Held, that the Railway Department were bound under their tariff to carry the said stone through to Cape Town at the lower rate.

This was an action brought by Arthur Hopkins and Co., building contractors, of Cape Town, who tendered successfully for the building in connection with the extension of the S.A. College, to recover the amount of £233 from the Government, which

was paid as an over-charge by the plaintiffs to the defendants for the carriage of certain stone from Queen's Town.

The declaration set out that during the months of February to October last the Government agreed with the plaintiffs to carry certain stone which was required by the plaintiffs from Queen's Town to Cape Town. Before entering into the agreement the plaintiffs enquired from the officials as to the carriage rate, and were told it was 32s. 9d. On that information they based their calculations for the tenders to the S.A. College Council, which was accepted. In April the Government claimed that the tariff rate was 38s. 4d. The plaintiffs were in urgent need of the stone, and the sum of £233 was overpaid to the Railway Department under protest. The stone was carried at the lower rate for some months before the Government demanded the overcharge. In April the Government refused to deliver the stone unless the higher rate was paid, and thereafter the higher rate was paid for the later consignments.

The plea set out that the defendants had no knowledge of any tender on the part of the plaintiffs. It was admitted that it was agreed to carry the stone in February and March at the lower rate, but it was denied that the department had any knowledge for what purpose the stone was required. The plaintiffs were charged in error during the months of February and March, and in April the plaintiffs were advised that the legal tariff was 38s. 4d., and the extra charge was paid without protest.

Mr. Searle, K.C. (with him Mr. Sutton), was for the plaintiffs, and Mr. Benjamin (with him Mr. Nightingale) was for the Government.

Mr. Searle said that the questions for the Court to decide would be what the rate was, whether the rate was the proper one according to the tariff book, what was the construction of the tariff book, was it 32s. 9d. or 38s. 4d., and if it be 32s. 9d. then was the payment of the plaintiffs an involuntary one and under such circumstances as to prohibit the plaintiffs from recovering it?

Mr. Benjamin: If it be held to be the lower rate then we contend it is a voluntary payment and cannot be recovered.

[Maasdorp, J.: A rather curious position for the Government to take up. If the Government charged these people more you may have the legal right to it, but it is certainly a curious position for the Government to take up.]

Mr. Benjamin: Your lordship may hold that it is the lower rate, but the Government take up the position that the rate always intended was the higher rate, and the higher rate should always have been charged.

Mr. Searle: After this correspondence the Government sued us in this court to recover at the higher rate, and we defended the action, and the pleadings

were closed, whereupon the Government withdrew the case and paid our costs. We claimed it was the proper rate and alternatively for damages. Subsequently the same construction as we put on the tariff book was accepted by the Government, and notices to that effect appeared in the papers.

Mr. Benjamin: I object to my learned friend leading evidence on that point. It took place subsequently, and it is irrelevant to the present issue what the Government subsequently did.

[Maasdorp, J.: That contains the contract with the public. Can any official charge more than that.]

Perhaps not.

[Maasdorp, J.: You almost admit you have taken more than you are entitled to.]

My contention is that the term in the tariff book "coastwards" is not a very definite term.

[Maasdorp, J.: Supposing it is definite, can any official charge more than specified?]

They might possibly enter into a particular arrangement. What we contend for now is the construction that has always been put upon the tariff book by the General Manager, and for that reason the Government resist any refund in this case.

Mr. Searle: There was a little dispute between two departments of the railway—the goods department wanted one rate and the financial department another. The rate was made up from the tariff book, the conditions of which then in force read that when stone in the rough is consigned "coastwards" in truck loads of not less than 5 tons then a particular rate is given, which works out at 3d. per ton, and the whole question is what is the meaning of stone in the rough consigned "coastwards." The Government take up the position that because during a portion of the journey the train was going in a northerly direction, it was not then going "coastwards," that was when it was going from Queen's Town to Stormberg. They did not take up the position that Naauwpoort to De Aar is not "coastwards," and it was only from Queen's Town to Stormberg they charged the higher rate.

Mr. Benjamin: Our contention is that traffic going from Queen's Town to Stormberg was inland. The reason for the higher charge was that traffic to Stormberg required special haulage.

Mr. Searle: My contention is that when the goods are consigned "coastwards" then the higher rate cannot apply.

Arthur Hopkins, managing director of the plaintiff company, stated that about January, 1904, he was engaged making up a tender for the extension of the S.A. College, and it had to be constructed with Queen's Town stone. Before sending in his tender he approached the Rail-

way Department as to the tariff rate of the stone from Queen's Town. He saw an official in the Inland Office in the goods yard, where he had been directed, and there he was told by a clerk that the rate was 32s. 9d. a ton, and upon that information he sent in his tender, which was accepted. About the 15th February he commenced to get the Queen's Town stone from a contractor. All the payments for the first couple of months were at the 32s. 8d. rate. The first intimation he had from the department about the increased rate was in April, when an official came with a long list of undercharges. As the tariff-book said the rate was 32s. 9d., the official in question said he thought the rate was correct, and witness refused to pay. A letter was then sent to the department pointing out that the rate of 32s. 9d., which was tendered to them, seemed to be correct according to the tariff-book. There was a difficulty about getting the goods from the department, and there was a certain amount of delay. A letter was subsequently sent enclosing the cheque for the overcharges, in order to release five trucks, but it was pointed out that the payment was made without prejudice. In June he made an effort to send the consignments by sea, but there were great difficulties in the way, and he had to fall back on the railway.

Cross-examined by Mr. Benjamin: He was not very well acquainted with the offices of the railway station, but he knew the offices in the Goods Department. He was not told that the Rates Branch Office was the proper place to make inquiries. He could not say who the gentleman was that he saw at the railway office. The trucks were detained in April until the higher rate was paid, but he did not know that of his own knowledge.

Henry Wm. Clark, who, at the time of the dispute, was with Hopkins and Co., stated he had written a good many of the letters in conjunction with Mr. Hopkins. Mr. Wilson, the cartage contractor, reported to him there was some difficulty with the Railway Department between 15th and 19th April, and witness discussed the matter with Mr. Ball, the Goods Superintendent, who said he thought his department was correct in charging 32s. 9d., but that another department had come down on them, and 38s. 4d. would have to be paid. Mr. Ball would not allow witness to unload the trucks on that day until the higher rate was paid. On witness's promise the trucks were released. Mr. Ball took up the position that unless witness paid for the stone he could not have it.

Cross-examined by Mr. Benjamin: Mr. Ball gave him to understand the trucks would not be released until the higher rate was paid.

Robert Henry Wilson said he was cartage contractor for plaintiffs last year. On one day in April, witness sent five

carts down for stone, and they were sent back empty. Witness saw Mr. Clark, and drove him down to see Mr. Ball. There was a delay of one or two days before he could get the stone.

Mr. Searle closed his case.

Herbert S. Ball, Goods Superintendent, said he was the person to authorise the detention of goods. In respect of none of these consignments of plaintiff's did he give any order for detention, until the higher rate was paid. He did not tell Mr. Clark that they would be detained until the higher rate was paid, but as a matter of fact, they would have been detained until the higher rate was paid. By an error made by a clerk, the lower rate was at first charged.

George Anderson said in April of last year he was chief clerk in the Inwards Inquiry Office. The charge he made was 32s. 9d. per ton, and that was the charge made in February and March, but instructions came from the General Manager's office that the rate was 38s. 4d. He would not have given the information as to rates to Mr. Hopkins.

[Maasdorp, J.: The question is, does the consignment note constitute the basis of the tariff?]

Mr. Searle: The consignment note is always made out on the basis of the tariff.

Cross-examined by Mr. Searle: Advice notes would not be made out before the goods arrived. An invoice was always sent with the goods to enable the advice notes to be made out.

Mr. Searle said that in this case they got no advice note.

Continuing, witness said he took up the position that the rate to be charged was 32s. 9d. Witness received instructions to charge 38s. 4d., and did so up to that time. Witness thought 32s. 9d. the proper rate. Witness did not send in the account for back rates. As a fact, witness had nothing to do with the making up of that account. Witness had no recollection of telling Mr. Wilson that he could not take the goods away until the account was settled. When witness endeavoured to collect the account for the trucks which arrived on April 13 then the question of the extra charge was raised. Witness was placed in another office at that time.

[Maasdorp, J.: Do you still stick to your own opinion?]

He was superseded by Mr. Hall. A man named Hill made out some of the returns, but he had since left the Government service.

Mr. Searle: Was it because of this matter he left?—I cannot say that it was.

Re-examined by Mr. Benjamin: Witness denied that he told Wilson that the goods could not be removed until the account was paid.

Harry Aspinall stated the tariff-book was compiled in his office. The rate was fixed at 38s. 4d. in the case under

dispute. This was because the stone had to go to Stormberg, which was inland, and charged at 14d. per ton per mile, and then it had to come to Cape Town, which was coastwards, and the rate was 4d. per ton per mile. The reason the inland rate was so high was because it was against a gradient, and it cost considerably more to do it. The witness was closely examined as to the method of calculating the rates, and explained that it was a matter both of haulage and empty trucks. The advertisement which appeared in the papers with regard to the rates on stone from Queen's Town to Cape Town had nothing to do with this contract, the reason being that the Commissioner wished to put Queen's Town stone and stone from other inland places in a favourable position to compete with imported stone.

Cross-examined: The line between Rosmead and Naauwpoort was in a more northerly direction than that between Queen's Town and Stormberg, but they gave their customers the benefit of that.

Walter Craig Gallen, clerk in the Inwards Inquiry Office of the Goods Yard, said nobody in that department would have given Mr. Hopkins the information he wanted about the rate.

This closed his case, and counsel for plaintiff having been partly heard in argument, the further hearing of the case was adjourned until Monday.

Counsel having been heard in argument,

Maasdorp, J., said it appeared in this case that in February, 1904, plaintiff commenced to receive consignments of truck-loads of stone in the rough from Queen's Town. The stone was carried by the Railway Department in their trucks, and the charge was made at the rate of 4d. per ton per mile for the whole of the journey. In April it seemed the Railway Department were under the impression that they had discovered a mistake in the charge. They thought that the charge should have been made at a different rate from that which had been made up to that time. They consequently refused to deliver to the plaintiff five trucks of stone which arrived in April. The contention which they then put up was that, instead of 32s. 9d. for the journey from Queen's Town to Cape Town, they were entitled to and bound to charge under the tariff 38s. 4d. per ton. The plaintiff disputed in April the claim made by the defendants, and the plaintiff said that the defendants' servants refused to deliver up the five trucks of stone which had arrived, unless the higher charge of 38s. 4d. was paid. Now before the Court entered into the construction of the contract, he would like to dispose of the question of fact. The legal position of the parties might be different, according as it was decided

tioned as prayed, mutual transfers to be passed by the various owners, in the case of the absence of one or more of the said owners, the High Sheriff to pass and receive the necessary transfer for such absentee or absentees; Mr. Julius Robert Jackson, of Nelspoort, to be appointed to effect the said partition, all parties concerned to be ordered at once to do all things necessary to enable the said J. R. Jackson to carry out his said duty; that all parties concerned pay the costs of partition *pro rata*, and that the defendants pay the costs of this suit, each to bear one-eighth share.

HEYDENRYCH V. STEER.

Mr. Burton (with him Mr. De Waal) was for plaintiff; Mr. Gardiner (with him Mr. Russell) was for defendant.

Mr. Burton said that this case had been settled, and he had to move for judgment in terms of consent paper, which was as follows: Judgment for plaintiff for (a) the sum of £100, with interest at the rate of 2½ per cent. per month from the 1st August, 1903; (b) the sum of £150, with interest *a tempore morae*; (c) the sum of £360 3s. 2d., as and for damages, and that defendant's claim in reconvention be dismissed, with costs.

Judgment entered in terms of consent paper.

GENERAL MOTIONS.

Ex parte MCKENZIE. { 1905.
Aug. 11th.

Mr. J. E. R. de Villiers moved, upon notice to the Master, for leave to presume the death of William Ditty Strehorn, and for directions for the appointment of an executor dative in the estate. The deceased was believed to have been drowned at Three Anchor Bay on the 18th November, 1900. He had gone to Three Anchor Bay to bathe, his clothes were found on the beach, and a few days later a body, which it was impossible to identify, was washed ashore. Counsel read the record of evidence given at the inquest. The verdict was "Washed ashore, probably drowned," the Magistrate adding that he was of opinion that the identity of the deceased had not been established. Strehorn left certain shares, a life policy, and other assets.

Leave granted to presume death, and the Master authorised to take steps to appoint an executor dative.

Ex parte SCHOLTZ.

Mr. Bailey moved for an order authorising the Master to pay out to petitioner certain moneys, due to the minor children of petitioner.

The Master reported favourably. Order granted in terms of Master's report.

Ex parte GREYLING.

Mr. J. E. R. de Villiers moved for the appointment of a *curator ad litem* to represent petitioner's wife in an application for an order to declare her of unsound mind, and to appoint a *curator bonis* of her property. Petitioner's wife was at present confined in the Graham's Town Asylum, but petitioner resided in the Orange River Colony.

Ordered to stand over for further information, a question being raised as to whether this was the proper court in which to proceed.

KEATING V. NANNUCCI.

This was an application, upon notice calling upon the respondent to show cause why a certain sum of £200, now in the hands of the Registrar of the Supreme Court, should not be paid over to the applicant, less £62 14s., which said amount applicant owed, and had only tendered to the respondent on the 20th February, 1905, in settlement of a dispute which existed between the parties, failing acceptance whereof, why the Court should not order the said matter to be tried before an official arbitrator, or, as a further alternative, why respondent should not be ordered forthwith to proceed with an action, and to show cause why he should not be ordered to pay costs of the application. The respondent had given notice of a cross-application, calling upon Keating to show cause why he should be ordered to proceed by action.

The matter, it appeared, arose out of a building contract that Keating entered into with the Mother Superior of the Nazareth House for the erection of a laundry block, Keating being financed by Nannucci, and authorising the Mother Superior to make payments on account of the contract to Nannucci. Disputes took place between Keating and Nannucci, and upon motion for an interdict the Court directed any moneys payable under the contract to be paid into the hands of the Registrar pending a further order of Court. (15 C.T.R., 283.)

Mr. Struben for applicant. Mr. Close for respondent.

Mr. Close contended that it rested upon Keating to bring an action to determine the rights of the parties to the

money in court. His client said that Keating owed him considerably more than £62 14s.

Mr. Struben said that his client was in the position of a defendant or a debtor, and it lay upon the respondent to bring an action or go to arbitration.

Hopley, J., asked Mr. Close why he objected to going to arbitration.

Mr. Close said that there were a good many people who preferred a court of law to arbitration.

[Hopley, J.: It depends which way the result goes.]

Mr. Close rejoined that people who had had experience of both preferred to lose at the Court rather than at the hands of an arbitrator.

An order was granted directing the respondent (Nannucci) to forthwith bring an action to establish his right to the sum of £200, or any part thereof, costs of application to stand over.

Hopley, J., remarked that he was sorry that the parties, instead of going to the additional expense of an action, could not have referred the matter to some competent person to decide the disputes between them.

Ex parte VAN DER WESTHUYSEN.

Mr. P. S. T. Jones moved for leave to pass transfer of certain land situate in the district of Beaufort West.

The property had been bequeathed to petitioner and the children of her marriage. These were all now majors, and consented to the transfer; but in view of the possibility of her having further issue, the Registrar of Deeds refused to pass transfer without an order of Court.

Order granted as prayed.

Ex parte LOMBAARD.

Mr. Gardiner moved, on behalf of the executrix testamentary in her late husband's estate, for leave to raise a loan of £1,000 on certain property at Craddock, in order to pay for property purchased on behalf of the estate in the Transvaal.

Order granted as prayed.

RANER V. BRADLEY AND CRAVEN.

Mr. Burton moved for a commission to take the evidence of Mr. H. F. Reply in Cape Town and two witnesses in Johannesburg.

Mr. Gutsche (for Bradley and Craven) consented, subject to the inclusion of a witness to be examined on behalf of his clients in Johannesburg or Cape Town.

Commission granted to examine the four witnesses named, Mr. Van Zyl to be commissioner in Cape Town and Mr. Saul Solomon in Johannesburg, costs to be costs in the cause.

Ex parte THE NEW CAPE COLLIERIES, LTD.

Mr. Struben moved for the registration of certain servitude of a railway line in the division of Albert. The farm over which the railway passed had been bequeathed subject to the condition that it was not to be sold until the death of all the testator's children. In violation of this condition a portion had been sold to a railway company.

Order granted, empowering the Registrar of Deeds to register the servitude upon the sum of £700 being deposited with a trust company to the satisfaction of the Registrar, to abide the final distribution of the proceeds of the land in terms of the will.

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

REX V. KINSLEY. { 1905.
{ Aug. 14th.

This was an appeal from the decision of the Assistant Resident Magistrate at Cape Town in a case in which the appellant was charged with the theft of 10s. by means of embezzlement and of 4s. 6d. from the Table Bay Fish Company, in which he was employed. Appellant was convicted. The appeal was on the ground that the decision was not supported by the weight of evidence.

Mr. Van Zyl appeared for the appellant, and Mr. Nightingale for the Crown.

Mr. Van Zyl said there was very little evidence to support the first charge of theft by embezzlement of 10s. There must be felonious intent, and there was no felonious intent here, the accused rightly or wrongly assuming that it was his own property. If there was a ground for complaint then the proper remedy was a civil action. As to the 4s. 6d., all

the evidence showed there was no theft committed. The business of the complainant Steer appeared to have been carried on in a very lax way, and a very ugly feature of the case was Steer's desire to come to a settlement for £18 for stock he said he had lost. Taking all the circumstances into consideration, he submitted there was no ground for conviction.

Maasdorp, J., without calling upon Mr. Nightingale, said the Magistrate came to the conclusion that there was a criminal intention, and he thought there was abundant evidence to support the contention of the Magistrate. As to the charge of theft of 4s. 6d., the Magistrate came to the conclusion that the theft was proved, and the Court would not interfere with that decision.

The appeal was therefore dismissed.

REX V. XELO.

This was an appeal from the Resident Magistrate, Umata, sentencing the appellant to nine months' imprisonment for contravening Act 35 of 1893, amended by Proclamation 109 of 1900, in that on the 25th June last he wrongfully and unlawfully stole a goat, the property of one Siekete. The appellant pleaded not guilty. The appeal was based on the grounds that the decision was contrary to the weight of evidence.

From the evidence for the prosecution, it seemed that a goat was stolen from Siekete's kraal, and about the same time the appellant sold the skin of a goat to a local dealer. The skin was identified by Siekete. For the defence the relatives of the appellant were examined, and they stated that the goat had been reared by him. Mr. Benjamin appeared for appellant, and Mr. Nightingale represented the Crown.

Mr. Benjamin contended that as the balance of evidence was in favour of the appellant, he was entitled to succeed in the present case.

Mr. Nightingale contended that the evidence brought forward for the defence at the magisterial investigation was not very reliable, as the appellant and his principal witness had been undergoing imprisonment for theft.

Maasdorp, J.: There was a great conflict of evidence on some material points which the Magistrate seemed to have given against the accused. The whole question was: Could the veracity of the accused be relied upon? The evidence for the defence on two important points was found to be false, and the Magistrate, taking that into consideration, was quite right in finding that the goat belonged to Siekete. The appeal would be dismissed.

REX V. EZDROWSKI.

Act 47 of 1902, Sec. 11—Sec. 3 (c).

E. had falsely represented herself to the Immigration officer as a married woman, whose husband was resident in S. Africa. Three weeks after landing she was married, and then represented herself as a spinster.

Held on appeal, that she had been rightly convicted under Sec. 11 of Act 47 of 1902.

This was an appeal from the decision of the R.M. of Cape Town, sentencing the appellant to pay a fine of £10, or the alternative to undergo two months' imprisonment, with hard labour, for contravening section 11, part 2, of Act 47 of 1902, in making a false declaration under the Immigration Act. She was tried before the Assistant Resident Magistrate, who held a preliminary investigation, and committed appellant for trial, but the case was remitted by the Attorney-General.

The appeal was based on the grounds that the Immigration Act did not apply to her, she being exempted therefrom under section 3 of the Act.

From the evidence it appeared that the appellant gained admission to the Colony by telling the Immigration Officer that she was a married woman, and was proceeding to Johannesburg to join her husband, whereas, three weeks after landing, she was married at the Registry Office, Wynberg.

Dr. Greer, for the appellant, contended that, as she had become domiciled in the Colony by reason of her marriage with a naturalised British subject prior to the prosecution being instituted, that she was entitled to succeed in her appeal.

Mr. Nightingale submitted that the present case was one that the Act in question was intended to meet. By saying she was a married woman, she endeavoured to establish her respectability, and by that means succeeded in gaining admission to the Colony, which she otherwise could not have done.

Maasdorp, J., said that the appellant in this case made a false statement, in order to obtain a certificate for the purposes of the Act. Now it appeared that the certificate which it was necessary for her to obtain was that from the officer appointed to examine into these matters, in order to gain permission to land in this country. In order to obtain such permission, she stated to the officer that she was a married woman, and that her husband resided in Johannesburg. That

satisfied the officer that she was a married woman, and upon reference to the Act, it seemed that he was satisfied to proceed no further in his examination into her circumstances, because it appeared that under section 3 of the Act, sub-section D, the wife of a person who was allowed to come into the country should be allowed to enter the country. As soon as the officer found that she was exempted from these disabilities, he allowed her to land. He stated that what satisfied him was the statement made by her, and that it was in consequence of this statement that he gave the necessary permission. Now this statement was a false statement. She made this statement on April 6, and it was only discovered to be false when she applied to the Magistrate for a licence in June, she being then called upon to make a declaration as to her condition, and she described herself as a spinster. Upon that inquiry was made, and it was found that she contravened the Act on the 6th April. It had been argued by Dr. Greer on her behalf that she was exempted from prosecution, because she now came under the description given under section 3, being now the wife of a person exempted in this colony. It was clear that the offence she committed was not excused by any subsequent change of condition. The offence was committed in April, and her subsequent marriage only took place in June. It was quite clear that there was a contravention of the section in April, and under these circumstances the appeal would be dismissed, with costs.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

MCKILLOP V. ZUCKERMAN. { 1905.
 { Aug. 14th.

Sale and purchase—Dominium—
Fraud.

One S. had obtained certain goods from K. by means of fraudulent misrepresentations. S. thereafter sold them to Z, from whom K. now claimed them.

Held, that as the dominium of the goods had never vested in S., K. was entitled to vindicate his goods and to recover damages for such of them as

had passed out of defendant's control.

This was an action brought by J. R. McKillop, tile and marble merchant, Cape Town, against Joseph Zuckerman, carrying on business in Cape Town as the Colonial Cabinet Factory, for restoration of 100 marble table tops or slabs, or, in default, payment of their value of £59 16s.

Plaintiff, in his declaration, said that on the 12th May last he had in his possession 124 marble tops, of the value of £73. On that date defendant, without the knowledge or consent of the plaintiff, obtained possession of 100 of the said marble tops, of the value of £56 16s., and wrongfully and unlawfully detained the same, and although called upon to do so, refused to restore the same to plaintiff.

Defendant, in his plea, said that he was not aware that plaintiff was the owner of any marble table tops in his (defendant's) possession, and that he had purchased 100 marble table tops from one G. R. Smith, of Main road, Claremont. The said Smith was the true and lawful owner of and was entitled to sell the same. Defendant prayed that the claim might be dismissed with costs.

Plaintiff, in his replication, denied that Smith was at any time the true and lawful owner of the said table tops, or that he had at any time the right to sell the said table tops. Smith obtained the said table tops on condition that he paid to the plaintiff forthwith a sum of £45. Smith did not then, and had not since, paid the said sum of £45, or any part thereof. Defendant said further that if the said sale did take place it was ineffectual in law, and defendant could not claim any property in the said table tops. As an alternative, plaintiff said that Smith obtained possession of the goods by fraud, representing that a cheque for £45, which he had handed to plaintiff, was good and valid, and that there were funds to meet it. The said cheque was dishonoured by the bank for want of funds.

Defendant, in his rejoinder, said that he had no knowledge of the allegations as to transactions between plaintiff and Smith, and as to the dishonoured cheque.

Mr. M. Bisset (with him Mr. Douglas Buchanan) was for plaintiff; Mr. P. S. T. Jones was for defendant.

Mr. Jones applied for leave to amend the plea, inasmuch as the defendant had *bona fide* disposed of a number of the marble tops to third parties. Defendant had in his possession 28 large table tops and 56 small ones, and counsel applied to amend the plea accordingly.

Mr. Bisset objected to such an amendment.

Hopley, J., declined to allow the amendment at this stage.

Joseph Robinson McKillop (the plaintiff) said that he carried on business in Hout-street as a tile and marble merchant. He recollected the sale on the 12th May last of the table tops in question to Mr. Smith. Mr. Stevenson acted on behalf of witness. Smith, he understood, bought 124 marble table tops for £73, and gave him a cheque for £45. Witness would not have allowed the goods to go out of his possession had the cheque not been handed over forthwith. He had had small cash transactions with Smith previously. The cheque was drawn on the Standard Bank and was dishonoured. Witness claimed 100 marble slabs from Mr. Zuckerman, 24 having been traced to the possession of another merchant. Criminal proceedings were instituted in regard to Smith, and certain affidavits had been filed, but Smith had not been arrested, having absconded.

Herbert Garland Stevenson, an assistant in plaintiff's employ, said that on the 12th May, Smith said that he had obtained an order for 100 suites of furniture from Garlick's, and that he wanted the marble tops. Smith went away ostensibly to show a sample to Garlick's, and then returned and said that he would take 124 of the slabs, the small ones to be 11s. each, and the large ones at 15s. Witness knew at that time that Smith was a cabinetmaker at Claremont. Smith said that he would let him have £45 on account, and that he would give him the balance on the following Monday. Smith gave him a cheque for £45. Witness then delivered the goods over to Smith, who said that he was taking the goods to his shop. Witness inquired at Garlick's, and found that they had not given Smith an order for furniture, but had bought 24 marble tops from him. Smith had bought table tops previously from plaintiff, but had always paid cash, the transactions being small. The goods were put on two wagons after delivery had been given to Smith. Witness afterwards saw the driver of the wagons (Cohen), who told him that he had taken the marble tops to Zuckerman's store. Witness found that all the table tops sold by Smith to Garlick's were small.

Cross-examined: Witness did not know at the time of the transaction that Smith was in difficulties.

Plaintiff (recalled) said that, as near as he could calculate, the cost of the table tops landed at his shop would be 8s. for small tops and 10s. 6d. for large ones.

Isaac Cohen, a wagon-driver, said that in May last a man came to him and ordered him to load up his wagon at McKillop's store with marble tops. He took a load and a half to Zuckerman's store and a half-load to Garlick's. Smith accompanied witness on the wagon.

Willoughby Seymour, clerk in the Standard Bank, Claremont, said that a man named George Reginald Smith opened an account on the 3rd May last, and deposited £20. On the 12th May last Smith had 5s. to his credit. The cheque for £45 was presented and dishonoured for want of funds.

Joseph Charles Mitchell, manager of the furniture department, Garlick's store, said that he agreed to purchase 24 slabs from Smith upon a sample that the latter produced. That was the only transaction Garlick's had had with Smith. They had not given an order for 100 suites of furniture.

Cross-examined: They could import similar slabs at 6s. 6d. They bought the slabs from Smith at 6s. They were short of the slabs at the time, and were awaiting delivery of similar goods from Europe at their stores at 6s. 6d.

Mr. Bisset closed his case.

The defendant, Joseph Zuckerman, Colonial Cabinet Manufacturing Company, said that he had had some difficulty about obtaining slabs from England, and had had to borrow from local firms. He was short of slabs when Smith offered him the goods in question. He knew Smith, but he had had no previous dealings with him. He understood that Smith got the goods from the Docks. The goods arrived without crates, and witness commented on this fact, whereupon Smith said that he had unpacked the slabs at the Docks for the purposes of selling in different lots. Witness agreed to pay Smith 6s. each for 60 small slabs, and 8s. 6d. each for 40 larger ones, except four which had been damaged, and upon which Smith made an allowance. Witness agreed to pay £33 6s., less 5 per cent. for cash, his payments being £20 and £11 13s., making a total of £31 13s. Before Mr. McKillop's representative and a detective called at his place on the following Tuesday he had used 12 of the large slabs, and had delivered six back to the Louvre. He had then 84 slabs in his possession. The white slabs were cheaper than the coloured slabs.

Cross-examined by Mr. Bisset: He suggested to take the detective round and show him the slabs. He told McKillop's representative that if he had authority from the Court he would show him the slabs. It did not strike him as strange that the man should go round selling slabs in a large quantity. Witness took it that he was an importer. The explanation given of the slabs being loose was that the goods had been unpacked with a view to their disposal in different quantities. He never had any suspicions with regard to this transaction. The driver told witness that the goods came from a store, but it did not occur to him to ask where the store was. With regard to the price of the

goods, he considered that he paid full value for them.

Mr. Jones closed his case.

Counsel having been heard in argument on the facts,

Hopley, J.: If I had had any doubt as to the way in which my judgment should go in this case, I should have taken time to formulate the judgment, and to go into all the authorities, in view of the somewhat interesting circumstances of this case, and of the way in which the points have been argued. But it seems to me that, after all, the case may be reduced to very simple limits, and there ought to be no doubt, as our law stands, as to the way in which the judgment in this case should go. On Friday, May 12, Smith went to the plaintiff's shop, and represented that he had obtained a considerable order for furniture from Garlick's, and that he would require about 100 slabs for the purposes of this contract. He got two specimens, and went away, and afterwards returned, and ordered 124 of these slabs. They were not given to him on credit, and, in fact, I have no reason to doubt Mr. McKillop and his clerk when they say that the matter was a sale for cash, as all previous transactions had been. But instead of paying in cash, Smith wrote out a cheque, representing that he had the money in a bank at Claremont, and he gave McKillop a cheque for £45 in part payment of the whole amount, which was £73, and he also received a promise from Smith that he would bring the balance of the money on the Monday. Smith took the slabs away, and sold them at prices much under those which he had just contracted to pay for them. All Smith's actions showed that he was committing a fraud. He had never received an order from Garlick's for this contract that he spoke about, and he had no money in the bank at Claremont to meet the cheque. It is a perfectly clear case of swindling McKillop out of his goods by means of false pretences, or what we should call in the Criminal Courts a case of obtaining goods by means of false pretences, a species of fraud which has been constantly dealt with by our Courts in exactly similar circumstances, and treated as a species of theft. It has been argued that, because McKillop took this cheque, and because he agreed to wait until Monday for the balance of £28, the transaction was a sale by credit, or partly for credit and partly for cash, and that accordingly McKillop must be taken to have parted with his *dominium* in these goods. It is quite possible, if the matter had stood simply there, and there had been no fraud in this matter—if this cheque had not been a fraudulent one, and if there had been no fraudulent representations—I might have held that under the circumstances *dominium* passed from

the plaintiff to Smith. I quite agree that the doctrine of law in this colony, whereby a person can reclaim from a third party who has obtained *bona fide* and for valuable consideration any goods sold for cash if they have not been paid for is one that should not be extended. That doctrine applies where the sale in the first instance was *bona fide*. But here is a case in which the goods were practically stolen, and I cannot hold that plaintiff passed *dominium* in the property to a thief like Smith, who was tricking him out of these goods, and Smith could not pass to the defendant any greater rights in the property than he himself possessed. It is undoubtedly a hard case for the defendant, but we must administer the law as it stands, and judgment must be for the plaintiff in this case. It is said that some few of the slabs had been parted with by the defendant, but I do not think that that can be on the present pleadings any defence. I think that Mr. Bisset was perfectly right in objecting to any amendment of the pleadings. Judgment will be given for the plaintiff for the return of such of the goods belonging to him as defendant still has in his possession, or others of similar quality, to make up the full quantity, and in respect of any that he cannot so return he must pay the plaintiff at the rate of 10s. for each large slab and 7s. 6d. for each small slab. Defendant must pay the costs of suit.

[Plaintiff's Attorneys: Reid and Nephew; Defendant's Attorneys: Silberbauer, Wahl and Fuller.]

SUPREME COURT

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

CARR AND CO. V. LENDERS { 1905.
AND CO. { Aug. 15th.

Contract, verbal—Breach—Measure of damages.

This was an action brought by Carr and Co., tea and coffee merchants, Cape Town, against F. H. Lenders and Co., of Cape Town, and elsewhere, to recover a sum of £66 10s., as and for damages for breach of contract.

The declaration stated that in November, 1903, the plaintiffs entered into a contract to purchase 100 bags of coffee

from the defendants, 50 bags to be of the quality known as "regulars," and the rest to be of the quality known as "fourths." The prices were to be 26s. 9d. per 100 lb. for "regulars," and 22s. 6d. per 100 lb. for "fourths," both to be c. and f. Defendants neglected to carry out the contract, and subsequently repudiated it. Plaintiffs had to purchase coffee elsewhere, and they now claimed damages at the rate of 10s. per 100 lb. on both qualities, each bag actually containing about 130 lb. Plaintiffs said that the market for coffee had since the said sale risen greatly, and they prayed for judgment for £66 10s., with costs.

Defendants, in their plea, denied that, as alleged in the declaration, they were registered as a joint stock company in this colony, and said that their head office was in Johannesburg. They admitted that the Cape Town branch took the order from the plaintiffs, but said that it was agreed between the parties that such order should be taken, subject to confirmation by the defendants' head office in Johannesburg. On the day following the taking of the said order the head office of the defendant company refused to confirm the same. They denied that the plaintiffs had suffered any damages.

Mr. Benjamin was for plaintiffs; Mr. J. E. R. de Villiers (with him Mr. Douglas Buchanan), was for defendants.

Jerome Washington Donovan (a member of the plaintiff firm) said that he had had six or seven transactions with the defendants. He met Mr. Joy (defendants' manager) in Church-square in November, 1903, when Mr. Joy told him they could make him a good offer of coffee. A few days later witness, from his office, rang up the defendants on the telephone in order to speak to one of their employees, Mr. Ericson. Mr. Joy answered the telephone, and told him that he had got the prices of coffee. Witness eventually told him that if he bought he would take fifty bags of each quality, and that he would walk over to defendants' office. The terms were to be c. and f. 26s. 9d. per 100 lb. for "regulars" and 22s. 6d. per 100 lb. for "fourths." He went over, and saw Mr. Ericson, who produced a copy containing the terms that Mr. Joy had given him over the telephone. Ericson pointed out a mistake on the paper, which gave the terms as c.i.f. He said that this would have to be altered, and witness agreed to take 50 bags of each kind of coffee at the prices named, but c. and f. Witness subsequently saw Mr. Joy, who said that he had made a mistake in regard to the c.i.f. terms. Witness rejoined, "That's all right; send the coffee along." The usual weight of a bag of Rio de Janeiro coffee such as they were dealing in was 130 lb. It was usual to allow three months for delivery of Rio coffee. No mention was made during

the negotiations about the contract being subject to confirmation from the Johannesburg office. Two or three days after the contract had been entered into Joy rang witness up on the telephone, and said that the coffee would be 3d. per 100 lb. more than he had stated. Witness said that he would not pay any such sum, and that he would keep the defendants to their bargain. About three months later Mr. Joy, when spoken to by witness, denied that he had entered into any contract of sale. Witness had never purchased coffee from defendants subject to confirmation by the Johannesburg office. He had since had to purchase coffee from Brussels and Antwerp in consequence of the failure of the defendants to supply them with the "fourths" ordered. That coffee, he calculated, cost them about 15 per cent. more than the terms arranged with the defendants. They also bought "regulars" from Mr. Van der Byl from 45s. to 48s. per 100 lb. The market was going up all the time.

Cross-examined: At the time of the contract he did not know that the defendants' head office was in Johannesburg. All the communications leading up to the contract were verbal. Witness's firm were coffee roasters and tea blenders, and carried on a wholesale business. Defendants carried on business on quite a different scale from witness's firm. Witness often bought 50 bags of coffee by word of mouth. Witness did not think there was anything unusual about there being no documents embodying the contract between witness and Joy. Witness did not know why no questions concerning the third telephonic communications between witness and Mr. Joy were put to the latter, when he gave his evidence on commission in London. When Joy told him that he must pay 3d. per 100 lb. more witness thought Joy was simply trying to get a little more out of him.

Joseph L. O'Brien (another member of the plaintiff firm) said he gave the telephonic message about the coffee from defendants to Mr. Donovan. In the letter he wrote to defendants in February, the mark c.i.f. was a mistake on his part.

By the Court: He made no entry of the contract in any of the books.

J. W. Donovan (recalled) said he took a note of the prices when they were questioned by Mr. Joy.

James William Bam (manager of Van der Byl and Co.'s grocery department) said the price of coffee in February, 1904, was 45s. to 48s., having risen from 33s. in November. That was the price of "regulars."

Mr. Benjamin closed his case. For the defence, counsel read the evidence taken on commission in London of William Frederick Joy, who was manager of the Cape Town branch of

the defendant company at the time of the alleged contract. Witness stated that he told Mr. Donovan that the prices quoted included freight, but not insurance, and he accepted the order, subject to confirmation next morning from the head office at Johannesburg. He was perfectly certain of that. Next morning he rang up Mr. Donovan, and said he could not let him have the coffee at those prices. Witness gave evidence in regard to certain correspondence. He went on to say that Donovan was well aware that he only took orders subject to confirmation. Donovan had previously given him an order on similar terms. In cross-examination, witness said that if Ericson told Donovan that he had left a paper giving the prices, he was mistaken. When witness told Donovan that he must ask an increased price, the latter did not accept, giving as his reason that he had bought on the previous day. Witness never authorised Ericson to confirm a contract with Donovan, and Ericson would have had no authority to confirm a contract in witness's absence.

Counsel having been heard in argument,

Hopley, J.: The only question which arises in this case is whether the contract was finally concluded or not. The plaintiff says that there was a firmly-accepted contract, and that there was a perfect consensus on both sides between him and one Joy, who was the authorised representative of the defendant company in this town. Joy does not deny that such a contract was made, but he says that it was made subject to the confirmation of the head office of the defendants, which he (Joy) says was in Johannesburg, but of which there is no evidence to prove that plaintiff knew at that time. It is a question of the evidence of Mr. Joy against that of Mr. Donovan. I have had the advantage of seeing Donovan himself; I have not had the advantage of seeing Joy. Donovan seems to tell a perfectly straightforward story, and when we look at the telegrams which passed between Joy and the company in Johannesburg, they seem to me to support most strongly, and almost absolutely the version given by Mr. Donovan. The first telegram that he sent was the telegram of a man who had concluded a final agreement without any stipulation as to any confirmation. The impression made by that telegram is confirmed by the terms of the second telegram sent by him on the same day, both of which point to an out and out sale without stipulation. Joy afterwards discovered that he had made a mistake in regard to the latest prices of coffee at Rio de Janeiro, and it might then have become his policy to get out of this contract as well as he could. I have come

to the conclusion that the contract was completed, as alleged by the plaintiff, on the 27th November, 1903. In the first instance, the loss was only of a few pounds, but it was a rising market, and, as time went on, the loss became much greater, and what might have been settled for a few pounds in the first instance grew eventually into a considerable loss; and Joy seems to have thought that as no broker's note had passed he might be able to repudiate the contract: but he did nothing directed to that end until he and Donovan met in the street about 10th February, 1904, when he for the first time definitely repudiated the sale. That date, therefore, must be taken in order to fix the measure of damages. The plaintiffs were then forced to purchase other coffee to take the place of what they had purchased from the defendants; and the difference in the prices is the amount they are entitled to recover in this action. The amount claimed seems to me somewhat less than such difference, and judgment will be for the plaintiffs for the amount claimed by them, with costs.

[Plaintiffs' Attorneys: Tredgold, McIntyre and Bisset; Defendants' Attorneys: Reid and Nephew.]

SUPREME COURT

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

BALL V. BALL. } 1905.
 } Aug. 16th.

This was an action for divorce brought by Mrs. Ball against her husband by reason of his adultery with one Amy Scott.

The plaintiff's declaration stated that the defendant deserted her and went with Amy Scott to reside at East London. Plaintiff followed him, and lived with him again for a couple of weeks.

Mr. Swift appeared for the plaintiff, and the defendant was in default.

Hopley, J., said that that action practically amounted to a condonation.

Mr. Swift said he had only heard of the condonation too late to bring evidence of subsequent adultery from East London. It was because she found defendant continuing to live with Amy Scott that she brought this action.

The plaintiff, Christina Ball, stated she was married to defendant in 1894, and lived happily with him until 1901, when he became intimate with Amy Scott, and finally went to live with her at Woodstock, and afterwards at Sea Point. Defendant and Scott then went to live at East London, but witness, having heard that it was all right, found her husband at East London, and lived with him for a fortnight, when she saw him arm in arm with Scott. He then broke up the home, and forced witness to leave. There were three children issue of the marriage, which she had since had to support.

The application was granted, with the custody of the children.

ESTATE PLEHN V. BRAUND.

This was an action to have a sale of certain property by an insolvent declared null and void.

The plaintiff's declaration stated that the estate of one Plehn was sequestrated on April 24, 1905, shortly after he had sold his shop and goods to Braund for £700. Plaintiff claimed that the sale was a fraudulent one at the expense of the insolvent's creditors, and that the defendant was privy to the fact that the estate was insolvent at the time.

Defendant's plea contended that the sale was a *bona-fide* one.

Mr. Close (with him Mr. Gutsche) appeared for the plaintiff, and Sir H. Juta (with him Mr. Benjamin) for the defendant.

Samuel J. Lamey Plehn, brother of the insolvent, said that £887 0s. 9d. had been proved against the estate, and there were no assets whatever. The insolvent formerly carried on business at the Paarl. A special order had been made to attach the goods in the shop, but the shop was found to be in the possession of Braund. Witness had not been able to locate the insolvent, who had absconded. There were no means of obtaining the books. The accounts proved showed that they were contracted more than two months before the sale to defendant. Witness had seen the deed of sale, which purported to pass the shop and goods, but nothing was said about the goodwill. The goods were valued at £525, and if they were brought into the estate they would be the only assets that could be claimed at all.

Cross-examined: He did not know that the goods were in defendant's own shop, not in the one purchased from Plehn. No request had been made to have a look at the goods or to have them valued.

Thomas B. Hunter, traveller for Messrs. Webster and Co., said he had business transactions with Plehn and his brother Bernard for about ten

months. At length the limit of credit was reached, and as the shop was stocked with goods on all the shelves, witness had a conversation with Bernard Plehn on February 9. Witness had made repeated calls inquiring for Herman Plehn, and because of the evasive replies concluded that he had absconded. On March 8, Bernard Plehn was still in charge, and had a power of attorney to collect debts and conduct other business on his behalf. It was then that witness heard that Braund had purchased the store. By this time there was a marked decrease in the stock. Shelves that had been packed a month before were then empty.

Cross-examined: The deed of sale had been signed on February 27. No questions had been asked about the goods being taken to Braund's shop.

Davis H. Turnbull, a traveller in the employment of Burmeister's, also stated he was anxious with regard to the whereabouts of Plehn, whom he last saw in January. In March witness saw Bernard Plehn, but not a word was said about Braund. It was only after the provisional order that Bernard mentioned the sale to Braund.

C. W. Cousins, of the Immigration Department, stated Herman Plehn landed in Cape Town in April, 1904, his financial position being represented by a cheque signed by S. Vogelmann, of the Paarl, for £226, and a signed agreement to work for him and Braund.

Sydney Archbell, manager of the Paarl branch of the Bank of Africa, said that Vogelmann was Plehn's brother-in-law. Both had accounts with the bank. Plehn's position was always weak, and he did not know who was keeping him going.

Albert Paulse said Plehn had told him that the stock belonged to Vogelmann.

James McDonnell, private inquiry agent, who had had the estate under observation on behalf of the creditors, gave evidence as to the closing of Plehn's and Braund's shops after the provisional order had been issued. Witness had traced Plehn outside the Colony.

This closed the evidence for the plaintiff.

Counsel having been heard in argument on the facts,

Hopley, J.: If it had been proved that there had been a fraud to which the defendant had been privy, the Court would be bound to set aside the sale. But a party alleging fraud should be prepared to prove it conclusively. The most important piece of evidence that has been produced in this case was a deed of sale of the goods in question, being apparently all the goods in the shop of the defendant. That document was drawn up and executed in the office of an attorney of this Court of good repute, and was witnessed by witnesses

apparently in that office. All the goods were clearly inventoried, and prices seem to have been fairly placed against them all. Now, it is clear that the man Plehn, who has since been made insolvent, has run away without satisfying his creditors: but it is not proved that defendant was a party to his absconding. The circumstances are undoubtedly suspicious, but it should be borne in mind that the defendant is virtually accused of a crime, and all that is adduced in evidence against him is only sufficient to raise a suspicion. There would not be sufficient evidence to send the defendant for trial before a jury on a criminal charge, and this Court should follow the ordinary principles of law and assume innocence until guilt is *prima facie* established. That might possibly have been done if the plaintiff had availed himself of the machinery of the Insolvent Laws, and elicited all the facts by means of a commission, where the matter could have been thoroughly sifted by examination of all parties who had anything to do with the impugned transaction. The plaintiff has, however, elected to come to this Court with insufficient evidence, and there must be absolution from the instance with costs.

[Plaintiff's Attorneys: Dold and Van Breda; Defendant's Attorneys: Faure, Van Eyk and Moore.]

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

THE ABERDEEN MUNICIPALITY V. THE ABERDEEN D.R. CHURCH.	{	1905.
		Aug. 15th.
		" 16th.
		" 17th.
		" 18th.
		21st.

Village Commonage—Ord. 9 of 1836—Act 45 of 1882.

In 1856 the farm B. was transferred to the Kerkeraad, for the time being, of the D.R. Church of Aberdeen. The Kerkeraad sold various erven under conditions, whereby the vendors reserved their right to sell more erven and to

impose such regulations on the purchasers as might from time to time be made either by the Kerkeraad or other local authority which might succeed them for the management of the township. The Municipality subsequently acquired some 5,000 morgen as additional grazing land, and now complained that the Kerkeraad were selling portions of the commonage as erven, and thereby restricting their grazing rights, and claimed a declaration that the defendants should not be entitled to sell further erven. They further asked for a declaration that the Town Commonage was under their exclusive control.

Held, that (1) the grazing rights of the owners of erven extend over the farm subject to any rights which the Kerkeraad may possess. (2) That as the original lands of B. were insufficient to depasture all the cattle, the inhabitants were entitled to place thereon: the defendants were not entitled to sell such portion of the commonage as would appreciably affect the plaintiffs' rights. (3) That Ord. 9 of 1836 and Act 45 of 1882 did not apply to the commonage in this case, inasmuch as the inhabitants had acquired only a common right to the servitude of grazing stock on the commonage, but not to the solum thereof.

This was an action in which the plaintiffs sued for a declaration of rights in respect of the town commonage of Aberdeen and the user thereof.

The plaintiffs' declaration was as follows:

1. The plaintiffs are the Municipality of Aberdeen, duly constituted by a proclamation of His Excellency the then Governor, in Council, No. 283 of 1903, dated the 11th day of September, 1903, in terms of the Municipal Act of 1882; and are a Corporation entitled by law to sue. To the said Corporation appertain, and in the same are vested, all rights and privileges that appertained to, or were vested in, the Commissioners of the Municipality of Aberdeen previous to the passing of the said Act.

2. The defendants are the Kerkeraad or Consistory of the Dutch Reformed Church at Aberdeen aforesaid, and are sued in their capacity as such.

3. The town of Aberdeen was established in the year one thousand eight hundred and fifty-six, by the then Kerkeraad or Consistory of the said church on certain land belonging to the same, in extent three thousand morgen. "Water-erven," forming part of such town, were sold by them on the 19th day of September, 1856, and "dry-erven," also forming part of such town, were sold by them at the same time or not long thereafter.

4. In the conditions of sale under which the said water-erven were sold the right was reserved to the Kerkeraad or Consistory for the time being of the said church to effect further sales of erven. Clauses 11 and 12 of the said conditions provided that no purchaser or owner of erven should be entitled to keep on the public commonage within the limits of the said land more than a certain number of horned cattle, slaughter sheep and goats, and horses, unless by direction of the Kerkeraad or Consistory aforesaid or some person authorised by them. In the conditions of sale of dry-erven a similar right was reserved, and clauses 10 and 11 thereof make similar provisions relative to grazing rights. The plaintiffs crave leave to refer to the said conditions of sale when produced at the trial.

5. The true intent and meaning of the said clauses are that the purchasers or owners of erven should be entitled to sufficient pasturage on the said commonage for the number of cattle therein mentioned; and the sellers of the said erven were and are not entitled to sell further erven with the grazing rights thereunto attaching to such an extent as to render the said pasturage insufficient for the said number of cattle belonging to the said purchasers and owners respectively.

6. Prior to September, 1904, the Kerkeraad or Consistory aforesaid had effected sales and transfers of erven to such an extent that the said commonage was and is already more than fully stocked with the cattle belonging to purchasers and owners of such erven, and grazed by them in accordance with the said clauses of the conditions of sale; and any further sales of erven, if effected, would be effected to the prejudice and in diminution of the grazing rights of such purchasers and owners, and in curtailment of the extent of ground available for pasturage for their cattle.

7. On or about the 17th day of September, 1904, the Kerkeraad or Consistory aforesaid advertised as for sale by public auction on that date certain erven adjoining those previously sold, and, notwithstanding the written protests of the plaintiffs, duly communi-

cated to them before such projected sale, actually did sell them on that date; and they claim the right to sell as many erven as to them may seem fit. The plaintiffs contend that the sales of the said erven were unlawful, as being to the prejudice of the rights of erf-holders in respect of their grazing rights on the said commonage.

8. The plaintiffs, as representing the inhabitants of the town of Aberdeen generally, and the aforesaid purchasers and owners of erven in particular, are by reason of the premises entitled to an interdict to restrain the defendants from transferring the erven then sold, and from effecting any sales or transfers in future of any more erven.

9. Municipal regulations for the town of Aberdeen were framed in accordance with the Statutes thereto relating, and were confirmed on the 17th day of September, 1857, by His Excellency the then Governor, and have been in force ever since, with such amendments as have from time to time been lawfully made.

10. The plaintiffs have had the control and administration of the said commonage from the time such regulations were framed and for a period of more than thirty years until the time of the occurrences hereinafter complained of; and under the said Act 45 of 1882, and regulations lawfully made thereunder, the said commonage is vested in the plaintiffs for the benefit of the inhabitants of the said Municipality.

11. In the year 1904 the plaintiffs granted to certain auctioneers at Aberdeen the right to erect certain kraals which were necessarily required for sales of cattle, as they lawfully might do.

12. On the 19th day of September, 1904, thereafter the defendants, unwarrantably seeking to interfere with the said lawful control and administration of the said commonage by the plaintiffs, demanded and required the removal of the said kraals, which demand has not been complied with, and claim the right and have threatened to eject the said auctioneers.

13. Some time previous to February, 1904, the plaintiffs gave permission to a certain golf club at Aberdeen to make use of a certain portion of the said commonage as golf links, as they lawfully might do.

14. On the 16th day of February, 1904, the defendants, unwarrantably seeking to interfere as aforesaid, gave notice to the plaintiffs that they required the plaintiffs to apply to them for permission to allow such use of the commonage; which plaintiffs have refused to do, and the defendants claim the right and have threatened to eject the members of the said club.

15. By reason of the premises as in the foregoing paragraphs numbered 9 to 14 in this declaration contained the plaintiffs are entitled to a declaration

of rights as hereinafter more fully prayed for.

Wherefore the plaintiffs claim:

(a) A declaration of their rights regarding the town commonage or village land of Aberdeen aforesaid.

(b) A declaration that the owners of erven or lots in the said village are entitled to depasture and graze upon the said town commonage or village land such number of cattle, sheep, goats, horses, mules, and other stock as are now or may hereafter from time to time be fixed by regulation or regulations of the plaintiffs.

(c) A declaration that the defendants are not entitled to sell either publicly or privately or to transfer in pursuance of such sales any further portion or portions whatever of the said town commonage or village land; such being to the prejudice of and in diminution of the grazing rights of existing erf-holders.

(d) A declaration that the said town commonage or village land is under the exclusive control and management of the plaintiffs.

(e) A declaration that the defendants are not entitled to interfere with the plaintiffs in the granting of licences or permission to use portions of the said town commonage or village lands, for purposes for the benefit of the inhabitants of the said Municipality generally.

(f) An interdict perpetually restraining the defendants from selling and transferring erven or lots as aforesaid and from interfering with the exercise of the rights of plaintiffs as claimed above.

(g) Alternative relief; and

(h) Costs of suit.

To this declaration the plaintiffs pleaded as follows:

1. The defendants admit paragraphs 1, 2, and 3 of the declaration, save that as to paragraph 3 they further say that transfer of the said land had been theretofore passed to the Board of Churchwardens of the said church at the then newly-projected town of Aberdeen, and the defendants are now the registered owners of the whole of such extent of the said land as has not been heretofore transferred by them to others; and they crave leave to refer to their deeds of transfer at the trial. The limits of the Municipality are co-terminous with the boundaries of the land transferred to the said Board of Churchwardens in 1856.

2. As to paragraph 4, the defendants crave leave to refer to the said conditions of sale when produced at the trial. In the conditions of sale under which water erven, and likewise in those under which dry erven were sold, the right was reserved to the Kerkraad or Consistory for the time being to sell further erven whenever they should deem

meet. The respective conditions aforesaid were registered with the title deeds of the said erven. Clauses 11 and 12 of the conditions of sale of water erven, and also Clauses 10 and 11 of the conditions of sale of dry erven, provided that the purchaser or owner of any erf should in no case be entitled to graze on the public pasturage more than a span of 10 oxen, 3 cows, or 13 head of horned cattle in all, 25 slaughter sheep and goats, and 2 horses; that all cattle or horses above the said number should be impounded, and that no one should graze or allow any cattle to run, unless by direction of the Kerkraad or some person thereto authorised. The land referred to as public pasturage in the said conditions (11-12 and 10-11 respectively) and as public commonage in the declaration (and hereinafter termed the pasturage) is included in that portion of the said land registered in the name of the defendants which has not yet been cut up into erven or disposed of as aforesaid. Save as above, they deny paragraph 4.

3. The defendants deny that the true intent and meaning of the said clauses are as set forth in paragraph 5 of the declaration. They admit that the purchasers or owners of erven sold subject to the aforesaid conditions of sale are in no case entitled to graze more than the number of cattle, sheep, goats and horses set forth in paragraph 2 hereof, but they deny that such purchasers or owners are entitled as of right to graze the full number of animals therein set forth, and deny that they (the defendants) were not or are not now entitled to sell further erven. They say that if by reason of the sale of further erven the pasturage has become or in the future may become insufficient for the grazing by each purchaser or owner of the full number of animals set forth above, the number which each purchaser or owner may graze should and can be abated, so as to allow each purchaser or owner of the several erven sold subject to the aforesaid conditions of sale by the defendants an equal share in the grazing for which the pasture may suffice.

4. With further reference to paragraph 5, they say that Clause 18 of the Conditions of Sale of water erven (17 of dry erven) provides that each purchaser or owner of any erf shall obey all such regulations as from time to time may be made by the Kerkraad or such other local administration as may succeed the Kerkraad.

5. As to paragraph 6 of the declaration:

(a) They admit that prior to September, 1904, they had effected sales and transfers of erven, as they lawfully might do, but deny that in consequence of such sales or by any act of theirs or in any way the pasturage has become overstocked. If the pasturage

has become overstocked, they say that this is due to the acts or defaults of the plaintiffs.

(b) The plaintiffs have unlawfully permitted persons, who are not entitled to graze cattle, sheep, goats or horses on the pasturage, to graze such animals, and permitted persons who are entitled to graze cattle, sheep, goats and horses on the pasturage, under the aforesaid Conditions of Sale to graze such animals in excess of the maximum provided by the said conditions.

(c) Save as above, the defendants deny the allegations in paragraph 6.

6. They admit paragraph 7 of the declaration down to the word "date" in line 5 thereof, and say that they are still entitled to sell erven as they may deem meet. They deny that the sales of the said erven were unlawful, or that they were to the prejudice of any rights which the erf-holders might have in respect of grazing.

7. As to paragraph 8 of the declaration, defendants deny that the plaintiffs are entitled to the interdict claimed or to any other order against them herein.

8. As to paragraph 9, they admit that Municipal Regulations for the town of Aberdeen have been framed and from time to time amended. As to the legality of such regulations, they refer to the terms of the said regulations and of the Statutes under which they purport to have been framed.

9. As to paragraph 10, they deny that the plaintiffs now have or at any time have had the control or administration of the pasturage. They deny that the said pasturage is vested in the plaintiffs.

10. As to paragraph 11, they admit that in 1904 the plaintiffs purported to grant to certain auctioneers the right to erect certain kraals on the pasturage, but they deny that the plaintiffs were entitled to effect such grant, and say that they acted illegally in so purporting to effect such grant. They deny that such kraals were necessarily required.

11. As to paragraph 12, they admit that in September, 1904, they demanded and required the removal of the said kraals, and that the demand has not been complied with, and that they claim the right and have threatened to eject the said auctioneers, but they deny that they have acted or are acting illegally or unwarrantably.

12. They admit that the plaintiffs purported to give the permission set forth in paragraph 13, but they deny that the plaintiffs were entitled to give the said permission.

13. They admit paragraph 14, save that they deny that they acted illegally or unwarrantably.

14. They deny the allegation in paragraph 15.

Wherefore they pray that the plaintiffs' claim may be dismissed with costs.

And for a claim in reconvention, the defendants (now plaintiffs) say:

1. They repeat the allegations in the plea set forth.

2. The plaintiffs (now defendants) wrongfully and unlawfully claim:

(a) That they are entitled to dig and carry away clay and sand, to quarry and carry away stones from the pasturage, and to grant permission to other persons so to dig, quarry, or carry away.

(b) That they are entitled to erect lime, brick, and charcoal kilns, and to erect huts, kraals, and other buildings and enclosures on the pasturage, and to grant permission to other persons so to erect.

(c) That they are entitled to grant permission to persons, other than the purchasers or owners of erven aforesaid, to graze cattle, sheep, goats and horses on the pasturage, and to grant permission to persons being such purchasers or owners, to graze cattle, sheep, goats and horses on the pasturage in excess of the number provided for in the aforesaid conditions of sale.

The defendants deny the several claims above in (a), (b), and (c) set forth.

3. In pursuance of their said claims, the plaintiffs have framed regulations, numbered 37, 55, 56, 57, 58, and 59 in the amended regulations for the Municipality of Aberdeen published in 1900, to which the defendants crave leave to refer when produced at the trial.

4. The plaintiffs have at various times wrongfully and unlawfully done the several acts the nature of which is set out and the lawfulness thereof denied in paragraph 2 hereof, and the defendants have been damnified and prejudiced thereby, and have suffered loss in the sum of £100.

5. The plaintiffs further claim that they are entitled to bore for water on the pasturage, which claim the defendants deny.

Wherefore the defendants claim:

(a) A declaration of their rights in respect of the pasturage and other lands within the limits of the plaintiff municipality registered in the name of the defendants.

(b) A declaration that the plaintiffs are not entitled to dig or carry away clay or sand, to quarry or carry away stones, to erect lime, brick, or charcoal kilns, huts, kraals, or other buildings or enclosures in or upon the said pasturage, or to grant permission to other persons to do any of the aforesaid acts.

(c) A declaration that the plaintiffs are not entitled to grant permission to graze cattle, sheep, goats or horses on the pasturage to persons who are not purchasers or owners of the erven aforesaid, or to grant permission to persons, being such purchasers or owners, to graze cattle, sheep, goats or horses

in excess of the number provided for in the aforesaid conditions of sale.

(d) A declaration that the Regulations 37, 55, 56, 57, 58 and 59 in the edition of the amended regulations for the Municipality of Aberdeen are invalid.

(e) A declaration that the plaintiffs are not entitled to bore for water on the pasturage.

(f) A declaration that the defendants are entitled to sell and transfer further portions of the pasturage and unsold erven registered in their name.

(g) £100 damages.

(h) Alternative relief.

(i) Costs of suit.

The plaintiffs' replication and plea to claim in re-convention, were as follows:

For a replication to the defendants' plea, the plaintiffs say:

1. They admit the reservation in the conditions of sale to sell further erven, referred to in paragraph 2 thereof, but say that the true meaning and interpretation thereof, and of the said conditions of sale, is that the defendants are only entitled to sell further erven, with grazing and other rights, up to such a number as will not prejudice the existing rights of erfholders who purchased, or whose predecessors in title purchased, under the said conditions. The defendants have at no time exercised any right under the said conditions, as to grazing or otherwise, since the establishment of the Municipality of Aberdeen in 1857, and in terms of and within the meaning of condition No. 18 of water-erven, and No. 17 of dry-erven, the plaintiffs have now succeeded to the control formerly exercised by the predecessors in title of the defendants.

2. As to paragraph 3 thereof, the Municipal Commissioners have for a period far longer than the period of prescription, to wit, since the year 1857 or 1858, lawfully exercised the control over the said commonage, and the defendants and their predecessors in title have therein acquiesced.

3. As to paragraph 5 thereof, the plaintiffs deny that all the sales of erven up to September, 1904, were lawful, inasmuch, as prior to that date, existing erfholders were prejudiced in their grazing rights by such sales; and the plaintiffs say that the present over-stocking of the commonage is due to the unlawful acts of the defendants. The plaintiffs deny that they acted unlawfully as alleged, and say that they have obtained additional ground as town pasturage, in extent 5,159 morgen and 343 square rods.

4. They deny the right of the defendants to sell further erven, as set forth in paragraph 6 thereof.

5. As to paragraph 8 thereof, they say that the said regulations have been

duly framed, and from time to time amended, and have been lawfully promulgated and acted upon, and are valid.

6. As to paragraph 9 thereof, they say that ever since the year 1858 they have held and exercised lawfully the exclusive control and administration of the pasturage, and that the same is vested in them, and they crave leave to refer to Section 45 of Ordinance 9, 1836, and Section 159 of Act 45, 1882.

7. They say that the auction kraals are necessary, reasonable and proper for the due administration of the municipality, that the defendants acquiesced in and were parties to their establishment, assisted in fixing the site, and have been receiving payment in respect of the same.

8. As to paragraph 12 thereof, they say that they have acquired the right by prescription to grant the permission referred to, even if the said right be not otherwise vested in them, for the reasons pleaded in this suit.

9. Save as above, and save in so far as the plea admits any of the allegations in the declaration, they deny all and singular the allegations of fact and conclusions of law in the said plea set forth, and join issue thereupon, and again pray for judgment with costs of suit.

And for a plea to the claim in re-convention the plaintiffs, now the defendants, in re-convention say:

10. They crave leave to refer to the matters pleaded above and in the declaration in this suit.

11. They contend that they are entitled to exercise the rights and perform the acts referred to in a, b and c of paragraph 2 of the said claim: that there is nothing in the conditions of sale referred to which prohibits the exercise of such rights: that in any case they have actually exercised such rights, continuously and uninterruptedly for a period far longer than the period of prescription, during which they have held and exercised the sole and exclusive control and administration of the pasturage or commonage without let or hindrance on the part of the plaintiffs in re-convention or their predecessors in title.

12. As to paragraph 3 thereof the regulations therein referred to and under which the defendants in re-convention have exercised their rights, and claim to be entitled to perform the several acts referred to have been in force and published and have been acted upon since the year 1858.

13. As to paragraph 5 thereof they say that they are entitled to bore for water, for the reasons above set forth and that the same is in the public interests of the inhabitants: that neither the plaintiffs in re-convention nor their predecessors in title ever protested against the said work, but on the contrary were privy thereto and fully ac-

quiesced therein, by their minister acting on their behalf.

14. Save as above they deny all and singular the allegations of fact and conclusions of law in the said claim and join issue thereupon and again pray that the said claim may be dismissed with costs.

For Plaintiffs: Mr. McGregor (with him Mr. Gardiner). For Defendants: Mr. Searle, K.C. (with him Mr. Burton).

Mr. McGregor said that it was the intention of his clients not to sell erven in future with grazing rights to the commonage.

Mr. Searle said that such an alteration in the pleadings would make the defendants' plea an inconsistent one. Considerable argument followed, and at length Maasdorp, J., ordered that the plea be amended so as to remove the inconsistency.

A. M. Melville, a Government land surveyor, said that the church acquired certain property in Aberdeen in 1855. He had recently surveyed certain portions of the commonage for the municipality, and there was approximately 2,745 morgen of commonage unused. Cattle could graze on the golf ground. The eastern portion of the original commonage up to a certain road was reserved for the grazing of sheep, and the western portion for larger cattle. To his knowledge the location had been in existence for many years.

Cross-examined by Mr. McGregor: The original farm consisted of 3,000 morgen. He could not say under what grant the municipality got the 5,159 adjoining morgen. Of that 4,000 was a free grant as commonage for the inhabitants of Aberdeen, and the remainder was granted in consideration of the payment of £231 to the Government.

Jacobus Swat, overseer to the Aberdeen Municipality, stated that since 1875 he had been connected with the municipality; his father had been in the employ of the municipality from 1868, and his grandfather had also been in the service of the town. He could remember the town from 1860. When he was twelve years old he assisted his grandfather in getting the stock in from the commonage. That was the work of the municipality, who always had control of the commonage. Permits were required from the municipality to make bricks, quarry, and for grazing rights on the commonage. Until the year 1890 he continued as overseer, and resumed as overseer in 1899. The first question raised by the church was about the recreation ground, which had been set aside by the municipality, and enclosed by the club, but he could not say how long that was ago. Prior to that there was no question as to the municipality's control of the commonage. There had been no interference with the municipality in connection with the location.

The commonage at present was overstocked, and if more erven was sold with grazing rights it would interfere with the rights of the present holders. The municipality had also regulations as to the number of stock to be grazed and the church had never interfered in this connection. The municipality last year endeavoured to bore for water, and the members of the consistory raised no objection. In his opinion, it was necessary that the municipality should make further experiments for water.

Cross-examined: Aberdeen was flourishing. The inhabitants were increasing in number, and the district was a good one. He hoped that one day the railway would reach there. In 1873 and 1882 certain buildings were erected on the commonage by the Municipality, but whether the consent of the Kerkeraad was obtained or not he could not say. In the latter year the Municipality gave permission for a tennis club to have a ground on the commonage, and the Kerkeraad informed the Municipality that the permission of the Kerkeraad had not been sought. Witness could not say if the Municipality withdrew the permission it had granted on receipt of the protest. Witness had seen as many as 13,000 cattle being sold by auction on the commonage. A sale of that kind would last several days.

[Maasdorp, J.: But that would be of great benefit to the town, and there must be a little give and take.]

Cross-examination continued: There were a good many donkeys in Aberdeen. The last time the commonage was cleaned, 606 donkeys and cattle were found grazing there. There were also about 300 head of small stock.

What would be the average number grazing there?—I should say between 600 and 700.

Do you speak of cattle for which people had permits?—No answer.

In 1903, when cattle were being purchased in the O.R.C., there was a great drain on the veld?—That is so.

And it has had no rest since?—No; none.

I must come back to the donkeys again. I believe the majority of the large stock in Aberdeen is composed of donkeys?—Yes. And they are good feeders?—They'll eat almost anything.

And they do it well?—Yes.

In cross-examination with regard to the native location, witness said he remembered it from about 1863. When witness was a boy the natives were not allowed to run cattle on the commonage.

[Maasdorp, J.: Do they now?]

Yes, my lord.

Mr. McGregor: And there has been some trouble over that?—I believe so.

Continuing, witness said that at a Municipal Council meeting during the present year the natives were restricted

to a certain area. The Municipal Clerk would know all about that. The brick and stone quarries would not do any harm to the commonage. The donkeys at present grazing were not owned by members of the Kerkeraad, but he did not know all the members. There was no other place for cattle than the commonage unless each party passing through were to make arrangements with private people. The natives were grazing about 20 donkeys at present.

Mr. Searle here pointed out that these natives were not purchasers of erven, and the Municipality had claimed to give grazing rights to purchasers of erven.

Witness said that the natives only had about 30 sheep grazing now. The first permits given to natives were given in 1884. Since the action began there had been a resolution that natives living in the location should have regular permits—the permits previously granted were temporary or monthly. There were 300 to 400 natives in the location. None of the quarries seriously interfered with the pasturage.

Philippus Arnoldus Marais said that he remembered Aberdeen from the earliest times. His father was one of the first Commissioners of the Municipality. He had been living in Aberdeen almost continuously since 1866. During all this time the Municipality had the control of the commonage—witness had been auditor for the Municipality, and knew that fees were regularly collected for permits for brick-making, quarrying, etc. The Kerkeraad first raised a claim after the recreation ground was enclosed, about six years afterwards. The mere selling of an erf would encroach on the grazing rights of the present erf-holders, and in his opinion there was not sufficient grazing now.

Cross-examined by Mr. Gardiner: Witness's father had brickfields before the Municipality came into existence. Witness did not know that in 1882 the Municipality had withdrawn its permit for the tennis court, nor that the cricket ground was granted subject to the approval of the Kerkeraad. It was really the travellers who had to be provided for who caused the over-stocking.

James Ablett, master builder, said that he had lived in Aberdeen since 1858. He had then been employed as carpenter in the building of the D.R. Church. The permits for wood were given by the Municipality. As far as he knew, all the permits for stone and bricks were given by the Municipality; the first time he heard of any objection by the Consistory of the D.R. Church was in 1893 in reference to the tennis court.

James Philip Daniel, who had resided in Aberdeen since 1861, remembered the building of the D.R. Church, and had had four houses built on his own behalf

in addition to houses for other people. All the necessary permits were obtained at the Town Hall. He had been an erf-holder, and always received the permits for grazing from the Town Hall. He first heard of the Kerkeraad's claim in 1893.

By Mr. Gardiner: His signature on the petition produced was given to the man who was carrying it about without any idea of its bearing on the question of rights. Witness did not think that it would be a very serious thing for the Municipality if the Kerkeraad sold more erven without raising the price. The general objection of the ratepayers was to the selling of the land. Witness signed a petition against a racecourse.

In reply to Mr. Searle, witness said he might have also signed one for it.

Gabriel de Vos gave corroborative evidence.

Francis John Nelson Truter, Mayor of Aberdeen, stated he came to Aberdeen in June, 1884. On several occasions he had been a commissioner of the Municipality. Since his residence there the commonage had been controlled and administered by the Municipality, which collected the fees for the several permits. There were no charges made for removing sand or clay or collecting wood, but permission had to be obtained from the Municipality. In August, 1887, the Municipality granted permission, and the lawn tennis ground was enclosed. It was not until 1893 that there was any question as to the use of the ground. The Consistory had not, to witness's knowledge, interfered with the cricket ground. In 1897 witness, who was an auctioneer, sought permission from the Council to establish an auction kraal on the commonage. His request was granted. Even if the Kerkeraad sold no erven in future with grazing rights attached, present holders of erven would be accommodated.

Mr. Searle proceeded to ask the witness what the possibilities of Aberdeen were.

[Maasdrorp, J.: Aberdeen will never be a big city, you can rest assured of that. If there were a big river, or a good water supply there, it might, but as there is not, Aberdeen won't be a big city.]

The Witness: But, my lord, we, the Municipality, have sunk some boreholes recently.

Continuing, witness said that the Municipality had expended £226 on the boring works, and the Kerkeraad never offered any objection. The Rev. Mr. Cillie had asked witness to use his influence to get the boreholes sunk. The Municipality had eradicated a considerable amount of prickly pear on the commonage at the cost of the ratepayers.

Mr. McGregor proceeded to cross-examine the witness on the doings of the Municipality in the past, whereupon

his lordship pointed out the need of brevity in the case. He was of opinion that the commonage was vested in the municipality. Witness had petitioned the Kerkeraad not to have the recreation ground so near the graveyard. He did that because he thought that the graveyard was not big enough for the purposes it was intended for.

Schalk Johannes Hugo, examined by Mr. Burton, said that he was a Commissioner of the Municipality of Aberdeen. He had lived for many years in Aberdeen, and the Municipality had always issued permits with regard to the commonage. Witness narrated the circumstances surrounding the water boring in 1904. The Rev. Mr. Cillie was interested in the boring. The increased supply had been of material benefit to the inhabitants, but it was still necessary to obtain a further supply.

Cross-examined by Mr. Gardiner: When Mr. Cillie went with witness to look at the water, he was very anxious to have an increased supply. He did not hear Mr. Cillie say that permission would have to be had from the Consistory.

P. W. Rubidge, stock farmer in the Aberdeen district and a holder of two water erven, stated his gardens had in the past suffered considerably from want of water. There was no other means of obtaining an adequate supply, except through boring. As a farmer, he would say that the pasturage was substantially overstocked.

Cross-examined by Mr. McGregor: He was guided in his opinion by the appearance of the pasturage.

Andries Kuyter, a commissioner at Aberdeen since 1898, stated he was present with Mr. Cillie at the water finding. He agreed with Mr. Hugo as to what took place.

Cross-examined by Mr. Gardiner: He would contradict Mr. Cillie if he stated that it was remarked at the time that permission to bore would have to be granted by the Consistory.

Robert Logie, who had lived at Aberdeen since 1877, and been a member of the Consistory in '93 and '94, stated that about eighteen months ago he was a commissioner of the municipality. As far as he knew the Municipality exercised control all through. From the church books they never claimed any fees in respect of the commonage. He endorsed what the other witnesses said with regard to the water supply.

Cross-examined by Mr. McGregor: The contractor who supplied the stone obtained it from the commonage quarry in the usual way.

Christian Jacobus Rabie, stock farmer, with fifteen years experience of Aberdeen, agreed that the commonage was overstocked at present.

Willem Jura, Town Clerk of the Municipality, said that the first meeting of the Municipality was in 1857. From the earliest times the Municipality had collected revenue from the commonage for permits and licences. Fees were collected for grazing, quarrying, and making bricks. The Church had never at any time interfered with these rights of the Municipality. In the sixties there had been boring for water near the fountain, and not until last year was it resumed, the Municipality had paid over £200 for the water boring and £115 for fencing in the commonage from a private farm adjoining. Nearly £200 was spent on the original commonage. There was no objection raised to these improvements. Temporary permits were issued to people passing through Aberdeen with their stock. The Church never took any exception to the site selected for the location. To pay for grazing would be illegal, but they paid for the permits. That Consistory had never questioned the right of the Municipality to collect the hut tax.

This closed the oral evidence for the plaintiff, and Mr. Searle, having put in certain documentary evidence, closed his case.

Mr. McGregor called.

Leslie Franks, draughtsman, of Cape Town, who produced a plan of the lots sold and unsold, specifying the lots that had been sold since 1885. His plan was a reproduction of the Deeds Office plan.

Cross-examined: According to the Deeds Office plan there were lots in the centre of the town unsold.

Paulus Jacobus Joubert, born in 1828, said he was living in the district when the town of Aberdeen was formed. His recollection of what took place was very hazy, as he never actually lived in the town.

Cornelius van Heerden, member of the Kerkeraad, said he remembered the time when the Municipality was formed. When the racecourse was established the Kerkeraad objected to it on account of the liquor sold there. On whose authority the first brickfield was selected he could not say. He remembered Mr. Cillie telling the plaintiffs they would have to get the Kerkeraad's consent to water boring. There were a number of donkeys on the commonage, and they were very destructive to grazing.

Cross-examined: He was getting stone at present from the new quarry, and his man might have had a permit from the Municipality. Witness had had a permit from the Municipality for the grazing.

Mr. J. J. van Heerden said he knew nothing of the circumstances under which the church was built. He and his brother, however, had delivered the first load of stones from the quarries. He did not know that one of the conditions of the erven was that liquor was

not to be sold, but he knew that there was a condition a few years ago that liquor was not to be sold on the recreation grounds. The commonage was not overstocked. The Kerkeraad, of which he was a member, was not trying to manage the affairs of the town. The conditions of sale were that the buyer had to obey and conform to the rules or regulations of the Kerkeraad, or any body that might succeed it.

Stephanus J. Naude, who lived at Aberdeen since 1868, said at that time there were three quarries in and about the town. Subsequently more quarries were opened.

By Mr. Searle: He had no objection to "Lee's" quarry, for good stone was obtained there.

S. J. de Villiers, a Commissioner of the Municipality and member of the Kerkeraad, stated that in 1898 he had to approach the Kerkeraad for a transfer of 39 erven. He had no objection to the selling of erven around the town.

By Mr. Searle: The owners of dry erven helped themselves to water for domestic purposes out of the furrow.

The Rev. Mr. Cillie, minister of the Dutch Reformed Church, said he had been minister since 1885. He had never had authority to agree to the boring. It was his opinion, and he told Mr. Kuyter, that the Municipality had to apply to the Kerkeraad for permission to bore.

By Mr. Searle: The boring would be an improvement to the town, and he was anxious it should be done.

This concluded the evidence, and counsel having been heard in argument,

Cur. Adv. Fult.

Postea (August 21st.)

Maasdorp, J.: In the year 1856 the farm Brakkefontein was transferred to a number of persons mentioned in the deed of transfer of the property, and described therein as comprising the Board of Churchwardens of the Dutch Reformed Church of the newly projected town called "Aberdeen" on the farm Brakefontein, and to the churchwardens for the time being of the Dutch Reformed Church. The township of Aberdeen was therefore laid out in lots consisting of dry and water erven, a sale of which by public auction took place under conditions attached to the deed of transfer of the erven which were subsequently executed. A question arose at the trial whether these conditions were properly registered against the remaining extent of the farm, but both parties to the suit agreed that the conditions were binding upon them, thus obviating the necessity of carrying the enquiry on that point any further. In the preamble to the conditions the sellers reserve to themselves the right to

sell thereafter more erven than those at that time put up for sale in case they shall deem fit. In the conditions provisions are made for the management and good government of the township by the churchwardens, and it is also provided that the purchaser or owner of any erf shall be obliged to submit to all such regulations as shall from time to time be made by the Kerkeraad, or other local authority that may succeed them. Besides the bare ownership of the erven, their owners, while subject to certain obligations, acquired certain rights in the streets, water furrows and dams, and the owners of the water erven acquired a right to share in the water of a stream mentioned in the conditions. No question now arises in respect of those rights and obligations. The main issues in this case are in respect of the rights of the parties over the remaining extent of the farm lying outside the town. The whole extent of the farm is about three thousand morgen, and the town of Aberdeen itself covers about one hundred and fifteen morgen. The conditions of sale which are of importance in this connection are the following: No. 11. The purchaser or owner of any erf shall in no case graze more cattle on the public grazing land than one span of ten oxen, three cows (or thirteen head of horned cattle altogether), twenty-five slaughter sheep and goats, and two nooses. No. 12. All the cattle or horses kept above the abovementioned number shall be impounded, and no one shall graze or allow cattle to run except by direction of the Kerkeraad or some one authorised thereto. We have, therefore, the erfholders on the one hand enjoying the full dominium of their erven, while, on the other, the rest of the farm remains the property of the churchwardens, subject to a servitude in favour of the erfholders. Whatever may originally have been the intention of the parties under the condition providing that no erfholder shall graze or allow cattle to run except by direction of the Kerkeraad, it is clear that since 1856 the whole of the farm Brakefontein outside the town has been regarded by all parties as the public grazing land, and has been so used as of right by the erfholders, the only restriction being with regard to the localities allotted to large and small stock respectively. I am of opinion that the grazing rights of the owners of erven extend over the farm, subject to such right as to the whole of the remaining extent of the churchwardens may possess under the power reserved by them to sell more erven in case they shall deem fit. I am of opinion that upon the correct interpretation of the two clauses of the conditions above-mentioned the erfholders acquired a right to depasture the full number of animals mentioned on the

public grazing land without let or hindrance on the part of the churchwardens, and that such right cannot be diminished by any action on the part of the churchwardens, except in so far as the conditions of sale justify such action. In order to ascertain whether the public grazing land on the farm Brakkefontein is capable of carrying more stock than the present erfholders are entitled to put on it, or do actually put on it, under their servitude, it is necessary to mention that the Municipality has acquired by purchase for the purposes of a commonage additional land to the extent of five thousand morgen. The nature of the country in this neighbourhood is such that the land in the opinion of some of the witnesses cannot carry more than one head of cattle to every twenty morgen and one sheep to every two morgen. Even if it be taken that the land can carry somewhat more than this number of stock it will be seen by a glance at the list of stock actually kept on the commonage during the last few years that the capacity of the ground is taxed to its full extent, and that the three thousand morgen of Brakkefontein is incapable of grazing the full number of stock, which the inhabitants are entitled under the conditions of sale to put on to it. Under the circumstances the plaintiffs complain that the defendants are selling more erven under conditions which seriously injure their rights to pasturage for their stock both by allowing more stock to be brought in, and by reducing the extent of the commonage, and they claim a declaration that the defendants are not entitled to sell more erven. The defendants in their plea claimed the right to sell further erven with grazing rights thereunto attaching without regard to the effect of such sales upon the rights to pasturage in the plaintiffs, but at the trial they abandoned this position and pleaded that they have not recently sold erven with grazing rights, and they do not claim the right to do so in future. This disposes of one of the most important issues in the case and only leaves upon this part of the case the question whether by the sale of erven the area of the commonage is encroached upon to such an extent as materially to affect the rights of the inhabitants. The defendants have reserved to themselves the right to sell more erven, and if that right is exercised with due regard to the concurrent rights of the erfholders the latter would have no ground of complaint. If the defendants under pretence of selling erven were to dispose of large portions of the commonage they would certainly exceed their rights, but hitherto they have not done so, nor do they claim the right to do so. The past sales of additional erven have had no appreciable effect in the extent of the

commonage, and if they proceed at the same rate they will not have any appreciable effect for some time to come. If the township were to double in size, and of this there is no prospect, the rights of all the inhabitants jointly will be affected upon the estimate made by the plaintiffs own witnesses, to the extent of about three head of cattle and about thirty sheep. As this will not appreciably affect their rights, and the defendants never contemplated or threatened to go as far as this, no case has arisen for a definite declaration of rights upon this head. The further claims set up by the plaintiffs are met so directly by the counterclaim of the defendants that under the circumstances it will be more convenient to approach them from the point of view of the defendants. The issues raised in this respect are important but present no real difficulty from a legal point of view, and may be briefly dealt with upon principles established in the cases cited at the bar. The defendants complain that the plaintiffs have from time to time dug and carried away sand, quarried stone, erected brick kilns, made huts and kraals upon the public grazing lands, and they claim a declaration that the plaintiffs are not entitled to commit these acts; and they also ask for a declaration that the plaintiffs are not entitled to bore for water on the pasturage. Until recently it seems the Municipality recognised in many respects the rights of the churchwardens as owners of the soil of the commonage, but lately the idea seems to have grown up that under the Municipal Ordinance No. 9 of 1836 and Act No. 45 of 1882 the rights of the Municipality have been enlarged at the expense of the Church, so much so that they have actually advanced a claim that the property in the commonage should be transferred to the Municipality. This right was supposed to be created by Section 45 of the Ordinance and Section 159 of the Act. These sections provide that the property in all lands to which the inhabitants of any Municipality shall at any time have or acquire a common right shall be vested in the Council of such Municipality. Now it is quite clear that these sections do not apply to the commonage in this case, to the property in which the inhabitants have not acquired a common right. The inhabitants or erfowners of Maclear have only acquired a common right in the servitude of grazing stock upon the commonage. Then the plaintiffs fall back upon the provisions of section 39 of the Ordinance and section 109 of the Act, whereby powers are conferred upon the Municipality to regulate in certain respects the enjoyment of certain rights by the inhabitants. Here again it is quite clear that reference is made to the property of the Municipality, or common

property of the inhabitants, and sub-section 23 of section 109 of the Act expressly guards the rights and property of third persons. Under the conditions of sale the inhabitants have no common right to dig for sand, quarry stone, erect lime kilns, huts or kraals upon the commonage, and it is only in respect of the kilns and quarries that there is any pretence that the right to them has been acquired by prescription. It is quite clear that a servitude may exist in respect of the rights to quarry and to take sand and clay, but in this case there is no grant of such servitude, and I may say at once that although it seems that from time to time the residents of Aberdeen did take sand, clay and stones from the commonage, there is no satisfactory evidence of an adverse, continuous user as of right, such as to constitute a servitude by prescription, nor does the 18th condition of sale confer upon the municipality power to interfere with vested rights. Upon these considerations I come to the conclusion that the only common right the erfholders of Aberdeen have on the commonage is the right of pasturage, and they are not entitled to rights in the soil. It follows from this that they have no right to bore for water on the commonage. It must be taken that the commonage referred to throughout the judgment is that portion of it which is on the farm Brakkefontein, the property of the defendants. And in this connection I may mention that prayer "d" of the claim in reconvention is much too wide seeing that the regulations are not confined to Brakkefontein, but cover the whole commonage, the larger portion of which is the property of the municipality. A declaration on the other issues will fully indicate what the powers of the municipality are as to regulations for the Brakkefontein commonage. Upon the plaintiffs' claim the Court declares upon the pleadings as now amended, that the defendants are not entitled to sell further or ven upon conditions conferring grazing rights on the commonage to purchasers. Upon the claim in reconvention the Court makes declarations in terms of prayers "b," "c" and "e." In each case with the addition of the words "without consent of the defendants." It must be understood that I express no opinion with regard to the rights of the parties as to the bore-holes now in existence, which were made with the acquiescence of the defendants and at great expense to the plaintiffs. Both parties seem to have mistaken their rights and claimed too much, and under the circumstances no order will be made as to costs, but each party will be left to pay their own costs.

[Plaintiffs' Attorneys: Mostert and Son; Defendant's Attorneys: Michau and De Villiers.]

SUPREME COURT

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

ADMISSIONS.

{ 1905.
{ Aug. 17th.

Mr. Sutton moved for the admission of Nicholas Jacobus Ackermann as an attorney and notary.
Application granted and oaths administered.

Mr. Bailey moved for the admission of Petrus Malan Joubert as an attorney and notary.
Application granted and oaths administered.

Dr. Rainsford moved for the admission of Milton E. O. Fennell as an attorney and notary.
Application granted, oaths to be administered before the R.M. of Butterworth.

Dr. Greer moved for the admission of George Hammond Hussey as an attorney.
Application granted and oaths administered.

PROVISIONAL ROLL.

ZOER V. GINSBERG.

Mr. De Waal moved for provisional sentence on a mortgage bond for £2,650, with interest at 6 per cent. from July 1, 1904, less £24 paid on account, and that the property specially hypothecated be declared executable, with costs.
Granted.

STIGANT AND CO. V. GAFFOOR.

Mr. P. S. T. Jones moved for the final adjudication of the defendant's estate as insolvent.
Granted.

CARTER V. PARRY.

Mr. Russell, for the plaintiff, moved that the provisional order of sequestration against the defendant's estate be discharged.
Granted.

BLAINE V. HEYDENREICH.

Mr. Struben moved that the provisional order of sequestration be discharged.
Granted.

JONES V. MITCHELL

Mr. Benjamin moved for a decree of civil imprisonment against the defendant, who had put in a consent paper to the order subject to its being suspended on his paying £1 per month.
Granted.

ADLER AND FRANK V. ENGELBRECHT.

Mr. Watermeyer moved for provisional sentence on a promissory note for £96 10s., for value received.
Granted.

TOKKINGTON V. HUMPHREYS

Mr. Long moved for provisional sentence on a promissory note for £25, with interest and costs.
Granted.

FREDERICKS V. ROHLAND.

Mr. P. S. T. Jones moved for provisional sentence on a mortgage bond for £500, with interest, less £25 paid on account, and that the property specially hypothecated be declared executable.
Granted.

NEL V. MOLEFE.

Mr. Sutton moved for the final adjudication of the defendant's estate as insolvent.
Granted.

SEARIGHT AND CO. V. SALIE.

Mr. Sutton, for plaintiff, moved for the discharge of a provisional order of sequestration.
Granted.

JUNKER V. KARROO.

Mr. D. Buchanan moved for provisional sentence on a mortgage bond for £300, with interest and costs, and that the property specially hypothecated be declared executable.
Granted.

ESTATE GOLDSCHMIDT V. DAVIS AND KATZ.

Mr. D. Buchanan moved for provisional sentence on a mortgage bond for £4,500, with interest and costs, less £65, paid on account, and that the property specially hypothecated be declared executable.
Granted.

BOARD OF EXECUTORS V. ROSE.

Mr. Watermeyer moved for provisional sentence on a mortgage bond for £2,000, with interest and costs, and that the property be declared executable.
Granted.

MACLEOD V. VAN NIEKERK.

Mr. Bailey moved for provisional sentence on a mortgage bond, with interest and costs, and that the property specially hypothecated be declared executable.
Granted.

HEYDENRYCH V. FRANK.

Mr. Roux, for the plaintiff, moved for a decree of civil imprisonment on an unsatisfied judgment of the Supreme Court for £48, with interest and taxed costs, amounting to £58 1s.

The defendant appeared in person, and said that he had lodged an appeal against his lordship's judgment, but unfortunately he was not in court when the writ was issued. He had to communicate with his father's trustee in Glasgow before proceeding with the appeal, and he would not hear from them until four weeks or so.

Hopley, J., said it seemed to him that it would do no harm to grant a decree, to be suspended until 5th September, and if the appeal should be brought to be suspended until the appeal had been heard.

FRIEDMAN V. UYS.

Mr. Van Zyl moved for provisional sentence for £255 7s. 7d., on an acknowledgment of debt, with interest and costs.
Granted.

SMITH V. VAN STRAATEN.

Mr. J. E. R. de Villiers moved for provisional sentence against the defendant on a broker's note signed by the defendant for the sale of certain shares at three months for £300, with interest. Plaintiff offered and tendered the transfer of the shares to the defendant.
Granted.

ILLIQUID ROLL.

NATIONAL BANK V. ABRAHAM. 1905.
HAMS, ALIAS BRAHAM. { Aug. 17th.

Mr. Benjamin moved for provisional sentence on two dishonoured cheques for £1,705 and £1,896, made by the defendant.
Granted.

MCLEOD V. MULLER AND OTHERS.

Mr. Watermeyer said that the matter was on the motion roll, and asked that it be taken later on.

Mr. Benjamin asked that the defendants be put to terms to file their plea.

It was ordered that the matter stand over one week from the date of the serving of a discovery order. The bar would be removed, costs to be costs in the cause.

MARTIN V. VAN RENSBURG.

Dr. Rainsford applied for judgment for £79 3s., for professional services rendered, with interest.

Granted.

HARPER AND FLOYD V. WORTH.

Mr. Lewis asked for judgment for £7 7s. for dental operations, with interest and costs of suit.

Granted.

LENNON. LTD. V. SCHAFKRO.

Mr. Close asked for judgment for £12 less £15 paid on account, with interest and costs.

Granted.

FRIEDLANDER AND DU TOIT V. KORNBLUN.

Dr. Greer moved judgment for £47 14s. 11d., for professional services, with interest and costs of suit.

Granted.

ESTATE THERON V. THERON.

Dr. Greer applied, under Rule 319, in default of plea, for judgment for £500, with interest and costs of suit. Personal service had been effected.

Granted.

VAN DYK V. KILFOIL.

Mr. D. Buchanan applied for judgment for £10, with interest and costs of suit.

Granted.

GENERAL MOTIONS.

Ex parte HEYDENBYCH. { 1905.
Aug. 17th.

Mr. Molteno made an urgent application for the arrest of Obi Dolla, against whom judgment had been given. An affidavit was read to the effect that Dolla was intending to visit India. Dolla had sold his shop, and had informed his barber that he was bound to India within a few days, probably by the

steamer which had been delayed by the British Association.

Ordered that application be made to the Registrar under 8th rule of Court.

Ex parte MARAIS.

Mr. Gutsche applied for a rule nisi under the Derelict Lands Act to be made absolute.

Granted.

Ex parte COETSMEE.

Mr. Gutsche applied for a rule nisi to be made absolute.

Granted.

LONDON AND LANCASHIRE FIRE ASSURANCE CO. V. IMPERIAL COLD STORAGE AND SUPPLY CO., LTD.

Arbitration—Interdict.

Where one company attempted to force arbitration proceedings upon another company in a case in which there appeared to be no subject matter for arbitration, the Court interdicted the former company from taking any proceedings in the nature of arbitration.

Sir H. Juta, for plaintiffs, asked for cause to be shown why an order restraining respondent from entering into certain arbitration proceedings should not be granted. Sir Henry said that there was no difference of opinion as to the amount due to the respondent, and, that being the case, there was no need to go to the expense of arbitration proceedings.

Mr. Benjamin proceeded to argue *contra* at some length, but

Hopley, J., said he could not understand why the respondents were trying to force arbitration on the plaintiff. Mr. Benjamin had not given a single good reason why arbitration should be forced upon the insurance company, and he (Mr. Benjamin) had better consult his clients during the adjournment. It was a foolish thing for such a big company to come into court with such a case.

Mr. Benjamin, on the Court resuming, contended that the application was an unwarrantable one. It might be that the respondents' advisers had misconstrued the arbitration clause, but that would not entitle the applicants to come to Court for an interdict.

Hopley, J.: In view of the fact that the parties have agreed that the loss by fire amounts to £1,950, there seems to be nothing to arbitrate upon in terms

of the condition of the policy relating to arbitration, and the respondents make that a reason for resisting the present application which they say is wholly unnecessary. That is an argument which comes strangely from the respondents, who have been insisting on forcing on arbitration proceedings in spite of the applicants' clearly expressed position that there was nothing to arbitrate upon. The respondents have gone so far as to appoint their arbitrator and to give notice to applicants that unless they take a similar step on their side the arbitration will be conducted in their absence, as laid down in the contract. In these circumstances the applicants feel themselves to be threatened with something of the ultimate effect of which they are apprehensive. It is now said for the respondents that such proceedings could not bind the applicants, and that the latter might ignore them; but in view of the correspondence it is clear that the respondents intend them to be binding on the applicants, and I think that the latter are entitled to relief at the hands of this Court.

The order of the Court would be that the defendant company be restrained from going into any proceedings in the nature of arbitration, which were intended to bind the applicant company, and be thought the applicants should have their costs in this motion.

COLONIAL GOVERNMENT V. DE WET.

Sir H. Juta moved, on behalf of the defendants, to have this case removed from the list on the 23rd August, on the ground that the defendant was instituting an action against the Government on similar lines as that brought by the latter. The Government were suing for an interdict restraining the defendant from proceeding with certain works at the Hex River, and the defendant would also bring a like action against the Government. It was imperative that both cases should be heard together, and it would take at least one month to work up the case. Counsel moved to have the case set down for next term.

Mr. Nightingale said although there were others joined with the defendants against the Government, there was nothing in the shape of damages or an interdict claimed against them. The work of the defendants caused the floods to flow towards the railway embankment and the whole thing might be carried away. The Railway Department were in a state of trepidation. The engineers on the railway took a most serious view of the case.

[Hopley, J.: All I can say is, if it is so dangerous put a host of watchmen there to stop trains.]

Mr. Nightingale: A host of special watchmen would be washed away.

[Hopley, J.: Put them a little further up.]

Mr. Nightingale: They would not be much use then.

Hopley, J., said the only thing he could do was to give the earliest possible date, as the defendant could not be forced into Court before his defence and counter-claim were ready. However, dangerous it might be, justice would have to be done in the case. The Railway Department, if they anticipated any danger would have to avoid it by extra vigilance. The application to remove the case would be granted, and the case put down for some day next term to be agreed to by the parties, costs to be costs in the cause.

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

BASSON V. THOMPSON. { 1905.
Aug. 18th.
" 21st.

Principal and agent—Cattle.

This was an action brought by Johannes Petrus Basson, a speculator, of Plaateklip, Paarl, claiming £3,270, the price of a certain number of cattle, purchased on behalf of the defendant Gerrit Peter Jacobus Thompson, also of the Paarl, and £218 commission.

The plaintiff's declaration stated that in March last the defendant, who was at that time making large purchases of oxen, requested plaintiff to proceed to Kenhardt, for the purpose of interviewing one Brussel there, with a view to purchasing 200 oxen or thereabouts for him. It was agreed between the parties that the plaintiff should purchase the said oxen on the defendant's behalf, if Brussel would fix a price acceptable to the defendant, and that defendant would take possession of the cattle at Victoria West-road. The defendant at the same time agreed to pay plaintiff a commission of £1 for every ox which he might purchase. Thereafter the plaintiff proceeded to Kenhardt, where he entered into negotiations with Brussel, in accordance with the agreement, and eventually, upon receipt of information from the defendant to the effect that he would be prepared to give £15 a-head, the plaintiff purchased from Brussel 218 oxen

at that price on behalf of defendant. Plaintiff disclosed his principal to Brussel before concluding the purchase, but Brussel declined to accept the defendant as purchaser, and refused to sell the oxen unless the plaintiff held himself personally liable and responsible as the purchaser for the purchase price. Whereupon plaintiff agreed to undertake the responsibility, and the plaintiff had accordingly incurred liability to Brussel in respect of the purchase price which he had already demanded from plaintiff. Plaintiff thereupon took the oxen to Victoria West-road, where the defendant met him on April 2; and on the following day defendant took delivery of the oxen, and after disposing of 26 of them, sent the remainder to his farm Snydam. Defendant refused to pay plaintiff the purchase price, or any portion of it.

The defendant's plea stated that in March last the defendant was under contract with the German Government to supply oxen of a certain condition and weight, the last of which oxen were to be delivered at the Docks, Cape Town, on April 5, all of which plaintiff knew well. It was agreed that if the plaintiff could deliver to the defendant 100 oxen of the weight of 700 lb. when dressed at Wellington Station, on or before April 3, in order that the defendant could fulfil his contract with the German Government, the defendant would buy them at £15 an ox. The defendant denied that he requested plaintiff to proceed to Kenhardt to purchase 200 oxen. The defendant denied that the plaintiff entered into arrangements with Brussel on his (defendant's) behalf. On March 20 plaintiff sent a telegram to defendant stating that he would be at Hutchinson with oxen on April 3. It was impossible for any of the oxen to be delivered from there in accordance with the contract with the German Government, and, therefore, defendant bought other cattle to fulfil his contract. Defendant admitted that he was at Hutchinson on April 2, but denied that it was in connection with the plaintiff's oxen, and he denied that he took delivery of any of the oxen which were not in accordance with the agreement as to condition and weight, and were wholly unfit for fulfilling defendant's contract with the German Government, but that at the request of the defendant he allowed them to graze, and tried to sell them for plaintiff upon plaintiff allowing him a fair and reasonable commission on each ox sold, and the defendant sold oxen for him to the amount of £339 18s. 9d., which sum less £6 10s. commission, the defendant was entitled to, and £11 9s. 3d., being moneys paid by him for railway and auction dues. The defendant tendered this amount to plaintiff before the action was brought.

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The plaintiff, in his replication, denied that he knew the conditions of the agreement between defendant and the German Government, and he also denied that the defendant made arrangement for the delivery of the cattle at Wellington. The plaintiff never at any time had any notice of the purchase of other oxen by the defendant. The plaintiff also denied the arrangement about the grazing or selling of the oxen on his behalf, and he denied that the defendant had ever tendered him money in respect of the oxen sold. The sum now offered was altogether inadequate. He denied his liability for railway rates or commission, and he held that the oxen were sold by the defendant for his own account.

Mr. Burton (with him Mr. Lewis) for plaintiff; Sir H. Juta (with him Mr. Russell) for defendant.

An aged coloured man stated he saw Mr. Thompson selling some oxen to the butcher—Mr. Robus—at Victoria West. They consisted of both old and young oxen, but none of them were in a bad condition.

Cross-examined by Sir H. Juta: But they were in a bad condition.

The witness contended that they were not too poor for the butcher. Witness did not consider them of poor condition, although he had had some experience of cattle.

Ignatius Viljoen, a butcher, residing at Victoria West, stated he saw Thompson in Victoria West in April last. Witness and Robus had given him orders for a couple of oxen. Witness saw Thompson and Robus at the latter's place. They drove two oxen out of the yard. In conversation either Robus or witness asked Thompson to reduce the price from £2 10s. per 100 lb. dead-weight. The oxen were about six miles out from Victoria West, grazing in charge of Basson. Witness selected two of the oxen, and Robus selected ten, and Thompson took sixteen. Basson asked witness to take one of the oxen, which was footsore. Witness was under the impression that Thompson owned the oxen. The condition of the cattle was fairly good.

In cross-examination, witness said the average weight of the oxen he purchased was nearly 600 lb. each. He paid £28 9s. for the two, and purchased them at 50s. per 100 lb. The oxen were full grown, and there were a few young ones.

To the Court: Oxen of 700 lb. dead-weight would be exceptionally fine.

Johannes de Kock, in the employment of plaintiff, stated that in the beginning of April he met Mr. G. Thompson. The latter told witness that there were 200 oxen of his coming along the road. Witness told him the veld was good. The oxen arrived in due course, and ran on the

veld for some time. Some of the oxen were in good condition, a few were young, and some of them were poor.

Cross-examined: Mr. Basson had been helping at the farm and looking after the oxen; he had wanted them, and said that they were in good condition. Some of the oxen were old, but there were only about 20 or 30 in poor condition. There were about 50 that were fat and about 20 young.

Sir Henry Juta added these up, and then asked what became of the other 100.

Witness said he should call them fair.

Cornelius Franz Barnard, a farmer, had met Mr. Thompson on the farm Biesjes Dam at the time of the sale in April. Witness spoke to him about the oxen, asking him to send them back to the Kenhardt district. Thompson said that they had only been there a fortnight, and that they would then be brought on to the Paarl. Mr. Thompson spoke about the oxen as "my oxen," and there was no mention of such a man as Basson. Witness allowed the cattle to graze on his farm, but that was because they were Thompson's, and Thompson was his friend.

The plaintiff, Johannes Petrus Basson, a farmer and speculator, said that in March last he received a letter about some oxen at Kenhardt, and he showed the letter to Mr. Thompson, at the Paarl. Thompson asked witness to wire to Brussel asking the price, and on receipt of a reply, witness took it to Thompson. Thompson said that he would require the oxen immediately—that was, after Brussel had sent a further telegram offering the lot at £16 10s. a head. Witness arranged to go at once, on an agreement that Thompson would pay him £1 a head for getting the cattle. Witness was to deliver the oxen by April 3, at Victoria West. Witness arrived at Kenhardt on March 24, and saw Brussel. Witness then sent a telegram to Thompson that Brussel had a buyer at £17. Thompson replied that he could not give more than £15, and witness subsequently bought at that price. A telegram was then sent by Brussel that delivery would be made at Hutchinson, on April 3.

Sir Henry Juta drew attention to the fact that the sending of this telegram was denied in the pleadings by the plaintiff.

Witness (proceeding) said that he went to Victoria West with the cattle, and there met Thompson, at Verster's, on April 2. Defendant remarked that there were a good many heavy oxen. There was some trouble about getting men to take the oxen to his (Thompson's) farm, that being necessary because there were too many oxen at that time at the Paarl. As regarded the sales to Robus and Viljoen, witness had nothing to do with them, except that Mr. Thompson

asked witness to point out those that were footsore.

Mr. Burton here read a letter from Thompson to witness giving the result of an attempt to sell some of the oxen, but as two of them had died on the road, it had been found impossible to sell the remainder at a profit. Thompson advised witness to take them to the German Border, to be sold to the Germans.

Witness immediately went to the Paarl to see defendant, and told him that he (witness) could not keep the oxen, because he was a poor man. Thompson gave him a letter to the German Consul, which witness took to Baron Von Nettelbladt. Nothing came of this. Subsequent communications had been through the attorneys.

Cross-examined: When witness went to Thompson at the Paarl, he (Thompson) got angry. Witness denied that he had gone to Baron Nettelbladt about the sale of the oxen. The Baron asked witness where his oxen were, and he replied that he had no oxen.

Sir H. Juta here read the evidence of the German Consul, which witness said was not a correct account of the conversation. Witness had only asked him for the conductorship of certain wagons.

Proceeding under cross-examination, witness said he did not know the contents of the letter Thompson had given him. Witness knew that Thompson had to buy oxen for the German Government. Witness had endeavoured in February last to get Thompson to buy more donkeys for the German Government. Witness did not hear from Thompson that his contract with the German Consul was to supply an average of 700 lb. weight. Thompson had not even told him that it was slaughter oxen that were required, and there were no conditions as to weight.

He knew nothing about the price obtained for the oxen by defendant. He received a letter from the defendant in April with reference to some oxen. There was a bull among the oxen, but witness denied that he exchanged it with Thompson. He had no authority to do so, because they were not his. On May 9 defendant wired that he would not take the oxen back.

But you asked him to do so?—I did not.

Well, why should he wire to you to that effect?—I wrote to him about the oxen after they had been to Cape Town.

Continuing, witness denied that it was an arrangement with Brussel that witness should try and sell the oxen.

What did Brussel mean by writing to you, and asking you what you were paying pound money for?—I don't know.

What did you reply to that?—Nothing. Didn't the oxen trespass on Pict Claassen's farm at Amsterdam, and hadn't you to pay £1 fine?—Yes.

And you have not claimed for that yet?—I intend to do so.

Witness (continuing) denied that he paid Jan Claassens £1 for water for the cattle. Witness intended to send in his claim for all expenses later on.

I believe you wanted one of the herds discharged?—No.

I put it to you that you asked Willie Thompson to pay the herd off, and you would settle with him afterwards?—No; I did not.

Witness said he refused to go to Paffadder without being hired for that journey.

In re-examination, witness said he had given Brussel a note to the effect that he would be responsible for the money. Witness explained to Brussel that he was buying the cattle for Thompson, and Brussel agreed to sell them if witness went security.

Mr. Burton explained that Brussel had been subpoenaed, but at the last moment he wrote stating that he was too ill to come down. The defendant's point was not that he did not agree to receive the oxen, but that the plaintiff failed in his contract.

Maasdorp, J., said he thought Brussel's evidence was necessary on the question of credibility.

Mr. Burton said that if it was necessary he would apply for a commission to take Brussel's evidence.

Cornelius Neilson, ranger on the municipal ground, Victoria West, said that in April last Thompson went to him and asked him to rent some veldt for the cattle in question. Witness did so, and Thompson then went to Basson and informed him that he had got a place for the cattle to run. Basson paid the amount due, but the receipt was made out in the name of Thompson. Witness had been subpoenaed by the defendant in this case.

Cross-examined: Witness denied that he had asked Thompson 16s. for the night's grazing.

Charles Steen, chief Traffic inspector, Cape Town Station, stated it took from 33 to 48 hours to carry cattle from Hutchinson to Cape Town. It would take the best part of a forenoon to truck 218 cattle. The usual cattle train left Hutchinson at 1.40 a.m., and arrived at 1.5 p.m. the next day.

Cross-examined by Sir H. Juta,

I suppose that is the ideal time?—It is the time laid down in our working books.

It would be cutting matters short to bring the cattle down in time for April 5?—It could be done.

But are there always 35 trucks available at Hutchinson?—They can easily be got.

I suppose you mean to suggest that the Railway Department is so ideal that nobody is ever delayed?—There is no reason why there should be any long delay. There is seldom any delay to the

live-stock train, because it is always expedited.

Mr. Burton closed his case.

Gert Peter Jacobus Thompson, the defendant, stated that he was a speculator, and had farms at the Paarl and Carnarvon. Early in the present year witness had a contract to supply the German Government with 200 oxen. He was in partnership with one Malherbe, and they agreed to supply 100 oxen each. They had to supply slaughter oxen, 1,100 lb. live weight, and got £15 5s. each. They were to receive £10 for every 1,000 lb. weight above that amount. It was by the latter clause that the profit was made. The particulars of the contract were conveyed to Basson. The cattle had to be delivered at the Docks at eight o'clock on the morning of April 5. They had to be examined by a veterinary surgeon at Wellington. In March the plaintiff went to defendant and asked him if he was still buying oxen. Witness replied that he had a contract for 100 slaughter oxen, and plaintiff asked witness to allow him to buy them. Witness said that as long as the oxen were good he did not mind whom he bought them from. Plaintiff then said he could get 140 oxen which would be about 700 lb. dressed weight, and witness said he would be glad to give £15 a-head for them. Basson then went away and returned next day, and said he had had a wire from Brussel stating that he had oxen for sale, but that he wanted to receive an offer. Witness then explained to Basson that if he bought cattle he would have to deliver them at Wellington on April 5. Basson then left for Kenhardt. Witness denied that he communicated with plaintiff. From the 14th March there was no communication from the plaintiff till March 20. The next communication was such that it would not enable him to fulfil his contract. So on March 21 witness closed with another offer. Witness did not therefore reply immediately to plaintiff's wire to meet him at Hutchinson. Witness had a sale on at one of his farms, and it was on that account, not because he wished to meet Basson, that he went to Victoria West. Whilst witness was there Basson arrived with the cattle. Basson said: "Here are your oxen," and witness replied: "What do you mean; you know you are too late, and you have too many." Plaintiff said that "the Jew would ruin him," and that he had lost five oxen on the road. Plaintiff asked witness to try and put the oxen through for him, and witness said he would do what he could, but that he would probably lose a lot of money on them. It was agreed that witness would help with the grazing arrangements and the getting of herds. Witness sent some of the oxen to Worcester and the remainder back to Lierkalk. Had they been his own, witness would have sold some of them at the

sale on the farm Besgesdam. Again, if the cattle belonged to witness, witness would have been able to look after them without the assistance of Basson. Witness had nothing to do with Brussel. The sales to the local butchers were with the object of reducing the number of the cattle. Witness made a deal with plaintiff in reference to a young bull among the cattle, and there were four people present. Witness endeavoured to arrange for the disposal of the cattle through the German Consul, but was unsuccessful. When witness found that defendant was taking up his present attitude, witness impounded the cattle; but subsequently an arrangement was made that the cattle be attended to in the meantime, so that neither would suffer unnecessary loss. These cattle were a poor, mixed lot—slaughter and trek, young and old. They would be absolutely no good as far as the German Government was concerned.

Cross-examined: There was not a scrap of writing to confirm the arrangement between witness and the German Consul. A special train could have been arranged for the cattle in question. The rule was that the veterinary surgeon examined the cattle prior to their being trucked. Witness had agreed to give £15 for oxen of 1,300 to 1,400 lb. live weight. Witness had absolutely nothing to do with Brussel. The telegram from plaintiff to "meet me at Victoria West on the third," might have meant that plaintiff wished witness to buy.

Mr. Burton: Do you really mean to ask the Court to believe that?

Witness: I do not to the present day understand the telegram. If it had been 100 oxen, and if it had been at an earlier date, I would have understood that they were for me. Witness (continuing) said that it was that telegram which decided him not to buy plaintiff's cattle; but he had not communicated the fact that he intended to "break" with plaintiff, nor had he endeavoured to hurry him up. It was on March 2 that witness heard of the outbreak of rinderpest and the stoppage of consignments of cattle to German South-West Africa.

Mr. Burton here produced an account from Robus in which certain of the cattle were allowed for, and the private purchases of witness credited. All the accounts for railage were in witness's name, witness explaining that he was at the time acting as agent for the plaintiff.

Proceeding, witness said that on March 20 he had 140 trek oxen at the Paarl and about 220 on delivery to the Germans at Hauptman's Hoff. He was in treaty only with Basson and Boltman. Witness had a contract for 107 trek oxen, which expired on March 27. Witness's partner was in treaty for 100 oxen with a Mr. Lamplough, at £15, delivered at Wellington, and they weighed over 1,200 lb. These came from Bloemfont-

tein. Nettelblat had no share in witness's profits. Nettelblat got the contract from the Government and passed it on to witness.

To the Court: The entries in the book (produced) were entered immediately witness returned to the Paarl. Witness made these entries before he wrote to Basson.

William Boltman, dealer in live-stock, stated that in March last he was in the Paarl. He had a conversation with Thompson with regard to the oxen Basson was after. Witness was to get an option on 100 oxen and deliver them at Wellington Station, on April 3. The agreement between witness and defendant was fixed about March 20. Witness sent down the oxen, and Mr. Malherbe, the defendant's partner, received them.

In cross-examination, witness denied having had any conversation with a Mr. Barnard about the cattle in question. He did not remember travelling with him at all.

Did you travel with him from Paarl to Hutchinson on April 9?—I did.

Did you tell Barnard that Thompson had sent Basson to get a couple of hundred cattle for him, and that Thompson was going to burn his fingers over it?—I do not remember it.

Would you contradict such a statement?—I would not.

John A. Robus, butcher, of Victoria West, stated that he recollected a lot of oxen arriving in the village on April 2. Witness offered to buy some, and made a certain offer. Witness believed he was buying the cattle from Basson. The general condition of about 40 or 50 of the oxen was good, but the others were poor. Some of the oxen were very old, and others very young. Witness considered he had the pick of the oxen in what he got.

Cross-examined by Mr. Burton: Witness did not know why Viljoen should think the oxen belonged to Thompson. Witness wrote to Thompson in May, sending the weights of the cattle, in reply to a request from Thompson.

Mr. Verster, in examination, detailed the conversation that took place between Thompson and Basson when they met at Victoria West. Thompson informed Basson that as he had not delivered the cattle in time he could not take them but as he was sorry for him he would do his best to help him to dispose of them, and offered to let them go to his farm. The condition of the cattle was only very poor.

In cross-examination, witness said he was standing close to Basson and Thompson when they were speaking. Witness signed the receipt produced. He received the money for the oxen on Thompson's behalf. Basson and Thompson went to the "Veldwachter." Witness was the bosom friend of Thompson; in fact, he was the friend of all people.

To His Lordship: Witness never saw Basson before the Sunday in question.

Johannes Moller, a farmer, stated that in April last he was on Thompson's farm. Basson was there. Thompson and Basson changed an ox for a bull.

In cross-examination, witness said the exchange occurred on April 8.

William Thompson, son of the defendant, stated he was on the farm Leeuwkalk when the cattle were taken there by Basson. They had some trouble with the herds, and Basson wanted to dismiss one, but he declined to do so as he would want him to take the cattle to Cape Town, as he intended selling them to Von Nettleblat. Witness paid the herd for him as he was short of cash.

In cross-examination, witness said the veld on the farm was not very good just at that time.

To the Court: The cattle had been taken back to Brussell's farm by consent.

The evidence of Baron Von Nettleblat, which was taken on commission, was read. He stated that he believed the cattle belonged to Basson.

Sir. H. Juta closed his case, and counsel were heard in argument on the facts.

Maasdorp, J.: The plaintiff's case was that he was employed by the defendant to proceed to Kenhardt and purchase for him about 200 oxen at a price to be agreed upon after he arrived at Kenhardt, through correspondence by wire, and that he was to receive remuneration at the rate of £1 per ox. On the other hand the defendant said that in negotiations with the plaintiff he informed him fully that he had entered into a contract with the German Government to supply them with oxen at the price of £15 5s. each, and that he would be prepared to pay the plaintiff £15 each for the same quality of ox as he was to deliver to the German Government. If the Court had to depend merely on the evidence in the case, it would have a very difficult task, but fortunately there was a good deal of documentary evidence, which threw a good deal of light on the circumstances. In the first place he would turn to the telegram that was sent on March 14 by plaintiff to defendant, and see whether it supported plaintiff's or defendant's statement. The plaintiff wired that Brussel had an offer of £17, and would he take as many good oxen as he could get at £16 10s. Now, that telegram proved conclusively that there was no such contract as that alleged by the defendant, because how could Basson expect Thompson to pay £16 10s. for cattle for which he would only receive £15 5s. Such a telegram could not have been sent unless the question of price of the oxen was still open. Defendant

wired back that he could not pay more than £15. Defendant told the Court that very soon after he got the telegram from plaintiff he considered that his negotiations with Basson were concluded, and that he set about purchasing elsewhere. He may have done so, but all the time he was under contract with Basson. On March 20 plaintiff sent defendant a telegram to the effect that he would arrive at Victoria West at a certain time, and asked him to be there. He did so, and seemed satisfied with the cattle. The defendant said he was not. The Court was expected to believe that the plaintiff quietly subsided, and said: "What is to become of me?" The Court did not believe the plaintiff would have been so easily satisfied. In the face of all the evidence it was impossible to arrive at any other conclusion than that the defendant told several persons that the oxen were his, and how did he deal with them? He sent them to his farm to stop there, and also sold them without consulting the plaintiff. Under all the circumstances the claim of the plaintiff for the price of the cattle would have to be allowed, and also the commission, and judgment would be given as prayed, with costs.

[Plaintiff's Attorneys: Faure, Van Eyk and Moore; Defendant's Attorneys: W. E. Moore and Son.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

GENERAL MOTION.

SMELLERKAMP V. RICHTER. { 1905.
Aug. 18th.

Mr. P. S. T. Jones moved, as a matter of urgency, for an order compelling the respondent, Ernest Richter, against whom an interdict and an order of ejectment had been granted in the Magistrate's Court, to transfer the licence of the International Hotel, Durbanville, of which he was the lessee and failed to pay the rent to the lessor of the premises, Mr. Smellekamp, who had nominated another lessee.

A similar order to that in the case of Ohlsson's Breweries v. Kerr's Trustee was granted.

TRIAL CAUSES.

ESTATE VORSTER V. PRETORIUS.

Mr. M. Bisset moved for judgment for plaintiff for £361, with taxed costs, in terms of consent paper.

Judgment in terms of the consent paper.

MIGG V. GERICKE.

1905.
 { Aug. 18th.
 " 25th.

Sale and purchase—Conditional sale.

This was an action to recover certain instalments due on the purchase price of certain land.

The declaration set out that the plaintiff was the owner of a farm called Bonnievale in the district of Swellendam. About April, 1903, the plaintiff, through his agent, sold to the defendant, and the defendant purchased, certain eight lots on the farm at a price of £34 10s. per acre, which was to be paid in two instalments of £146 9s. on May 1, 1903, and May 1, 1904. The defendant failed to pay the instalments, and plaintiff claimed £292 18s., with costs.

The defendant in his plea set out that after inspecting the lots he told the agent that it was too late for him to satisfy himself as to the efficiency of the furrow, and said that he would look at the furrow at another time. The agent got him to sign a paper in case he was satisfied as to which lots he would pick, but on that paper there were no conditions of sale. He also told the agent that he was a poor man, and unless he got some money from the military authorities he could not purchase.

Mr. Sutton was for the plaintiff, and Mr. J. E. K. de Villiers was for the defendant.

Piet Johannes Laurens, who acted as agent for the plaintiff, in 1903, said the plaintiff had built a water furrow from Breede River. When the defendant came to the farm the conditions of sale were discussed, and witness told him he would have to pay the purchase price in seven instalments. The defendant read the conditions of sale before he signed.

Witness had the right of letting certain rooms on the property, and of these defendant hired four. The defendant signed the "koop brief" on the spot in lead pencil. Witness took the defendant to the house of the plaintiff. Some time afterwards Messrs. Schoeman, Swartz, and Meyer, who had purchased plots, visited the property, and Mr. Meyer said that he could foresee a difficulty with regard to a wooden aqueduct running round a kraant. Meyer went on to plead poverty, and that he had been told by Mr. Calitz that £1,000 would have to be expended in buying iron pipes. Such being the case, he thought that the sale should be considered to have fallen through. Later in the day the defendant told witness that his brother Franz could not advance him the money, and that he (Gericke) like Meyer, could foresee difficulties. Defendant went on to ask witness to cancel the sale, but this witness said that he was not in a position to do.

Defendant subsequently wrote a letter to the effect that the agreement had not been kept, inasmuch as the furrow was eighteen and not seven miles long. Furthermore, he had not been paid out by the military, and, being a poor man, he could not possibly purchase the plots. Witness had not misrepresented the advantages and disadvantages of the land to defendant. Witness in reply to the letter pointed out that other people had wanted to buy the land, but witness was not given to selling one piece of land twice. A hesitating purchaser by the name of De Jager had thought better of his diffident attitude, and had bought the plots assigned him, but would have to pay £100 as costs for the manner in which he had dalled. As witness would be grieved to see a poor man like Gericke in a similar plight to that of De Jager, he (witness) counselled Gericke to pay up. There was no conditional purchase about the matter.

Cross-examined: Witness was paid for his efforts by what he could make. A certain price was fixed, and if witness could get a bid beyond that amount witness pocketed the difference. If defendant sold eight of the plots, witness would give him one as a present. Witness did not tell other witnesses that if the defendant approved of the furrow he would purchase the lots. The defendant told him about camping a farm for the military, but while the defendant spoke of getting money either from his brother or the military he did not say unless he got that money he could not purchase the lots, furrow or no furrow. The defendant protested very strongly against the declaration being sent to him. The day after the first visit of the defendant witness showed Mr. Honeyball, who picked certain lots, over the ground. Witness did not say that the lots would not be purchased unless the defendant approved of the furrow and got compensation from the military.

Mr. De Villiers: You have a great capacity for denying, Mr. Lawrence?

Continuing, witness, in explanation of the conversation with Honeyball, said that the latter was only in position to buy a small lot. The defendant did not say in the presence of witnesses that he would not buy any lots near such a rotten furrow, nor did he repeat that he refused to purchase anything on the same evening in the presence of the same witnesses.

The plaintiff in the course of his evidence produced a diary in support of his contention, despite the protest of Mr. De Villiers, who said that the book had not been "discovered."

Hopley, J., in glancing through the volume, said to the witness: "What's this thing occurring every day?"

Witness: That means no water in the sluic, my lord.

Mr. Sutton (to witness): But that means the water was there, but not running.

Witness: Yes, my lord.

Carl Petrus van Wyk stated that he heard the defendant say that he had bought the ground.

Cross-examined by Mr. De Villiers: Witness did not start to write out conditions of sale instead of a guarantee about the water.

Mr. Sutton closed his case.

Jan Gerike, defendant in the case, stated that he fenced in his brother's farm as a protection camp for the military. In April, 1903, he visited Bonnievale, and put up at Mr. Lourens' house. Lourens said he had purchased the farm from Rigg to sell out in even in order to give the poor people a chance. After witness had inquired about the distance of the furrow, Lourens said the terms were so reasonable that almost any man could pay the instalments out of the ground. Lourens on that occasion said it was too late to see the furrow. Witness denied having said in the presence of Van Wyk that he had bought ground, and was going to live there. Witness admired the ground, but regretted that he could not see the position of the furrow. The paper that witness signed did not contain any conditions of sale. The plaintiff said if he did not get sufficient purchasers there would be no sale. It was only a conditional paper that witness signed.

Cross-examined by Mr. Sutton: He knew that Oudtshoorn ground was the best in the country, and he thought the ground in question was like that of Oudtshoorn. Mr. Lourens was not a reliable man. He said he bought the ground from Mr. Rigg for £17,000. If he (witness) might drop down dead, Lourens never showed him the conditions of sale.

[Hopley, J.: Never mind telling us about dropping down dead here.]

Continuing, witness said that Lourens always had his son-in-law present to hear evidence.

[Hopley, J.: Does he keep a son-in-law on the premises for that purpose?]

Witness: Yes.

Continuing, witness, in reply to Mr. Sutton, said he never had the Koep brief in his hand. When he signed the paper there was nothing on it but the names.

[Hopley, J.: He was trying to induce people to purchase under false representations from the first?]

Witness: Yes.

[Hopley, J.: Was it part of his swindle to keep you from going to the suit?]

Yes.

Susannah Gerike, who was with her husband at Lourens' house, said that in her presence no conditions of sale were read out. Her husband said nothing about purchasing the land. Witness cor-

roborated her husband as to what took place at the farm and in other material facts.

Cross-examined by Mr. Sutton: She assisted her husband, who had a lot to do. She did the writing part of the business.

Piet Lourens, recalled, said that it was the intention of the plaintiff to make a dorp out of the farm. There were many people on the ground now with many ostriches and a considerable amount of land under lucerne.

Mr. Honiball said Rigg did not speak to the defendant in witness's presence. When witness was looking for a small plot Lourens said there was still a chance for him as Gerike had not actually purchased.

Philip Rudolph Schoeman said on the 1st June, 1903, he, in company with others, visited the spot at the request of Mr. Lourens. He heard the defendant say to Lourens that he (Lourens) had not adhered to his agreement. Gerike told Lourens that the demand for the instalment was contrary to the agreement which was if the military paid and the furrow suited him he could have paid £50. Lourens then said the demand was a mistake on the part of Teubens. Witness had sold plots provisionally.

Antonio Meyer, who was in the company of the plaintiff and defendant, testified to the defendant repudiating the agreement of sale to the plaintiff. Lourens attributed the letter of demand to a misunderstanding on the part of Teubens. Next morning he heard the defendant say to Lourens that he would not purchase ground near such a rotten furrow.

Cross-examined by Mr. Sutton: Witness became secretary of the committee established for the sale of the land.

Mr. De Villiers closed his case.

Pöstea (August 28th). Counsel having been heard in argument on the facts.

Hopley, J.: The plaintiff alleges in his declaration that in the month of April, 1903, he sold, through his agent, one Lourens, certain eight lots of ground on his farm, Bonnie Vale, in the district of Swellendam, for the sum of £1,009, payable in seven instalments, falling due on the 1st of May in each year, together with interest at the rate of 6 per cent. per annum, and in the present suit he claims payment of the first two instalments. He alleges that the defendant signed a written contract of sale, and in the course of the hearing a document of a peculiar nature in more respects than one was produced, bearing among other names of alleged purchasers that of the defendant written in lead-pencil, together with the numbers of certain of the allotments. Such name is admitted by the defendant to be his genuine signature, and the numbers were also

written by him, but he pleads that he was induced to sign his name on the representation of Louwrens that he was entering into a merely provisional agreement, which would become final and binding only if, after inspection of a certain aqueduct or furrow, he was satisfied therewith, and if he were paid certain moneys which were owed to him. And he says that on a subsequent inspection he was dissatisfied with the aqueduct, and that he then at once declared that he would not conclude the bargain. These are the issues raised by the pleadings, and the matter has proved to be one of some difficulty and of a painful nature, since it is clear that some, if not all, of the witnesses on one side or other—all apparently respectable and decent people—must be committing deliberate perjury. The facts, which are beyond doubt, are that the plaintiff, in the year 1901, purchased the farm Bonnie Vale, which seems to have considerable agricultural possibilities, and to which his predecessor had made an aqueduct and water furrow from the Breede River from an intake about nine or ten miles away. A portion of this farm plaintiff caused to be cut up into agricultural allotments irrigable by means of this water-leading, and he advertised what he called his colonisation scheme, offering such allotments to the public. Nothing much seems to have come of his original offer, and it appears that by 1903 he had put the whole matter into the hands of Louwrens—who lives upon the property—with whom he agreed that Louwrens might sell all the allotments for about £16,500, and that any surplus above that amount which he could obtain would belong to Louwrens himself. Whether this was the exact contract between plaintiff and Louwrens or not, it is clear that something of the sort had been agreed upon, and that Louwrens in subsequent transactions with third parties took the active part in concluding or attempting to conclude contracts, and it is also clear that he had a direct and substantial interest in getting rid of the land as expeditiously and advantageously as possible. Early in 1903 Louwrens seems to have drawn up and the plaintiff to have typewritten the document which I have described as peculiar in some respects. It is written in type on a single leaf of foolscap paper, and there are certain uninitialled interlineations. It is to the following effect (the original being in somewhat illiterate Dutch): "We, the undersigned, have hereby agreed and bind ourselves to have purchased a certain share or portion, according to what is set after each name (in extent), in the farm Bonnie Vale, for the price of £34 10s. per acre, of the ground below the water-furrow, together with an undivided free right in the outlying veld and an equal right to the half of the water furrow. Each purchaser

will be bound to pay the sum of £5 for each acre which he has purchased before or on the 1st of May (1903), and so paid yearly on the 1st of May, until the entire sum is paid with interest at the rate of 6 per cent. (on payment of the first instalment transfer will be given *pari passu* to the purchasers). If any person wishes to obtain transfer he is bound to pay two-thirds of his (individual) purchase price, and the balance which he still owes may remain on first mortgage at 5 per cent. Finally, this agreement is of force only in case M. J. Louwrens procures enough purchasers for all the ground below the furrow. Seller (signed) M. J. Louwrens, q.q.; (signed) M. J. Louwrens. Date; purchasers; extent of ground." Such was the document the parts included by me in rectangular brackets being the uninitialled manuscript interlineations referred to across the margin is the following manuscript addition in Louwrens's writing. (Each purchaser is entitled to one unirrigated allotment for each lot which he takes. (Signed) M. J. Louwrens.) By the 25th March eleven people had signed on the leaf on which the agreement was written, and the signatures then go on on a second leaf under similar three headings of Date, Purchasers, and Extent. This leaf was affixed by an ordinary pin to the first one, and it is plain from the numerous pin-holes in the two sheets that they have been very frequently detached and again united by this method. Nearly half way down this second leaf is the defendant's signature in pencil. Now, the defendant, who is a resident of Mossel Bay, had been told of the Bonnie Vale scheme in that town by one Schoeman, a relative and sub-agent of Louwrens's, and he had intended to visit the place specially with a view to purchasing some of these lots if he approved of the proposition after inspection; but having occasion towards the end of April, 1903, to go to Montagu for another reason, he on April 29 hired a cart in that town, and drove to the place accompanied by his wife, the driver being an intelligent coloured man named Stoffel Abrahams. They reached Louwrens's house, and it is said by Louwrens that defendant, after some talk on the subject, there and then practically agreed to purchase the lots in question, and this before he had inspected the ground, in corroboration of which he produces his stepson, Van Wyk, who says that defendant told him before he had been on the ground, that he had purchased 14 morgen there. This I am unable to believe, as the defendant is a poor man with a large family, and the amount of over £1,000 was a very large liability for him to undertake. Moreover, even if he had been a rich man, I cannot believe that he would purchase ground without going to examine the nature, and exact position of it, and in the case of irrigable arable land, which

this was, satisfying himself as to its slopes and other facilities. So that, setting apart the fact that there was admittedly no water running in the furrow owing to a breakdown of the wooden aqueduct somewhere higher up in its course, and the unlikelihood that a man would buy without seeing the run of the water, I find the greatest difficulty in believing that any man like the defendant could so readily commit himself to a concluded bargain about a thing he had not seen, although it was lying only a short distance off, ready for inspection. Here, then, is the first doubt raised in my mind as to the trustworthiness of the plaintiff's witnesses. However, it is clear that after some conversation, Louwrens and defendant walked to the ground and inspected the lots in question. They were followed by the hired cart, in which Mrs. Gericke and a Miss Van Wyk (Louwrens's stepdaughter, since married to one Esterhuizen) were driving. It is clear that Louwrens took with him a diagram showing the subdivision and position of the lots, and he also had with him the document on which defendant signed his name, but whether he had both leaves or only the second leaf thereof is a matter about which there is a considerable conflict of evidence, which, however, I do not think to be of very great importance, save as a test of accuracy of testimony, as it seems to me that the present controversy might in either case have arisen. There in the veld, and with a lead pencil produced by Louwrens, defendant signed the document or placed his name on the second leaf thereof; and it is sought to hold him to the purchase chiefly by reason of that fact; but Louwrens is alone in swearing that this was an unconditional and final acceptance of the contract of sale. He is directly contradicted by the defendant, by Mr. Gericke, and by the driver, who says that he had a special reason for paying close attention to the conversation, as he, and some of his friends in Montagu of the well-to-do coloured class, had an idea of purchasing some of these lots, and were anxious to know the conditions. These three witnesses all swear positively and circumstantially that Louwrens induced defendant to sign by assuring him that the whole matter was provisional, and that defendant would not be bound, unless after inspection of the furrow he were satisfied therewith, and unless further he found that he could make the necessary financial arrangements to meet the first instalments by being paid some money which he said was owing to him. It is admitted that another matter was also spoken about, viz., a block of about 55 morgen of this ground, of which just then one Scheepers had the refusal, but of which it was suggested

that Gericke might have the disposal, in case Scheepers threw up his option, and it was pointed out by Louwrens that he would be willing to pay a commission of £10 per morgen to Gericke, who might thus pay off the greater portion of the £1,000 he would have to pay for his own lots. After the defendant had signed his name, his party drove to Montagu, and Louwrens and Miss Van Wyk walked back to their house. It is alleged by the plaintiff himself that he met the defendant's cart at the farm boundary, and that defendant then told him he had taken up 14 morgen of the ground. On this point, however, Rigg is contradicted by four witnesses, viz., Mr. and Mrs. Gericke, Stoffel Abrahams, and the witness Honiball, who all swear that the two men did not speak at all, and that they were on different roads, and only close enough to wave a salute to each other. The entry in his diary, on which Rigg relies to corroborate him, does not really do so. It is simply to the effect that Mr. and Mrs. Gericke had come and taken 14 morgen. It does not say "spoke to Gericke, who told me he had bought, etc.," and it is clear that, as the entry stands, it might have been made on Louwrens's report, while at this distance of time its presence in his diary may have misled Rigg into thinking that he remembers a conversation to the effect he has recorded. On May 1, or two days after his departure, the defendant again visited the place, and this expedition is utilised by the plaintiff and his witnesses to prove further that he, at that time, considered himself finally bound by the contract; for they swear that he came out for the conditions of sale, which he said he had been twitted by his brother-in-law in Montagu with not having obtained. But it is odd, to say the least of it, that if that was the sole object of his journey, he went away without obtaining a copy of the document, though, according to the evidence, Van Wyk was actually engaged in writing him a copy; nor does the reason given by Rigg and Louwrens for his going back without the only thing he had come for (viz., that it was a joint and not a separate agreement of sale) seem to me at all satisfactory. The defendant, however, gives a totally different version. He says that he went out partly to inspect the furrow, but that it was said by Louwrens that no horses were that day available for the purpose, and partly to get some written guarantee as to the capacity of the furrow and the water-supply, which he might exhibit to people to whom he might try to sell the 55 morgen, in case they should be abandoned by Scheepers. This is, at all events, a plausible explanation of this visit—at least, as likely to be true, it seems to me, as the one given by the plaintiff's witnesses. Defendant says

that Louwrens refused to give him any guarantee in writing about the water-supply, but that he spoke most enthusiastically about its abundance, and that he stated that defendant and all purchasers would have an opportunity of inspecting the furrow before the contract was finally concluded. In view of the provisional nature of the clause with which the document concludes, which states clearly that the sales would be binding only if Louwrens could get enough purchasers for the whole of the irrigable land, I think it not at all unlikely that, at the stage at which matters stood on the 1st of May, Louwrens would then say that matters were provisional, and that all parties could satisfy themselves at a later date. Early on May 2 defendant left by train, and returned to Mossel Bay, and shortly after that date, on May 7, a telegram was sent to him telling him that he might have Scheepers's land for disposal. This, however, has come to nothing, and we are only concerned with the lots defendant is said to have personally bought. On May 18, a letter was sent by plaintiff's agent, Teubens, to defendant, demanding the first instalment, and enclosing what he called a declaration of purchaser, for signature before a J.P. This declaration is in reality so drawn that it would amount to a written contract of sale, and if defendant had signed it, as requested, he would undoubtedly have destroyed any chance of defending such an action as the present; but he did not sign it, and he swears that he posted a reply to Louwrens pointing out that the matter was not concluded, as he had not inspected the furrow yet, and moreover, that he had been asked for the whole of the first instalment, whereas Louwrens had agreed, in case of a sale, to take £50 in cash and a promissory note for the balance. Very shortly after this Schoeman seems to have got up a party of buyers or possible buyers to proceed to an inspection of the place, and defendant joined them. They all arrived at the farm on June 2, and defendant says that he almost at once accused Louwrens of a breach of faith in trying to fix him as a purchaser before he had approved of the furrow, and in asking for the full amount of the first instalment, and he swears that all Louwrens had to say was that it was a mistake of Teubens's. Louwrens admits a complaint by defendant, but states that it was only about the demand for the whole of the first instalment, and he admits that he said that that was a mistake of Teubens's. But here again defendant is directly corroborated by independent witnesses, who swear that he impressed upon Louwrens that the contract was conditional on his inspection of the furrow. The party inspected the furrow, which was not in a satisfactory state. There was no river

water in it, a considerable length of the wooden aqueduct along the face of a krantz had fallen down, and it was clear that a large sum of money would have to be spent in putting it into working order. Of these defects and troubles Louwrens spoke in an optimistic spirit, pointing out that by co-operation a satisfactory state of things could be brought about without very heavy expense to any individual; but the defendant swears that on his return he said plainly, and more than once, in the hearing of all the party, that he would not buy with such a defective furrow. Louwrens says that defendant said nothing at all publicly, but that privately he asked him to rescind the contract, as he could not afford to carry it out. The other witnesses, however, again corroborate defendant, and contradict Louwrens on the point, and it is difficult to see what interest they can have in giving false evidence in this particular. It is clear that the defendant has never done any act in any way showing or tending to show that he considered himself the owner of the land. He did not go upon it or try to dispose of it, and for some time he seems to have been left in peace; but in August, 1903, another demand was made upon him, and he wrote repudiating liability. Subsequent attempts in October, 1903, and in 1904, all failed to get any acknowledgment or settlement from him, though he was threatened by Louwrens with law suits, bankruptcy, and imprisonment. Taking the evidence as a whole, I am not satisfied that the plaintiff's case has been established; the possibilities seem to me to be on the side of the defendant, as also does the preponderance of the evidence, and I am of opinion that there should be judgment for the defendant, with costs.

[Plaintiff's Attorney: G. Trollip; Defendant's Attorneys: Michau and De Villiers.]

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice (the Hon. Sir JOHN BUCHANAN), and the Hon. Mr. Justice HOPLEY.]

INSOLVENT ESTATE VINK { 1905.
V. NEW ZEALAND INSUR- { Aug. 21st
ANCE CO.

Fire insurance—Conditions of policy.

V. had insured against fire with the N.Z. Co., and subse-

quently his premises were burned. By the conditions of his policy he was bound (1) to give notice to the company of the fire forthwith; and (2) within 15 days to furnish them with an accurate and particular account of his losses. (3) It was further provided that no action should be sustainable against the company unless brought within six months after the loss or damage. V. had not complied with the second condition, and more than 18 months after his fire his trustee in insolvency brought an action to recover the insurance from the company.

Held, that as these conditions were fair and reasonable and had been duly brought to V.'s notice, judgment must be given for the defendants with costs.

This was an action brought by Edward Ridge Syfret in his capacity as sole trustee in the insolvent estate of Johannes Albertus Vink against the New Zealand Insurance Company to recover certain sums of money upon two policies of fire insurance.

Plaintiff, in his declaration, said that he was the trustee duly appointed in the insolvent estate of J. H. Vink, whose estate was finally adjudicated on the 12th March, 1904. On the 18th December, 1903, Vink, who was then carrying on business as a general dealer at Philadelphia, Koeberg, Cape Division, effected a policy of insurance for £1,800, for which the premium was duly paid, on his merchandise, shop, stock, and furniture, there situated, with the defendant company, through their agent, duly appointed, at Koeberg. On the 22nd December, 1903, he effected a further policy of insurance against fire with the defendant company to the extent of £1,800, made up thus: £650 on a certain iron shed, £1,000 on certain oathay, and £150 on certain timber and two reaping machines. On the 25th December, 1903, a fire occurred on his premises whereby the buildings, furniture, and stock were destroyed. Notice of the occurrence of the fire was duly given to the defendant company on the following day. The defendant company refused to satisfy the claim under the policy. Thereafter, on the 13th January, 1904, an inquest was held into the circumstances of the said fire. On or about the 18th January criminal proceedings for arson were instituted and prosecuted against the said Vink, and

one Charles Albert Haupt and others. The said Vink and Haupt were duly tried and acquitted of the said charge. Plaintiff prayed for judgment for the said sums of £1,800, £650, £600, and £150.

The defendant's plea was:

1. Defendant admits paragraphs 1 and 2 of plaintiff's declaration.

2. The said Vink made two proposals to the defendant company's agent for insurance by the defendant company against fire. One on the 18th December, 1903, for £1,800 on merchandise, shop, stock, and furniture, and one on the 22nd December, 1903, for £1,800, on iron store (£650), oathay (£1,000), timber and two reaping machines, all situated at Philadelphia, and, having paid respectively the sums of £18 9s. and £13 19s. on account of the respective premiums receipts, in form similar to that here unto annexed marked "A" were issued by the said agent to the said Vink and accepted by him. The said receipts constitute the contracts of insurance between the said Vink and the defendant company, and they were in force as such on the 25th December when a fire took place which destroyed certain of the goods and buildings insured, of which fire due notice was given.

3. By the said receipts it is agreed that the said buildings and goods are insured subject to the terms and conditions of the defendant company's policy. By the 13th and 21st conditions of the defendant company's said policies incorporated as aforesaid as conditions of the said contracts between the said Vink and the defendant company, of which both the said Vink and the plaintiff had notice and knowledge, it is provided respectively, viz., by the 13th condition: "That the insured sustaining any loss or damage by fire shall forthwith give notice in writing to the directors or manager or other nearest agent of the company, and shall within fifteen days after such fire shall have happened, deliver to the said directors, their manager, or agent, as accurate and particular account, in detail, of their loss or damage respectively, as the nature and circumstance of the case will admit, with full particulars of any other insurance upon the property, and shall verify the same by solemn declaration or affirmation before a Justice of the Peace, and shall produce at the office of the company his books of account, vouchers, and such other evidence as the directors, their manager, or agent may reasonably require; and no claim whatever under this policy shall be payable or recoverable unless the terms of this condition have been complied with. No profit of any kind is to be included in such claim, and if there appear to be any fraud, overcharge, imposition, or any misrepresentation, or if the fire shall have happened by the procurement or wilful act, means, or connivance of the insured, claimant, or claimants, they

shall be excluded from all benefit under this policy." And by the 21st condition it is expressly provided: "That no suit or action of any kind against the said company for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any court of law or equity unless such suit or action shall be commenced within the term of six months next after any loss or damage shall occur, and in case any such suit or action shall be commenced against the said company after the expiration of six months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced." The said Vink and also the plaintiff have wholly failed and neglected to comply with and fulfil the said conditions, and did not within the aforesaid fifteen days, or at any time, deliver to the said directors, their manager, or agent, any account at all in accordance with the above condition. Furthermore, the defendant states that the action was only instituted on March 11, 1905, whereas the fire occurred on December 25, 1903.

4. The defendant company admits that the said Vink was at the date of the said fire interested in the buildings and goods insured, but it does not admit the alleged extent of such interest or the amount of damage alleged, and defendant puts plaintiff to the proof of his claim.

5. As regards paragraph 7, the defendant company states that the prosecution was a public prosecution at the suit of the Crown, and not a private prosecution, and that it only admits that Haupt and Vink were acquitted.

6. Save as aforesaid, defendant denies paragraphs 3, 4, 5, 6, 8, and 9, save that it refuses to pay the sums claimed, and says that by virtue of the premises it is not liable to pay any sum to the plaintiff.

Wherefore defendant prays that plaintiff's claim may be dismissed with costs.

The annexure to the plea was headed, South African Branch, New Zealand Insurance Co., and read as follows: Koeberg Agency, December 18, 1903. Mr. Johannes Albertus Vink having this day made a proposal to the above company, for the insurance of £1,800 (eighteen hundred pounds sterling) on merchandise, shop stock, and furniture, situated Philadelphia, and having paid the sum of £18 9s. as a deposit on account of the premium, the same is hereby held insured, subject to the terms and conditions of the company's policies for thirty days from date hereof, unless the manager in Cape Town previously determines to decline the risk, of which due notice will be given. (Signed) J. van Renen, agent. Note.—The assured is particularly requested to take notice that this receipt will only remain in force thirty

days from the date hereof, and in the event of a policy not being delivered within that time, the fact should be reported to the manager in Cape Town.

Plaintiff, in his replication, denied that the alleged conditions set forth in paragraph 3 of the plea were material conditions or were incorporated as conditions of the terms of insurance, sued upon in this action, or that he or the said Vink had due or legal notice thereof. He denied that the said company were entitled to rely on the said conditions as a defence to the claim.

Mr. Upington (with him Mr. Alexander) for plaintiff, Mr. D. Buchanan for defendant.

Cornelius J. Muller, clerk in the Master's Office, produced the records in the insolvent estate.

Alfred Newton Foot said he was a partner of Mr. Syfret, who was the trustee of the insolvent estate. Witness had had control of the whole matter. He had received four books from the insolvent—two day-books, and two sundry debtors' books. There was not a complete set of books, in fact, there was nothing from which he could make up an account of the material destroyed. Witness was only able to make up a very approximate account from the proofs of debts and so forth. Witness applied to the defendants for payment of the policies, and in reply was referred to the defendants' attorneys. On the 12th August, witness's firm wrote to the company, setting out the circumstances of the fire and insolvency, and claiming payment of the insurance. They did not file a claim at that time, because they had not satisfactory details, and also in view of the fact that criminal proceedings for arson were pending against the insolvent. Further correspondence ensued, in which the defendants said that they were under the impression that any intention to claim the insurance had been abandoned, and that under all the circumstances they could not comply with the demand of the trustee. Amongst the claims proved against the estate were claims for merchandise to the amount of £1,510.

Mr. Buchanan submitted that this was not good evidence as to the stock in the insolvent's premises.

Buchanan, A.C.J., said that if the question of the amount was to be gone into, it would be referred to a referee. The evidence at present being led in regard to the value of the stock was inadmissible.

Mr. Upington said that in that case Mr. Foot would be unable to assist the Court any further.

Witness, in answer to the Court, said that he could not, from the books, give a statement as to the actual position of the estate at the time of the fire. He thought that Vink was just about solvent at the time. The debts proved were £2,070. The assets realised £570,

£500 was received from the Guardian Insurance Co., the movables realised £5 odd, and the outstanding debts were £193 6s. 8d.

The Court: But for the land, which would not burn everything in the estate was destroyed?

Witness: All except some horses and carts, which were pledged.

Johannes Albertus Vink, now of Achter Paarl, said that he was at present travelling for life insurance. In November, 1903, a man named Van Renen, who was agent of the defendant company, came to him. Witness was then carrying on a general dealer's business at Philadelphia. He agreed with Van Renen to insure his merchandise, shop, and furniture for the sum of £1,800. Witness paid the premium. He was not made acquainted with the conditions of the company's policy. Witness asked Van Renen what the conditions were, and the latter said that he did not know. Witness was not aware at that time of the 13th and 21st conditions. On the 22nd December he made a further proposal on the oath, the iron shed, and two reaping machines. Witness was given a receipt for the premium. Van Renen inspected the buildings and stock which had been insured. Witness did not read through the proposal form. Van Renen asked him questions, and wrote down the answers he gave, after which witness signed the form. Witness was unable, after the fire, to make up a particular account of his stock. He had lost his books, stock lists, and papers by the fire. The day after the fire witness telegraphed to the company saying that his place had been destroyed by fire. The fire took place on the evening of the 25th December, 1903. On the 6th January, Mr. Wilson, the company's manager, came out, and, after looking over the premises, gave witness a certain form, and told him that he must specify his losses in regard to the merchandise. Mr. Wilson also gave him a copy of the company's policy. Witness told him that he could not make up the list, and Wilson then said he must consult his solicitor.

Cross-examined: He had a conversation with the agent about the conditions. Within ten days of the fire Mr. Wilson showed him the form of the conditions. At the time the fire took place witness, Van Renen, and others were trying to get a contract for forage, and the forage in the store would have gone to the Harbour Board.

John Fredrick van Renen stated that at the latter end of 1903 he was agent at Philadelphia for the New Zealand Company. In December of that year he was agent for the company. Witness approached Vink about insuring the stock. At first Vink was not anxious to insure, but witness subsequently got him to sign the proposal forms. Witness filled in the text of the proposal,

and also the valuation. The iron shed was practically destroyed after the fire.

Cross-examined by Mr. Buchanan: Witness was a partner with Vink in the farming line, and he had an interest with him and others in the contract with the Harbour Board. He knew Vink wanted to insure, but he did not know that he wanted to insure with the New Zealand Company.

Mr. Upington closed his case.

Mr. Buchanan read the evidence—taken on commission—of Frank William Wilson, manager of the defendant company, which set out that the first he heard of the matter was a telegram from Vink on the 26th December, 1903. He sent a Mr. Harley to Philadelphia on the 29th December. Subsequently witness went to the farm and said that no policy had been issued, and that Vink had better take the form with the conditions to his solicitor, who would tell him what to do. Deponent remarked that the circumstances of the fire appeared to be rather extraordinary, and advised an inquiry, which was declined. In his opinion, he certainly did not think there had been a large stock on the premises. Vink never sent in a claim to the company; the first they heard of it was when the trustee's solicitors sent a letter of demand.

Mr. Buchanan closed his case.

Mr. Upington: The case of conditions inscribed on a railway ticket is very different from that of conditions embodied in a life policy. No doubt there are cases in which a person who takes a ticket is bound by the conditions printed thereon. But this is quite a different case. Here neither the agent nor the client knows what the conditions are.

[Hopley, F.: The agent says he knows that there are conditions.]

But for a binding contract the agent and the insurer must both know what the conditions are. See Porter on Insurance (3rd edit. p. 27). My client had no opportunity of knowing what the conditions were. In the case of *Queen Insurance Company v. Parsons* (7 Ap. Ca. 96, 125) the question of reference to the conditions was not raised. Here the Company say that they will not issue a policy until they are satisfied as to certain particulars, but they will insure. I would urge (1) that the conditions of this policy were not understood by both parties to the contract. (2) That even assuming they were there is no proof of this. (3) That no further statement of account was produced; and (4) that the criminal trial took place as long ago as August last, when Vink was acquitted.

Mr. D. Buchanan: The word "Insurance" of itself means little or nothing. I refer to *Queen v. Rymell* (10 Q.B. 178). This is not a simple contract. See also *Woodgate v. S.W. Railway Company* (51 L.T., 826), *Burtse v. G.W. Railway*

Company (5 C.P., 1). The case of *Queen Insurance Co. v. Parsons* shows that a man is bound by the conditions of proposal forms and receipts as to the notice within 15 days, there is nothing to show that that was a condition precedent. See *Stewart v. Sichel and Others* (4 Juta 436). Here there is no question of waiver.

[Hopley, J.: His case is that there was no contract.]

Then they have no case at all. Our conditions are only the ordinary conditions and we never attempted to obscure them.

[Hopley, J.: Then you say that there is no contract before the Court?]

Yes, and the plaintiff is estopped from leading evidence as to waiver. The conditions on the proposal form are conditions precedent.

Mr. Upington in reply.

Buchanan, J.: I think the first question is whether the conditions of the policy are binding upon Vink. They were brought to his notice when he proposed the insurance. They were agreed to by him in the written proposal which he signed, and they were specially referred to in the receipts which he obtained. I think, under these circumstances, there is no ground justifying the Court in coming to the conclusion that Vink can be exempted from these conditions. The next question is, have the conditions on the contract been complied with? The first condition, No. 13, requires that after a fire takes place the insured shall give notice of the fire forthwith, and within fifteen days deliver to the company an accurate and particular account in detail of his loss or damage, as the nature and circumstance of the case will admit. This condition in substance is a common condition in all policies of fire insurance. It is clear from the case of *Hollander v. Royal Insurance Company* that we must hold that it is a condition precedent which must be complied with before action can be brought. Up to the present time that condition has not been complied with. It is not a question of the sufficiency of the information given, but that no information whatever was supplied. Then there is the further condition, No. 21, which says "that no suit of any kind against the said company for the recovery of any claim upon, under, or by virtue of this policy shall be sustainable in any court of law or equity, unless such action or suit shall be commenced within the term of six months next after any loss or damage shall occur." The loss or damage occurred in December, 1903, and yet no action was instituted until March, 1905. Even if that Court should say that the prosecution for arson suspended the operation of this condition until after the other action had been decided, then the prosecution took place in August last, and more than six

months elapsed after the conclusion of this prosecution before any proceedings took place in this case. Both conditions are reasonable conditions, in my opinion, especially in fire insurance. Vink was bound by these conditions and the trustee of his insolvent estate has no greater rights than he had against the insurance company. On both these grounds, the plaintiff cannot succeed in this action. There is no use in giving absolution from the instance. Seeing that the 21st condition has not been complied with, which makes no action sustainable after a period of six months. I think the proper judgment in this case ought to be judgment for the defendants, with costs. Judgment will be entered accordingly.

Hopley, J., concurred.

[Plaintiff's Attorneys: Berrange and Son. Defendant's: Fairbridge, Arderne and Lawton.]

[Before the Acting Chief Justice, the Hon Sir JOHN BUCHANAN.]

GENERAL MOTIONS.

Ex parte ESTATE HULLEY. { 1905.
Aug. 21st.

Mr. Roux moved for leave to mortgage certain property in the district of East Griqualand. The Master's report was favourable.

Order granted as prayed.

ESTATE GARVIE V. B.S.A. ASPHALTE CO.

Mr. Alexander moved for an award of arbitrator to be made a Rule of Court. A certain matter in dispute had been before Mr. James Appleton, as umpire, who found that the company should pay £269 6s. 10d. to the joint trustees of the estate of James Garvie, together with a sum of £11 15s. 6d., half the costs to be paid by the applicant.

Award made Rule of Court; costs of application to be shared by the parties.

DE BRUIN V. DE BRUIN.

Mr. Roux moved for an order requiring the respondent (husband of the applicant) to pay to her a certain sum to enable her to institute an action for restitution of conjugal rights, failing which divorce, and also a certain sum, by way of alimony, pending the suit. Respondent was a Griqua headman, residing at Kokstad, and was a pensioner of the Government.

Order granted, requiring respondent to pay to the applicant's attorneys £20 within 14 days after demand, applicant to institute her action forthwith in the Circuit Court at Kokstad.

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the
Hon. Sir JOHN BUCHANAN.]

SMITH V. INSOLVENT ESTATE (1905.
GROSS AND SMITH BROS. { Aug. 22nd.

This was an action brought by David Smith, of Cape Town, against the insolvent estate of D. Gross and Smith Bros. to recover certain property alleged to have been unlawfully attached, or the value thereof (£120), and £50 damages.

From the declaration, it appeared that the plaintiff in the latter part of 1904 resided on a farm at Malagas, district of Swellendam, and along with his wife and child occupied two rooms. He said that he had certain wearing apparel, crockery, and furniture of the value of £65; a cart which he had purchased from one of the Smiths, of the value of £15, and two mares which he had also purchased from one of the Smiths, of the value of £40. After the compulsory sequestration of the estate of Gross and Smith Bros., the foregoing goods and property were attached, and the defendants refused or neglected to release the same from attachment. He claimed the release of the goods and property, or in default payment of their value (£120), and damages in the sum of £50.

Defendants, in their plea, put the plaintiff to proof that the goods belonged to him, and, as to the alleged purchases of the cart and mares in October last, said that at that time the liabilities of the firm, fairly calculated, exceeded their assets, fairly valued, and that the alleged transaction was an alienation in fraud of the firm's creditors, and was not for just and valuable consideration. They said that plaintiff had furnished no satisfactory proof of ownership of the other goods. They also denied that plaintiff had sustained any damage by reason of their acts, and prayed that the claim might be dismissed, with costs.

Plaintiff, in his replication, denied the alleged alienation in fraud of the firm's creditors, and said that the purchases made were *bona-fide*, and were for just and valuable consideration.

Mr. Roux was for plaintiff; Mr. Upington (with him Mr. Swift) was for defendants.

Mr. Roux submitted that the onus was upon the defendants to prove that the property was not plaintiff's.

Buchanan, A. C. J., ruled that plaintiff must open his case.

David Smith (the plaintiff) said that he had worked in Cape Town as a bricklayer. He went to Malagas once before

last Passover, that was in April, 1904. He asked if he could be allowed to stay there, as times were bad in Cape Town. He was given permission, and he sent his goods to the farm. He had about £220 or £225 when he went to Malagas. He was working about four years as a bricklayer in Cape Town, and had been paid at the rate of £4 for five days' work. Witness went on to testify as to his ownership of the property in question, and was subjected to a lengthy cross-examination by Mr. Upington. He denied that the receipts which he held from the Smiths were made out considerably after the dates that they bore.

Joseph Smith, partner in the firm of D. Gross and Smith Bros., said he remembered when his brother came to South Africa. Work was very plentiful then, and the building trade was brisk. Witness's brother earned £4 a week, and saved some money. He sold two horses to his brother David for £40, which was paid in cash. The money was put in the safe. Witness dealt in horses. That constituted a portion of the business of the firm. At the time witness sold the two mares he had seven horses besides. The mares were sent away because they were in foal.

In cross-examination by Mr. Upington, witness admitted that a judgment was given against his firm, and a meeting of creditors was called, and an endeavour was made to assign their estate. Barnett Smith was at present in Johannesburg. Witness sold the cart and horses on behalf of the firm, and received the money. Witness told Gross that he had sold them, but he did not know whether the sale was entered in the books, as he could not write. Witness could not recollect the date of the sale. Witness did not remember having claimed a number of things in the house as belonging to the firm. The firm had a bar in addition to the shop.

By the Court: They did not touch any of the attached property.

[Buchanan, A. C. J.: But your property was all attached.]

Mr. Upington: These things had never been given up to the messenger.

Cross-examination continued: Witness knew of nothing being hidden on the farm.

Pierre F. de Villiers (called for the defence) said he had formerly been in the employ of the insolvent firm as book-keeper. On Saturday mornings it was necessary for witness to pass through the house, and he then saw a large mirror, a sofa, dining-room, table, etc. Witness had since seen the mirror at Mr. Du Preez's house. The place was fairly well furnished. Witness did not know whether the cart and horses were sold or not. The cart was there when witness entered the employment of the firm. Witness saw the horses grazing on the farm on the afternoon of the messenger's ar-

rival, but they were gone next day. The messenger arrived at 6 o'clock that evening, but did not attach the property until next morning. The entry on the cash-book of £40 was made by witness at Mr. Gross's request on the evening the messenger arrived. The receipts for the purchase price of the horses were made out the same evening, and ante-dated at the instruction of Joseph Smith.

In cross-examination, witness said that when D. Smith arrived with his wife and child they did not bring any furniture with them. Subsequently some parcels arrived. The house was well furnished after Gross left.

Mr. Roux having been heard in argument on the facts.

Buchanan, A. C. J., said he found that the receipts held by the plaintiff for the carts and mares were not given when they purported to have been, but some time afterwards. The plaintiff's case rested solely upon his evidence and the documents, and, having regard to the suspicion that attached to the documents, and the conduct of the plaintiff, he (the learned Judge) could not find that the plaintiff ever bought the mares and cart from the insolvents, and paid for them. With regard to the wearing apparel, crockery, and furniture, he thought it possible that one or two things placed upon the list by the Sheriff's officer did belong to the plaintiff, but when a person acted in the way plaintiff did, and attempted to defraud the creditors of the estate by removing a quantity of property belong to the estate, and mixed up his own things with them, he must take the consequences of this amalgamation, and if he lost things thereby it must be taken as one of the consequences. Plaintiff attempted to remove things belonging to the firm, and in so doing he attempted to defraud the creditors. He might have lost a few things, but the plaintiff had not proved that any of the things belonging to him were attached. The judgment of the Court would be absolution from the instance, with costs.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

TRIAL CAUSES.

CHANNING V. CHANNING. { 1905.
{ Aug. 22nd.

This was an action for an order of restitution of conjugal rights, failing which a decree of divorce, with the custody of the children. The parties were married in community of property

in Cape Town, on August 3, 1896, and there was one child as issue of the marriage. In February, 1900, the defendant maliciously deserted the plaintiff, and had failed to contribute to her support.

Mr. D. Buchanan was for the plaintiff and the defendant was in default.

The plaintiff identified her marriage certificate with the defendant, who had been a ship's carpenter at the Docks. The defendant went to Durban when the war broke out, and witness followed him. Witness returned to her mother, and since February, 1900, she had heard nothing about him. She had information that the defendant had joined one of the corps during the war, and had gone to the front.

[Maasdorp, J.: Why do you think he deserted you?]

Because he has never sent a line since.

[Maasdorp, J.: He may be dead?]

Yes.

[Maasdorp, J.: Was there any unpleasantness at the time?]-Yes, he sent me back to my mother after some unpleasantness.

Decree of restitution granted, to be complied with on 12th September, or cause to be shown by the 16th October why a decree of divorce should not be granted, and why the plaintiff should not have custody of the child.

Postea (August 24).

Maasdorp, J.: In the case of *Channing v. Channing*, I notice that the defendant is not resident in this country, and there will have to be service according to the process by edictal citation, and more time consequently is allowed. In the judgment yesterday the time given is too short, but the circumstances were not brought to my notice. A decree of restitution will be granted, to be complied with by the 30th October, and not 12th September, and cause to be shown on the 14th November, personal service to be effected, or in default a substituted service as before.

Postea (November 14)

Rule made absolute.

MCGREGOR V. MCGREGOR.

This was an action for a decree of divorce brought by Jessie McGregor against her husband on the ground of his cruelty and misconduct, and for custody of six minor children, and payment of £5 per month maintenance for each child. Dr. Greer was for the plaintiff, and the defendant was in default.

Evidence having been given,

[Maasdorp, J.: The only question is about the maintenance. How is a man to contribute so many hundreds a year when he is out of employment?]

Dr. Greer: I feel I am entirely in the hands of the Court in that matter. Perhaps your lordship would make an order for a smaller amount, and give us leave to apply again.

Maasdorp, J., said he would grant a decree of divorce, the plaintiff to have custody of the minor children, maintenance of £4 per month to be paid for each child until such child attains the age of sixteen years, with leave to the plaintiff to move again in respect of increased maintenance.

DU PLESSIS AND ANOTHER } 1905.
V. VAN OS. } Aug. 22nd.
" 23rd.
" 24th.
" 28th.

Will, mutual—Massing—Sale by survivor.

K. and his wife made a mutual will, instituting as heirs the survivor and their daughter (the first plaintiff) and her children: the survivor to enjoy a life usufruct of the whole estate. K. survived his wife and adiated. Thereafter K. sold three erven, part of the joint estate. Plaintiffs now claimed that the sale be declared invalid as to half of the three erven and that defendant be ordered to pay the price of the other half, which they said he had not paid. Or in the alternative that he be ordered to pay the full price of the erven, if the sale could not be set aside, either wholly or in part. The fact of the sale having taken place was disputed, but the Court found, as a fact, that it had gone through. The Court also found that no part of the purchase price had been paid.

The defendant was ordered to pay the full amount of the purchase price (£600): or in the alternative to pay £200, with interest, for half the erven and to re-transfer the remaining half free and unencumbered.

This was an action brought by Mrs. Du Plessis, who was a daughter of the late Mr. Kotze, of Pearston, and her husband, who was executor in the estate

to recover transfer of certain erven which the defendant, it was alleged, got transfer of from the testator under undue influence. In May, 1889, the late Mr. Kotze and his wife made a mutual will, by which they effected a massing of the joint estates. In the joint estate there was seven erven in Pearston, and in respect of these erven the action was brought. The testator's wife died in 1889, and the survivor adiated and remained in possession of the joint estate. In 1903 the testator was over eighty-four years of age, was nearly blind and infirm in body and mind. The defendant was his legal adviser. In May 1903, the defendant, knowing the tenor of the will, wrongfully and fraudulently exercised undue influence and persuaded the testator to agree to sell to him the erven, which were worth £1,000, for £600, promising to pay off certain bonds on another farm belonging to the testator. The defendant wrongfully obtained transfer of the erven on the 16th June, 1903, and there after mortgaged the same in sums of £350 and £400. The testator died in July, 1903, and plaintiff now urged that the sale and transfer was null and void, that the plaintiff was entitled to have the sale and transfer set aside, and that the defendant, having paid no money for the erven or paid off the bonds as promised, was obliged to pay off the bonds of £350 and £400 to release the erven. In the alternative, it was claimed that the second plaintiff, in his capacity as executor dative, was entitled to judgment against the defendant for the sum of £1,000, being the value of the erven, and, failing that, that the second plaintiff was entitled to obtain the purchase price of £600, which had not been paid.

The plea admitted the age of Mr. Kotze at the time of the sale, but denied the other allegations as to his infirmity. The sale, it set out, was a perfectly bona fide one. At the time of the sale the defendant was not aware of the mutual will; he only knew of two wills, in which the testator excluded the erven from the operation thereof. The defendant denied that he acted fraudulently, or that he exercised any undue influence, or that he made any agreement to pay off the bonds on the other farm. The sum of £600 was duly paid, and the testator or his estate had the benefit of it. The defendant admitted that under the provisions of the mutual will the testator was not entitled to dispose of more than one-half of the erven, and as to one-half, he admitted that the transfer was null and void, but as to the other half he contended that the sale was good. He was willing to transfer the one-half of the erven to the plaintiff, free of any burden, on compensation for improvements being paid to him in the sum of £350, and in the alternative if the transfer was con-

sidered unnecessary he offered to pay to the plaintiff £300, the value of one half of the erven, and to pay the taxed costs of the plaintiff to date. For a claim in reconvention he stated that he paid to the testator £300 in ignorance of any mutual will, and that the testator or his estate had the full benefit of the money, and he claimed from the separate estate of the testator the sum of £300.

Sir H. Juta, K.C. (with him Mr. McGregor) was for the plaintiff, and Mr. Burton (with him Mr. Gardiner) was for the defendant.

Samuel John Annear, estate agent, of Somerset East, who knew the late Mr. Kotze, and was administering agent in the estate, said that the assets in the separate estate of Kotze were hardly worth speaking of. Witness was well acquainted with the testator's signature, which was peculiar for the accent over the "e" in "Kotze." Witness, examining the alleged declaration of sale purporting to be signed by the testator, said that he would never take the signature produced for that of Mr. Kotze. Quite apart from the spelling of the name "Coetsee," he would not accept the writing for that of Mr. Kotze. In 1902 the testator was almost blind. If anyone had offered him the document with the signature produced over the alleged sale, witness would not have accepted it. Mr. Kotze could not have written so clearly in May, 1903.

Cross-examined by Mr. Burton: The commission on movables disposed of by auction was 5 per cent., and generally 2½ on valuation. When witness knew Mr. Kotze in 1902, his sight was very bad; one eye in particular. He did not recognise the signature on the receipt or declaration of sale. Witness would never have taken the signature to be that of Mr. Kotze. A man of the years of the deceased would never have signed his name as Coetsee when for years and years he had signed it as Kotze.

Carel Froelich, Mayor of Pearston, said that the defendant was the Town Clerk. In 1903 the deceased had to be led about, and he could not distinguish between half a sovereign and a sixpence. The signatures put in were not those of the deceased. In the year, 1903, the defendant did not appear to be a man of means; he was living with his father-in-law, looking after the sheep.

Cross-examined by Mr. Burton: He thought £600 was about the value of the erven in 1903. The defendant had built a house on one of the erven, and made some other little improvements. Witness could not say whether Mr. Kotze, looking through his glass, could distinguish half a sovereign from a sixpence. There was nothing "mixed" about the old man's intellect. For his age Mr. Kotze was a hale, hearty old man. Witness was not used to the testator signing his name as "Coetsee." The defend-

ant had a counter account against witness.

Re-examined by Sir H. Juta: Witness would not give more than £850 for the property, as it stood now.

By Maasdorp, J.: The property would have been worth more in 1903 when times were better than they were now. Without the house £600 would be a fair price for the erven now.

Walter Hancock Humphrey stated that he was a law agent in Pearston until June, 1903. A few months before he left the defendant settled down in Pearston. The late Mr. Kotze he knew very well, having transacted a good deal of his business. In May and June Mr. Kotze was getting very weak, and his eyesight was very bad. Witness should almost call him nearly blind, as Mr. Kotze had to feel with a stick to get to the office door. Mr. Kotze never could write with ease; he had very great difficulty in writing at all. "Kotzé," with the accent over the "e," was the usual signature. The defendant asked witness to go with him as a J.P. to witness some business with Mr. Kotze, and witness said he had not the time, but said that he had heard that the old man had sold the property to the defendant, and if the defendant got the signature, which witness knew very well, and swore that Mr. Kotze knew what he was doing, he (witness) would attest it. In the beginning of May the deceased was not in a fit condition to write like the signatures produced. At times Kotze could not see at all, and it was necessary to guide his hand, and to tell him when and where to leave off when signing his name. Witness did not recollect having seen old Kotzee in Van Os's office regarding these papers.

Johannes Kotze will say that you went with old Kotze to Van Os's office, and there was some discussion as to whether he should sign Kotze or Coetsee. Is that so?—No. I deny that the old man was there at all.

Did a conversation between you and Kotze take place?—I won't deny that it did.

Johannes Stephanus Lombard, a foster child of the testator, said that when Kotze died he was surprised to hear that there was a bond on some of the testator's land. In May and June the old man was very sickly, and his eyesight was very poor. He was 84 years of age, and was very shaky.

In cross-examination, witness said there was a bond on the farm, and one on an erf in the village.

Albertus Petrus Myburg, law-agent at Somerset East, stated he knew old Mr. Kotze. Prior to his death Mr. Du Plessis consulted witness about him, and witness went to see him. He was very weak. Witness took him a power of attorney to sign, but he was not in a fit state to do it. If a subject was brought to his memory he might be

able to speak about it, but if it was dropped for a few minutes he would not remember it. Witness and Du Plessis went to Van Os to ascertain if he could trace what amount of money he had paid to Kotze. Witness informed Van Os that the money could not be traced, and inquired if he had paid him in cash or by cheque, and he replied that he had paid him in notes and gold. Witness asked him if he had the numbers of the notes, and he replied in the negative. Witness then suggested that it might be possible to get them from the bank, and he gave an affirmative answer. Mr. Du Plessis then asked him how he could buy property from a man in such a weak mental condition, and he replied that Kotze was all right. Van Os jocularly asked Du Plessis if he suspected him. Du Plessis made some answer, but witness could not remember it. Witness informed Van Os that search had been made for the money, but that it could not be found, and he said he gave it to Kotze. Such an amount had not been drawn from Van Os's banking account. Van Os said no witnesses were present when he paid Kotze. On the same occasion witness asked him if he had any documents of Kotze's, and he replied in the negative. Witness asked him where the will was, and he said it had been sent to Cape Town. Witness asked him if he had receipts for the money, and he replied that he had. In reply to a request to show them Van Os said he had not got them in his office. He never showed witness the receipts during Kotze's lifetime. Witness made inquiries in Cape Town about the will, but could hear nothing about it. Witness again mentioned the will, and Van Os said he had forgotten it, but that it was then in Cape Town.

Was that after Kotze's death?—I would not be sure.

Cross-examined by Mr. Burton.

Do you wish the Court to understand that after you first spoke to Van Os about the will that you wrote to Cape Town?—Yes.

You went to get the will before Mr. Kotze's death?—Yes.

Because you were anxious to destroy it?—No.

What did you want with it? Remember, Kotze was still alive.—Mr. Du Plessis wanted to inquire into his circumstances.

Was Du Plessis quite sober on that occasion?—Yes.

Is he habitually sober?—I would not say that he was habitually drunk.

Witness concluded that Van Os got the notes and gold from the bank.

Kotze's have their shop on the same premises as Van Os? Yes.

When you asked him for the receipts didn't he say I have not got them, but I can get them?—I would not deny that.

And you left Pearston the next day?—Yes.

The power of attorney which you say Kotze was too ill to sign was subsequently signed?—Yes.

In re-examination, witness said he heard nothing about an accident to Mr. Kotze. Witness asked Van Os how he paid the money to Kotze, because there were rumours afloat to the effect that he had not done so. Witness administered the estate, but could find no trace of the £600, nor did he find that the money had been spent in any way.

To the Court: There was a bank at Pearston at that time. Witness made inquiries about the money from the bank manager.

David Jacobus du Plessis stated that he was a son-in-law of Mr. Kotze. He knew of the mutual will. Mr. Kotze lived in the town of Pearston, and was looked after by Miss Victor. Witness lived in the district of Somerset. In June he went to see Mr. Kotze. He was accompanied by Myburgh. They had a conversation with Mr. Kotze. He was very weak. Witness gave corroborative evidence of the interview between Myburgh and Van Os. After Van Os was seen the house was searched for the money.

Elsie Jacobs Katrina du Plessis, daughter of the testator, said that she was married out of community of property to the plaintiff. In 1903 her father was in a very weak condition, and could only see with one eye. About that time he told her some ludicrous stories, such as he was to share in the sale of a bottle for £1,000,000, and that she was to take care of his mother's cat, which had been in the possession of the family since 1838. When the testator died witness could only find sixpence in the house.

Cornelia Victor, a spinster, said that from 1901 she looked after the testator. She corroborated the evidence of the previous witnesses. She never saw a large amount of money in the house.

Cross-examined: On one occasion the testator strayed away from the house and fell exhausted on the veldt.

Andrew Stegman, an attorney, of Somerset East, said that the matter was handed to him in October, 1903. He then found that the case had been stated in the previous August.

David du Plessis, examined by the Court, said that he did not know where the testator kept his money.

Sir H. Juta closed his case.

Robert Broom, a medical practitioner, and professor at the Victoria College, Stellenbosch, said that he was district surgeon at Pearston in 1903. He saw Kotze professionally every month up to the time of his death. When witness first met Kotze he was blind in one eye, and in 1902 the other became affected with cataract. Shortly afterwards he became practically blind. On the ad-

contended that this was not a case where the burden of proof rested on the defendant, because the matter was gone through, and some time had elapsed since the transfer of the property, but it remained in the position of a sale, of which there were doubts as to the payment of the price, and the burden of proof still rested on the person alleging such payment. It was said that the burden was removed by reason of two receipts having been put in. The value of those receipts the Court would refer to later on, only remarking that if these receipts were proved to have been given by the old man, it would largely dispose of this case. He would rather approach these receipts from another point of view. The defendant alleged payment of a large sum of money at a time when he was in a very small way of business, and the question at once arose, "where did he get that money?" It was sometimes difficult for a man to trace the source of small sums of money that had accumulated, but here it was given as evidence that it had accumulated in a very short space of time. He said he sold his stock of furniture. The defendant went into details, but it was painfully evident that he could not lay his finger on anything of great value that he had sold. The impression left on the mind of the Court was that although he might have some property, it was not of very great value. Then he said that although he had a banking account, he carried all this money about in his pocket. That was not an extraordinary thing, but it certainly was unusual. The usual course for a man was to pay when he got his title deeds, but here the money was paid before he obtained anything, and it was paid without any witnesses being present, which any man paying such a large amount would have taken care were there to substantiate and secure him. Then, again, there was no arrangement made that the money should be paid, but the defendant walked down the street to his office with this £600 in his pocket, and, meeting Kotze, paid him. It was said that the money was paid, and could not be traced. If the money was in the house it must have been found when the place was renovated. Regarding the receipts, his lordship said that a man of business like the defendant would be expected to see that he got all his papers, and receipts before handing over such a large amount, and have had witnesses. Considering the condition of the old man, he was mentally and physically feeble, and he required advice and protection, and any man who had a dealing of this kind with him should have seen that he had this advice, and not have done things secretly. The Court was of opinion that the signature on the receipt was not that of the old man. The Court came to the conclusion that the sale did take place, and that the pur-

chase amount, £600, was expected to be paid in settlement of the bond, and was not paid, and consequently remained. He thought it would be to the advantage of those interested if £600, which was a fair value of the property, could be paid into court. The order of the Court would be for the plaintiff for £600, to be paid by September 15. Upon failure to do this, to re-transfer half the undivided property free of mortgage to the plaintiff, and to pay the sum of £200, with interest on £600, from the 25th July, 1903. The defendant to pay costs.

[Plaintiff's Attorneys: Fairbridge, Arderne and Lawton; Defendant's Attorneys: Van der Byl and De Villiers.]

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

VOGEL V. VOGEL.

{ 1905.
} Aug. 23rd.

This was an action brought by Henriette Charlotte Mathilde Vogel, of Cape Town, against her husband, Rudolf Albert Vogel, of Paris, France, for restitution of conjugal rights, failing which a decree of divorce.

The action had been brought by edictal citation, the citation having been served on defendant in Paris and on his father in Holland.

Plaintiff, in her declaration, said that she was married to defendant in Holland in August, 1901. They came to Cape Town in May, 1903. In April, 1904, defendant maliciously deserted the plaintiff, and refused and still neglected to support her.

Mr. P. S. T. Jones was for plaintiff; defendant did not appear.

Plaintiff, in her evidence, said that after their marriage they lived for a while in Paris. Her husband subsequently became the representative of a certain firm in South Africa, but he returned about five months later. They then lived for about three months in Antwerp. They both left Antwerp about May, 1905, and came to live in South Africa. He entered into partnership with one Deckers as importers and general agents. Witness and his husband lived at Three Anchor Bay. Deckers went to Antwerp, and her husband next

entered into partnership with one Stegman, and remained with him until April, 1904. Her husband then went back to Holland for the purpose of floating the company, telling her before he left that he intended to return in about two and a half or three months. He had not returned. She had received letters from defendant since he had left the Cape. He said he was unable to return owing to financial difficulties. Witness had since supported herself by taking a position as a lady demonstrator.

Mr. Jones read a letter from defendant, in which he said that it was impossible, for financial reasons, for him to return to South Africa, and that he was willing that a divorce should be pronounced against him. That would, he added, make two lives possible again.

[Buchanan, A. C. J. (to witness): Had you any quarrel before he left?]

Witness: We certainly were not very happy.

[Buchanan, A. C. J.: Owing to what?—Owing to his force character. He was certainly very ill tempered.

Degree of restitution granted, defendant to return to or receive plaintiff on or before the 31st October, failing which to show cause on the 14th November why a decree of divorce should not be granted; service, as on the previous occasion, on defendant and his father.

JACOBS V. SHAW.

This was an action brought by Barney Jacobs, general dealer, Cape Town, against William Bunting Shaw, law agent, also of Cape Town, for damages for breach of lease. Mr. Alexander was for plaintiff; Dr. Rainsford was for defendant.

Dr. Rainsford, at the outset, said he understood that a petition for the compulsory sequestration of the defendant's estate had come before the Court. If that petition were granted it would put a stop to the present proceedings.

Buchanan, A. C. J., said that such a petition had not yet come before him, although he was Judge of the week. If the petition came before him, and it were granted, then these proceedings would have to stop.

Plaintiff, in his declaration, said that on the 20th May, 1904, plaintiff and defendant entered into an agreement for the letting and hiring of a certain house, No. 26, Plein-street, Woodstock, at a rental of £7 3s. per month, including sanitary charges, for a period of twelve months, to be used as a boarding-house, rent to be paid monthly in advance. Thereafter defendant entered into occupation of the said premises, and continued in occupation by himself and his tenants until the month of September. He gave notice on the 9th

September of his intention at the end

of the said month to vacate the premises in breach of the agreement. Plaintiff claimed damages in the sum of £30, being loss of three months' rent, 10s. a month difference between the rental received and the rental specified in the agreement, broken windows, advertising charges, etc.

Defendant, in his plea, said that he entered into the agreement subject to the conditions that the said premises were to be sublet by defendant as a boarding-house, and that the plaintiff would execute certain repairs thereto, more especially to the yard and bathroom, and that plaintiff would give him beneficial occupation thereof. Plaintiff had refused to execute the said repairs in breach of the said lease. Defendant denied that he broke the lease, or that plaintiff had suffered any damages for which he (defendant) was liable. In recollection he claimed an order declaring that he was entitled to cancellation of the said lease.

Plaintiff, in his replication, said that the alleged conditions set out in the defendant's plea were bad in law, and irrelevant, and he prayed that the same should be expunged.

Mr. Alexander said that he did not know whether this was a point that should first be dealt with.

[Buchanan, A. C. J.: It is a trumpery case altogether; you might as well go through with it at once.]

Plaintiff gave evidence. He denied that Mr. Shaw said anything to him about having the back yard and w.c. fixed up.

By the Court: He entered into no conditions with defendant except those that appeared in the lease.

In cross-examination, he said that Mr. Shaw did not, just before he signed the lease, say anything about certain repairs being carried out to the property. During the tenancy he did not frequently receive complaints about the condition of the house. The first mention that he had of any complaints was in September. Witness knew very little about the house, the matter being in the hands of his brother.

Abraham M. Jacobs (plaintiff's brother) said that he had had a number of alterations and repairs carried out at the house in June at the request of Mrs. Seed (the tenant). He did everything to the house that she asked should be done. Certain alterations were carried out at the request of the Municipality in September. Mrs. Seed said that she was leaving the house, because it was too far from the Mission Hall. An action was brought by plaintiff in the Magistrate's Court for rent, and an exception was taken on the ground that there was an action pending in the Supreme Court. That exception was upheld. Witness let the house again as from the 1st January of this year at a rental of £6 13s. per month. This rental continued for

January, February, and March. Damages had been sustained through the windows being broken. Certain deductions had to be made from the claim, bringing the amount down to £24 13s.

Cross-examined: He did not know that one of the bedrooms had been condemned as unfit for occupation. The bath-room was always used during the time of the tenancy. It was absolutely false to say that the bathroom could not be used. Witness had to look after 21 houses, and he agreed that if the bathroom door could not be closed it was impossible to use the bath for the purposes of a boarding-house.

Alfred Raphael, Inspector of the Woodstock Municipality, and Wm. Mathew Dawson, a former tenant of the house, also gave evidence on behalf of the plaintiff.

Mr. Alexander closed his case.

Dr. Rainsford called.

Elizabeth Mary Seed (who hired the house from the defendant), who said that the bathroom and yard required putting in order, while in one of the rooms there was no ventilation. She complained, as the boarders threatened to leave if the bathroom was not put in order, and, the landlord refusing to make the necessary repairs, she gave up the house.

Joseph Hall and John Rutter, two boarders of the last witness, also testified to the dilapidated condition of the bathroom and the need for other repairs.

Francis Lily Fuller and Joseph Robson corroborated.

The defendant, W. B. Shaw, said that when he took the house for a client the plaintiff promised to put the house in order. Witness would never have attempted to take the house with the bathroom in that condition.

Dr. Rainsford also read the evidence taken on commission of Henry Hyman, importer, Cape Town, who was a witness of the signatures to the lease; and Alexander Robert Smith, formerly a cashier and bookkeeper in defendant's employ, who testified that on more than one occasion Mrs. Seed complained about the bathroom and other places when she called with the rent.

Dr. Rainsford, having been heard in argument,

Buchanan, A. C. J., said that the onus was upon the defendant to prove that the conditions were agreed to when he entered into the lease. In the face of the written documents, he was inclined to think that the defendant had not discharged that onus. He also believed that plaintiff had done everything that was required of him in the matter of repairs. Defendant had given up the place because, he said, the sub-tenant could not close the bathroom door, and dirty water ran from the kitchen into the yard. The repairs were of so trivial a nature that they should not have been brought forward as a reason for breaking the lease. Defendant

had broken his contract, and he must pay damages. Plaintiff had shown that he had suffered at least £25 damages, and judgment would be given for plaintiff for that amount, with costs.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

Ex parte FRENCH. { 1906.
Aug. 23rd.

Mr. Struben moved, as a matter of urgency, for an interdict to restrain the Bank of Africa from paying over to the applicant's wife the sum of £105, lodged by him to her credit pending an action for the recovery of the same.

The applicant's affidavit stated that he had been married over 14 years, and during that time he had lodged the amount mentioned to the credit of his wife. She had informed him that as she had got all she could out of him she intended leaving him, and he wanted to restrain her from drawing the money.

An order was made as prayed, pending an action being brought for the recovery of the amounts, with leave to the respondent to move to set aside the order.

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

ADMISSION. { 1906.
Aug. 24th.

Mr. P. S. T. Jones moved for the admission of Harold Christie as an attorney and notary.

Application granted, oaths to be taken before the Registrar of the High Court at Kimberley.

PROVISIONAL ROLL.

MCLEOD V. VAN RENSBURG.

Mr. P. S. T. Jones moved for provisional sentence on a mortgage bond for £100, the bond having become due by reason of the non-payment of interest. Counsel also applied for the

property specially hypothecated to be declared executable.
Order granted.

FOURIE V. STRYDOM.

Mr. Struben moved for provisional sentence on a mortgage bond for £750, the bond having become due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

GREEFF V. DELMORE.

Mr. Payne moved for provisional sentence upon a mortgage bond for £1,000, less £285 paid on account, and for the property specially hypothecated to be declared executable.

Order granted.

WEGE V. HART.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £60, and for the property specially hypothecated to be declared executable.

Order granted.

WEGE V. HART AND OTHERS.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £100, the bond having become due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

MORTON V. RICHARDS.

Mr. De Waal moved for provisional sentence on a mortgage bond for a balance of £100 and for £2 8s. insurance premiums. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

BOSEKARA V. PALMER.

Dr. Greer moved for provisional sentence on a certain acknowledgment of debt for £100, with interest *a tempore morae* and costs.

Order granted.

THOMPSON V. BEZUIDENHOUT.

Mr. Struben moved for provisional sentence on a promissory note for £261,

payable at King William's Town, with interest from March 1, 1905.

Order granted.

PILLANS V. BUCKTON.

Mr. De Waal moved for provisional sentence on a mortgage bond for £9, less £4 10s. paid on account, being one year's interest and costs.

Order granted.

EATON, ROBINS AND CO. V. BARWIN
AND ANOTHER.

Mr. Sutton moved for the final adjudication of the private and partnership estates of the defendants.

Final order granted.

LOMBARD V. MYBURGH.

Mr. De Waal moved for a provisional order of sequestration to be made final.

Final order granted.

WIGGETT V. PIENAAR.

Mr. Struben moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

DEMPERS V. VAN ALMELO.

Mr. De Waal moved for provisional sentence on a mortgage bond for £600, with interest, due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

HARE V. HARTING.

Mr. M. Bisset moved for provisional sentence on a cheque for £123 2s. 9d. and costs of suit.

Order granted.

TILES, LTD. V. FISHER.

Mr. Van Zyl moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

THOMPSON V. HALL.

Mr. M. Bisset moved for provisional sentence on a mortgage bond for £700, and for the property specially hypothecated to be declared executable.

Order granted.

MCLEOD V. WERTH.

Mr. Bailey moved for provisional sentence on a mortgage bond for £500, due by reason of the non-payment of interest. Counsel also applied for the property hypothecated to be declared executable.

Order granted.

ILLIQUID ROLL.

MALAN V. CARLSON. { 1905.
Aug. 24th.

Mr. Van Zyl moved for judgment under Rule 329d for £54 4s. 5d., less £20 paid on account, for goods sold and delivered, with interest *a tempore morae* and costs.

Order granted.

FRIEDLANDER AND DU TOIT V. PSIAKI BROS.

Dr. Greer moved for judgment under Rule 329d for £21 14s. 6d., professional services and money disbursed, with interest *a tempore morae* and costs of suit.

Order granted.

LINTON V. LIEBENBERG.

Mr. De Waal moved for judgment under Rule 329d for £30, professional attendance, medicine supplied, etc., to defendant's son.

Order granted.

GENERAL MOTIONS.

Ex parte FINKELSTEIN.

Mr. M. Bisset moved, as a matter of urgency, for an order restraining Philip Finkelstein, A. son, of Oudtshoorn, from disposing of or alienating certain bills and books of account in the partnership business lately carried on by the parties as dealers in ostrich feathers.

Rule nisi granted calling upon the respondent to show cause why an interdict should not be granted restraining respondent from dealing with or negotiating the bills in question, and why he should not deliver up the books to applicant, rule to be returnable at the ensuing Circuit Court at Oudtshoorn, costs to abide the result, and rule to operate as a temporary interdict.

ANNENBERG V. FOURIE.

Mr. P. S. T. Jones moved, in terms of consent paper, for the removal of trial to the ensuing Circuit Court at Oudtshoorn.

Mr. Uppington (for respondent) acquiesced.

Order granted in terms of consent paper, costs to be costs in the cause.

Ex parte HERMAN.

Mr. J. E. R. de Villiers moved for leave to register a certain ante-nuptial contract entered into in the Transvaal.

Order granted, saving all just rights of creditors.

HEYDENRYCH V. FITZGERALD.

Mr. Van Zyl moved, as a matter of urgency, for the removal of trial to the next Circuit Court at Aliwal North.

Removal of trial ordered, costs to abide result.

Ex parte ESTATE MIDDLETON.

Mr. Benjamin moved, on behalf of the executrix testamentary, for leave to pass bond on certain landed property at Port Elizabeth.

Order granted.

COLONIAL GOVERNMENT V. MCKENZIE AND CO.

Mr. P. S. T. Jones moved for certain award of arbitrator to be made a Rule of Court. He said that the arbitrator had found in favour of the Government for £341, and had directed respondents to pay costs.

Order granted as prayed.

Ex parte DU PLESSIS AND OTHERS.

Mr. Molteno moved for leave to sell certain property in the district of Colesberg. Counsel said that the matter had stood over pending a report of the Master, such report being now read. The Master said that the proposal of the petition was in direct conflict with the will. The testatrix had directed that the farm should not be sold or let to anyone except the three branches of the family named up to the third generation. The farm would not support the three families, and two had gone away. The parties could buy out the property. The parties concerned were really poor whites, and unless they were allowed to sell as now prayed the property would simply remain a "white elephant." Counsel cited the case of *ex parte Groenwald* (12, "Cape Times" Law Reports, 849).

Buchanan, A. C. J., said that he did not see how it would be possible for the Court to step in and alter the will of the testatrix. No order would be granted.

Ex parte SOHELTEMA.

Mr. M. Bisset moved for confirmation of sale of certain property in an estate of which petitioner is executor, and payment of certain moneys standing to the credit of minors.

Order granted in terms of the Master's report.

KLEIN V. STEYN.

Mr. Lewis moved for the return day in this action, which was for the sequestration of the defendant's estate, to be extended from August 10 to the present date. By a mistake the case was not set down on the right date.

Buchanan, A. C. J., said that possibly the defendant was present in Court on the old return day, and that he had no notice of this application, and might want to oppose it.

Mr. Lewis said the defendant had signified his intention of not defending.

The application was granted. The return day was fixed for August 31.

Later in the day Mr. Lewis said he understood that the defendant had left the Colony, the allegation being that he had gone to German South-west Africa. He applied, therefore, for leave to effect substituted service.

Leave was given to effect substituted service by one publication in the "Cape Times."

SWEENEY V. SWEENEY.

Mr. P. S. T. Jones, who appeared for the applicant, asked to have the case postponed, as allegations were made in the respondent's affidavit, which the applicant, who was very ill, was not yet able to answer.

Mr. Lewis, who appeared for respondent, consented, but asked to have the costs of the day allowed.

The application was postponed until next Thursday. The question of costs to stand over until then.

Ex parte HLIKIHLA.

Mr. J. E. R. de Villiers moved for leave to transfer certain property.

The application was granted.

LEPERSEN V. BRUNT.

Mr. Alexander moved on behalf of applicant to have a certain interdict set aside.

Mr. Van Zyl opposed the application. The property concerned was a billiard table, which the applicant bought from one Davies, who purchased it from one Goldstein on July 15, and whose property shortly after the sale was placed under interdict. The billiard table was

removed on July 31 from Goldstein's premises to Lepersen's. The applicant was not told until August 3 that an interdict was granted giving the sub-Sheriff power to follow up the property of the estate, and the billiard table was then placed under the interdict.

The respondent's affidavit stated that the interdict was served on the applicant about 9.30 a.m. on July 31. On August 1 respondent was informed that two loads of furniture had been removed from the house, and he obtained another order from the Court. On August 5 he went to 4, Sir Lowry-road, to remove the furniture, and he was informed that there was no furniture there belonging to Goldstein.

A considerable number of affidavits was read on both sides.

Mr. Alexander having been heard in argument,

Buchanan, A. C. J.: An application was made by the respondent Brunt to a Judge in Chambers on an affidavit setting forth the fact that one Goldstein was a tenant of his and that he was under an agreement to pay rent for the premises monthly in advance. The rent, he alleged, had been paid up to the end of June; the rent for July, which was payable in advance on or before the 1st July, had not been paid, though frequently demanded, and there was rent due for the month of August. These facts were disclosed to the Judge, who granted a provisional order. The respondent Brunt said he saw that all the movable property in the premises was advertised for sale on the 31st, and he applied for an order restraining the sale until the rent (£44) had been paid. The learned Judge who had the application before him made the provisional order and restrained the sale. After service of this order, on the morning of the 31st July, Goldstein allowed certain property, which had been restrained from removal, and which had been attached by the order, to be taken away from the premises. Thereupon Brunt naturally applied to the Court, and got an order authorising the Sheriff to follow up any property which had been removed in disobedience to the order of the Court, and restore it to the premises. Now, one Lepersen applies to set aside the order on the ground that a certain billiard table which he had removed after the service upon Goldstein of the order attaching the same for the rent, was his property. From the affidavits, as far as they disclose the facts, it is clear that this billiard table was removed after the service of the order of Court. When the billiard table was followed up by the Sheriff, it was found to be concealed in a suspicious manner. But whether or not the billiard table belonged to Lepersen, it was on the premises and was attached for unpaid rent. The applicant, Lepersen, has

shown no ground for removing that attachment and the application will be refused, with costs.

CAMP'S BAY EXTENSION ESTATES CO.
V. SAMSON.

Mr. P. S. T. Jones moved, upon notice of motion, for an amendment of the order given by the Court in the recent trial so as to avoid future disputes. A consent paper had now been filed for an amendment of the order.

Order granted in terms of consent paper, applicant to pay costs.

Ex parte ESTATE CAMPBELL.

Mr. Molteno moved, on behalf of the executrix testamentary, widow of the deceased, for leave to pass a bond for £200 on certain property in the district of Cradock. Counsel stated that the matter had caused a good deal of correspondence, and that he was now prepared to accept an order in terms of the Master's report.

Order granted in terms of the Master's report.

Ex parte ESTATE MCGRATH.

Mr. Sutton moved for an order authorising the Master to pay out from the guardians' fund to the tutor dative certain money for the maintenance and upkeep of the minor children.

Order granted in terms of Master's report.

Ex parte INSOLVENT ESTATE VILLET.

Mr. Douglas Buchanan moved, on behalf of the trustee, for leave to sue by edictal citation one James Collins, said to be of Cannon-street, London, England, for a debt of £2,349 1s., alleged to be owing to the estate, and for the attachment of certain property *ad fundandam jurisdictionem*. The affidavit of Mr. Hazell (the trustee) said that he had reason to believe that Collins was a bogus person, and that the property registered in his name was for insolvents' account, jointly with Kaiser Bros.

Buchanan, A. C. J., remarked that it was a very extraordinary proceeding to sue a defendant who was believed to be a bogus person.

Mr. Buchanan said he thought this was the only way of reaching the property.

Order granted attaching the property, and giving leave to applicant to sue by edictal citation, citation to be returnable on November 30, personal service, failing which one publication in the "Government Gazette" and one publication in the "Daily Telegraph," London.

MYERS BROS. V. MORGAN AND ANOTHER.

Mr. Lewis moved, on behalf of Myers Bros., jewellers, Cape Town, for an order authorising the gaoler to pay over certain moneys. The respondents had been convicted of a charge of stealing a diamond bracelet, the property of the applicants, and had been sent to gaol. Certain sums of money had been found in their possession by the prison authorities, and applicants applied for the same to be attached, pending an action which they proposed to bring against respondents to recover the value of the missing bracelet.

Order granted as prayed.

BABOOLALLAND V. BABOOLALLAND.

Mr. P. S. T. Jones moved, on behalf of Mrs. Baboolalland, for an order requiring respondent to pay costs of application, which he had brought for custody of the child of the marriage, in default of his proceeding with the action.

Order granted, with leave to respondent to recover costs in any action which may be instituted.

Ex parte THE INSOLVENT ESTATE
STEPHAN AND OTHERS.

Mr. Gutsche moved for the appointment of a curator of the property and effects of one Ashley Cooper Partridge, more particularly in respect of a certain property at Rosebank. The property, it was stated, had been sold by public auction to Ashley Cooper Partridge for £3,165, and it was desired to complete the transaction. An affidavit by a member of the firm of Silberbauer, Wahl, and Fuller stated that no reason could be assigned for Partridge's disappearance.

Buchanan, A. C. J., said that he had never heard of such an application in that Court before. He did not see how they could deprive Partridge of his estate; he was not before the Court. It was not proposed to presume his death, nor was it proposed to sequester his estate. The only suggestion that he (the learned Judge) could make was that the estate should be sequestered on the ground that Partridge was absent from the Colony and was delaying his creditors. There would be no order at present.

HENDRIKS V. CAPE TOWN TRAMWAYS
AND CAPE DIVISIONAL COUNCIL.

Dr. Greer moved for leave to sue *in forma pauperis*.

The petition was referred to Dr. Greer for report.

Dr. Greer certified forthwith in favour of the application.

Rule *nisi* granted, to be returnable on the 12th September.

Dr. Greer added that the plaintiff was no longer proceeding against the Divisional Council.

Ex parte THE INSOLVENT ESTATE LATE PRINCE

Mr. Close moved on behalf of Mr. J. E. P. Close, as sole trustee in the insolvent estate, for an amendment of transfer deed of a mission hall, erected by insolvent at Claremont for the African Methodist Episcopal Church and other purposes.

Rule *nisi* granted, calling upon the persons in whose name the property is registered to show cause why the transfer deed should not be amended as prayed, with costs, and the pastor of the Claremont branch of the A.M.E. Church to disclose the names of trustees of the branch, and restraining Mr. Attorney Peters from disposing of the property, rules to be returnable on the 12th December.

PLOTTEL V. BERMAN.

Mr. De Waal moved for an order removing the respondent from executorship of the estate of petitioner's brother, Hyman Plottel, late of Philip's Town.

Rule *nisi* granted, calling upon the respondent to show cause why an order should not be granted as prayed, rule to be returnable on the 16th October.

DE JAGER V. DE JAGER.

Mr. Roux (for plaintiff) moved for the removal of trial to the ensuing Circuit Court, at Uniondale.

Order granted, costs to be costs in the cause.

COLONIAL GOVERNMENT V. LASENBY.

Mr. Nightingale moved, on behalf of the Assistant Treasurer, for leave to sue the respondent by edictal citation for £142 17s. 6d., quitrent and stamp duty due in respect of a farm in the Vryburg district. Lasenby was now said to be in Johannesburg, but his exact address was unknown.

Order granted, attaching the property and granting leave to sue, citation to be returnable on the 16th October, personal service, failing which one publication in the "Government Gazette" and one in the "Star."

COLONIAL GOVERNMENT V. CONRADIE.

This was a similar application to the previous one, defendant being at Germiston, Transvaal.

A similar order was granted to that in the previous case.

Ex parte LOUW AND MARAIS.

Mr. Gardiner moved for an order empowering petitioners to sell certain shares.

His Lordship said that he did not see any need to make an order at present. The trustees should first make an attempt to sell the shares.

Ex parte WEIDEMAN.

Mr. P. S. T. Jones moved for an order authorising the transfer to petitioner of certain property at Britstown. Petitioner who was a trustee in the estate had bought the property at public auction.

Order granted.

Ex parte ESTATE LIXTON.

Mr. Benjamin moved for the appointment of a curator *ad litem*, etc.

His Lordship said he did not think that the application should have come before the Court. There would be no order. The matter was one that might properly come before a judge in Chambers.

Ex parte ESTATE MOSTERT.

Mr. Gardiner moved for leave to transfer certain property at Observatory. Counsel now furnished certain additional information as required by the Court.

The matter was ordered to stand over pending notice to the trustee and certain further information.

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice (the Hon. Sir JOHN BUCHANAN) and the Hon. Mr. Justice HOPLEY.]

BEIRA COLD STORAGE V. s. 1905.
RHODESIA COLD STORAGE. { Aug. 25th.

Mr. Searle, K.C., moved as a matter of urgency for an extension of time in order to prosecute an appeal from the High Court of Rhodesia, in the mat-

ter between the Beira Cold Storage Co. and the Rhodesia Cold Storage, in which £11,000 damages had been given against the defendant company, and an order for the delivery of certain shares to the value of £22,000. The respondent, counsel said, consented to the application. According to the rules of Court, the appeal should have been prosecuted this term, but the record was a most voluminous one, and the difficulty was to have the record printed within the time.

[Buchanan, A. C. J.: I suppose it is a genuine appeal.]

Mr. Burton: My learned friend says it is.

Buchanan, A. C. J., said that under the circumstances the case would be set down for October 23.

TABLE BAY HARBOUR BOARD { 1905.
v. THE CITY LINE. { Aug. 25th.
{ Sept. 4th.

Harbour Board Regulations—
Compulsory pilotage—Acts 8
of 1879 and 36 of 1896—
English Act 17 and 18 Vict.,
C. 104.

One of the defendants' vessels, while leaving Cape Town Docks under the pilotage of a pilot selected by the Harbour Board, whom the Company were under the Board's regulations compelled to employ, struck and damaged one of the dock quays. It was admitted that this damage was not due to any negligence on the part of the Company's servants, but to an error of judgment on the part of the pilot.

Held, that so far as the Harbour Board regulations gave the Board a right of action for damage resulting from the misfeasances of their own servants, they were inconsistent with the provisions of British Merchant Shipping law as set forth in Act 17 and 18 Vict., C. 104, which is by Sec. 1 of Act 8 of 1879 also the law of this Colony, and were ultra vires.

Table Bay Harbour Board v. Bucknall Co. (14 C.T.R. 351) distinguished.

This was an action brought by the Table Bay Harbour Board against the

City Line, who were sued through their Cape Town agents, Messrs. Mitchell Cotts and Co., to recover £2,590 damages.

Mr. Searle, K.C. (with him Mr. Bisset) was for the plaintiffs and Sir H. Juta, K.C. (with him Mr. Benjamin), was for the defendants.

Mr. Searle said that although that amount was claimed in the original declaration on account of certain admissions between the parties, the question would now be chiefly one of law for the Court. It was agreed between the parties if the Court gave judgment on the admission between the parties the matter might be referred to Mr. Stewart, the Engineer, to assess the damages. The question was mainly one of law. It arose through damages done to one of the quays of the Docks by the screw steamer City of Perth, belonging to the defendant company, which occurred on March 18 last. The vessel was leaving the Docks for the purpose of proceeding on her voyage, when she struck a portion of the quay at the South Arm, and did a large amount of damage, which the plaintiffs set out at £2,590. The vessel at the time was in charge of a pilot, duly licensed and appointed under the terms of and subject to the regulations of the Board. The plea did not admit that a large amount of damage was done, and set out that when she struck the vessel was in charge of a pilot supplied by the plaintiffs. The defendants had no voice in appointing him, and had no control over the pilot, and the defendants did not admit that the pilot was competent. After the accident the plaintiffs suspended the pilot. The accident was caused by an omission on the part of the pilot. The replication set out that the Board exercised all due care and control in the licensing of pilots. The vessel could not have left the Docks without such pilot being employed. Counsel said the point would be whether the defendant company was liable under the Harbour Board regulations, after the Board had exercised due caution in the appointment when they had a compulsory pilot on board. He would call evidence as to the pilot's character.

William Stephen, Port Captain at Cape Town, stated as regards the licensing of pilots, the Harbour Board granted them a licence. The pilots were examined by two competent men, and witness and Captain Spence gave this pilot in question a certificate of efficiency. Up to the time of this accident the pilot had taken over 200 vessels in and out of the Docks. He was perfectly sober and trustworthy, and he held the highest certificate the Board of Trade could grant. In the case of a new pilot he served on probation for three

months. The master of a ship very often selected his own particular pilot.

Cross-examined by Sir H. Juta: Pending the inquiry into the circumstances, witness suspended the pilot. It was chiefly on account of that accident that witness wrote that the pilot seemed to lack sufficient judgment in handling vessels in narrow water, such as a dock. The pilot did not turn out so "brilliant" as witness expected.

This was all the evidence, and counsel having been heard in argument,

Cur. Adv. Vult.

Postea (September 4).

Buchanan, A. C. J.: The plaintiffs in this action claim that the sum of £2,500 is payable to them for damages done by the defendant company's steamer *City of Perth*, on the 18th March last, to one of the quays of the Table Bay Docks, which are under the management and control of the plaintiff Board. If the defendant company is found to be liable at all, the parties have agreed that the actual amount to be paid by them shall be assessed by Mr. Stewart. The Court is further relieved of the necessity of itself finding the actual facts by the admissions made by the plaintiffs. It is common cause that the *City of Perth*, while leaving the Docks for the purpose of proceeding on her voyage, struck one of the quays, and did considerable damage thereto. The plaintiffs admit that this damage was not in any way due to any act of negligence on the part of the defendant company's employees, but that it was due to an error of judgment on the part of the pilot in charge of the vessel, and that the vessel was, at the time, under the absolute control of the pilot, who had been licensed as such by the plaintiffs. The plaintiffs themselves plead that, by the Harbour Board Regulation No. 5, section 10, the employment of a licensed pilot is compulsory on all vessels entering or leaving the Docks, or shifting berth therein, and counsel on both sides are in accord on the point that, as this is a question relating to maritime and shipping law, by the General Law Amendment Act of 1879, the law governing this case is that of England, so far as the same is not inconsistent with any Colonial Statute. Counsel also agree that the law of England is correctly set forth in the 388th section of the Merchant Shipping Act, 17 and 18 Vic., c. 104, viz., that no owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law. But the plaintiffs contend that this case is taken out of the operation of this gen-

eral rule of law by the provisions of the Board's Regulation No. 4, section 6, which makes the masters and owners of vessels liable to pay for all damage done to any quays or other property belonging to the Board, "whether such damage shall be done directly or indirectly by their vessel or by themselves or any of them, or by the sailors, or servants, or other persons whatsoever belonging to such vessels, or engaged or assisting in bringing them into or taking them out of dock or basins, or in executing repairs or other works thereon, or in putting on board or discharging their cargoes, or connected therewith in any other way whatever." The defendants contend that if this regulation was intended to give the Harbour Board a right of action for damages caused by the default of their pilot, then it is not only unreasonable, but it is also *ultra vires*, as altering the general law relating to compulsory pilotage without legislative enactment. The regulations in question were framed under the powers conferred on the Harbour Board by the 31st section of Act No. 36, 1896. That Act assimilated and amended the law relating to the control and management of the three harbours of Table Bay, Port Elizabeth, and East London. Of these three harbours the 87th section of the Act declared only East London to be a compulsory pilotage harbour. It is, however, not disputed that the Table Bay Harbour Board had authority to make pilotage compulsory within this port. It may be noticed that this 87th section, while making pilotage compulsory at East London, at the same time provides that the Harbour Board of that port "shall not be responsible for any loss, damage, or accident that may occur through the act, omission, or default of any pilot though such pilot may be for the sake of convenience a servant of the Harbour Board." In like manner the Table Bay Harbour Board regulation No. 5, section 10, while making pilotage compulsory within the Docks, disclaims any liability on the part of the Harbour Board for the acts of the pilot. It might well follow that under these provisions no action would lie against either Board for any damage resulting from the default of the pilot. That view is supported by the decision of this Court in the case of *Table Bay Harbour Board v. Bucknall Steamship Lines* (21, S.C. Rep., 220), where similar provisions in another regulation exempt the Board from liability for damage done by their tugs employed in towing a vessel out of harbour were held valid. This decision was in argument greatly relied upon for the plaintiffs. In that case, however, the use of the tugs was neither compulsory nor necessary, and the by-law there in question expressly provided that while so employed the master and crew of the tugs were to be deemed to

be the servants of the owner or master or pilot of the vessel, and were to act under their instructions. The terms of the regulation being known to the master of the ship when he hired the tug, the conditions of the regulation were held to be part of the contract, and in such a contract these conditions were not, on the face of them, so unreasonable that the Court could declare them *ultra vires*. But all through the argument in that case a distinction was drawn between a voluntary contract, by which the tug was placed under the orders of the master of the vessel, and a case of compulsory pilotage, where the pilot was not under the control of the master, but himself directed the management of the vessel, of which, by the Board's regulations, he was placed in charge. Here not only was pilotage compulsory, but the only pilot whom the Harbour Board allowed the master to take, was one examined and licensed by the Board itself. The pilot in question had been examined and licensed in 1904, and had had considerable experience since then in taking vessels in and out of dock. When this accident happened, the pilot was suspended by the Harbour Board authorities, and the Harbourmaster stated he was glad the pilot had thereupon resigned, as though not incompetent, he was not so skilful as were the other pilots. The defendant company had no special knowledge of the relative skill of the Harbour Board pilots, and as a matter of fact, had no opportunity of selecting any particular pilot, as the practice was for all the pilots to take their turns in taking charge of vessels going into dock. It will be noticed that this Regulation No. 4 is not, in terms at all events, an abrogation of the rule of law as to compulsory pilotage. It makes no express reference to the compulsory pilot, and if it is read as rendering a ship liable for damage done by any person over whom the master has any control, it will be in accord with the decision in Bucknall's case. Putting such a construction on it, on the face of it, it will not be *ultra vires* of the Act. But though the Harbour Board has protected itself from liability for the default of the pilot, different considerations come into force, when the Harbour Board seek to found a right of action on such default. The principle ordinarily underlying liability for such damage as is here sued for is, that there has been *culpa* on the part of the person sought to be made liable, or on the part of his servants or other persons under his control. Here we have the Harbour Board decreeing that there shall be compulsory pilotage within the area of their docks, and they examine and licence the only persons who may engage in such pilotage. The damage was caused through the default of the per-

son whom the Harbour Board put in absolute control of the vessel. There is no default of any kind on the part of the master or of the crew or other persons under his orders. Where there is no negligence or fault on the part of the employees of the owners, the law of England exempts them from liability for the default of the pilot where pilotage is compulsory. As regards the Table Bay Docks, there has been no direct legislative limitation of the exemption conferred by the law; and, in my opinion, the Board's regulation does not contain any such alteration of the general rule which the parties agree would otherwise bar this action. Under such circumstances, it cannot be said that there is any statutory enactment or any express or implied contract taking the vessel out of the protection afforded by the law governing compulsory pilotage. Considering the area covered by the regulation, the position of the pilot would seem very similar to that of the Harbour Master or other officials to whom is entrusted the control of vessels whilst within the Docks. If by any bye-law the Harbour Board should attempt to give themselves a right of action founded on the default of their own servants, an important question would arise whether such a bye-law would ever be sanctioned, and if it should be, whether it would not be held to be unreasonable and *ultra vires* of the Harbour Board Act. The construction I put on the existing bye-law renders it unnecessary now to discuss that question. As the case stands, I fail to find in any principle of law or equity firm ground for holding the vessel liable for the damage now sued for. Judgment must, therefore, in my opinion, be given for the defendants, with costs.

Mr. Justice Hopley, in concurring, said: In this case the plaintiffs claim damages for injury done to one of the quays of the Docks by the defendants' steamer City of Perth on March 18, 1905. The facts of the case on which the claim is founded are admitted, and may be briefly stated as follows: The City of Perth was on the said date leaving the Docks to proceed on her voyage, and she was at the time in charge of a pilot duly licensed by the plaintiffs, in pursuance of their statutory powers. By an "error of judgment" on the part of the pilot, the ship was brought into collision with the quay, and damage to a considerable extent was done. The pilotage was, by virtue of one of the plaintiffs' bye-laws, compulsory; and there was no negligence of any kind on the part of the master or any of the crew. The steamer was left entirely in charge of the pilot, and the collision and resulting damage were due entirely to his mismanagement of her. The plaintiffs do not found their claim on any allegation of negligence on the part of the

defendants, but they claim to be reimbursed for the damage done, by virtue of one of their bye-laws, to which I shall at a later stage more fully refer; and the defendants reply that, as there was no negligence on their part, they are not liable for what has occurred. The plaintiffs exercise jurisdiction and control over the Harbour and Docks by virtue of Act 36 of 1896, and by section 31 of that Act, they have the power to make reasonable regulations *inter alia* for the proper management of the harbour and for the preservation from injury of any of their works, and also for the proper control of all vessels entering any docks and coming alongside any jetties or wharves (see sub-sections 3 and 6). By virtue of the powers vested in them, they have made certain bye-laws, which have been promulgated, and two of these, upon which the plaintiffs rely, are annexed to the declaration, their material portions being as follows: Section VI., Regulation 4—"The master and owners of vessels shall be liable, conjointly and severally, for the payment of all damage done to any of the quays, piers, bridges, or other harbour works, . . . whether such damage shall be done directly or indirectly by their vessel or by themselves or any of them, or by the sailors or servants or other persons whatsoever belonging to such vessels or engaged or assisting in bringing them into or taking them out of Docks or Basins or in executing repairs or other works thereon or in putting on board or discharging their cargoes or connected therewith in any way whatsoever . . ." Section X, regulation 5: "The employment of a licensed pilot is compulsory on all vessels entering or leaving the Docks or Basins or shifting therein . . . but the Harbour Board shall not be responsible for any loss, damage, or accident that may occur through the act, omission, or default of any such pilot." It is clear that under the letter of these bye-laws it has been made compulsory for vessels in the docks to employ one of the pilots licensed by the plaintiffs, and the question that arises in this case is as to the liability of a ship for damage done by it when so in charge of a pilot, when the pilot alone is to blame therefor. By Act 8 of 1879, section 1, it was enacted that in all questions relating to Maritime Shipping Law in respect of which the Supreme Court has concurrent jurisdiction with the Vice-Admiralty Court, the law of this Colony shall hereafter be the same as the Law of England in so far as the Law of England shall not be repugnant to or inconsistent with any Ordinance, Act of Parliament, or other Statute having force of law in this Colony." Now by the Law of England it is clear that when a compulsory pilot is in charge of a vessel the owner is not

liable for damage done by his ship entirely through the negligence or default of such pilot. That seems to be part of the Common Law of England; but it is placed beyond doubt by section 388 of the Statute 17 and 18 Vict., c. 104, which enacts that "No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law." That was the English law in force when our Act of 1879 was passed, and consequently by virtue of its provisions which I have quoted a ship, while under compulsory pilotage within the jurisdiction of this Court would be similarly exempt from liability unless there be some Statute in force at the place when the damage is done to deprive the owners of such ship of the benefits of such exemption. The plaintiffs claim that by virtue of their bye-law above quoted such a change in the law has been effected in the Docks and harbour of Table Bay in the case of any damage done to any property belonging to themselves. It is a somewhat startling proposition that a bye-law can change the general principles of the law of the land, and the question is distinctly raised in the pleadings as to whether, if such be the meaning of the bye-law in so far as the liability of a ship under compulsory pilotage is concerned it is, *quoad hoc*, *intra* or *ultra vires*. It is a well-known principle, settled by many cases, that bye-laws, to be valid, must not exceed the statutory powers by which they are authorised, and that they must not be in conflict with the general principles of law. The statute under which the plaintiffs have framed their bye-laws gives them the right to make reasonable regulations for the proper management of their Docks, and for the preservation of their works from injury, and also for the proper control of vessels using their Docks; but it nowhere gives them the express or implied power to alter the law of the land, and it is quite clear that they might frame such regulations to attain such objects without in any way infringing upon or changing the general principles of our maritime shipping law. The bye-law in question seems to me more or less declaratory of the common law, and perfectly reasonable if intended to apply to the ordinary persons in charge of and employed upon any vessel. It is right that if damage is occasioned by any of them to the plaintiffs' property, the ship and its owners should be liable therefor. But the plaintiffs contend that the bye-law goes further, and renders the ship and owners liable for the negligence or default of a compulsory pilot. For such an interpretation of the bye-law, one must read into

it something subversive of the existing law, which is not necessarily contained in its terms. But bye-laws should be read, if possible, as being in accordance with, and not repugnant to the law, and I am consequently clear that this bye-law was not intended to embrace the case of damage occasioned by the act or default of a compulsory pilot, and I am also clearly of opinion that if it could be read to bear such an interpretation, it would, in such respect, be *ultra vires* and invalid. Such interpretation as I have given to this bye-law seems to have the authority of a decided case to support it—a case to which I have not had access, but which I find quoted in Marsden on Collisions at Sea (p. 232, 3rd Edition), where the author says: "By the Thames Conservancy Act, 1857, it is enacted that owners of vessels navigating the Thames shall be liable for damage to property of the Conservators caused by persons belonging to or employed in their vessels. It has been held that this Act does not affect section 388 of the Merchant Shipping Act, 1854, and that the owners of a vessel in the Thames in charge of a compulsory pilot are not liable for damage done by the fault of the pilot to a vessel or other property belonging to the Conservators. (*Conservators of the River Thames v. Hall*—3 Mar. Law, Cas. O.S., p. 73.)" If this be a correct summary of the case, as I have no doubt that it is, it appears that not even a Statute containing a provision in favour of the Conservators could in the opinion of the Court receive the interpretation or have the force which the plaintiffs claim for their bye-law, which is practically to the same effect, and *in pari materia*. For these reasons I am of opinion that the plaintiffs' case must fail, and that there should be judgment for the defendants, with costs. Since writing the above, I have found the case of the *Conservators of the Thames v. Hall* reported in L.R., 3, C.P., 415, and though I have not time to refer more fully to it, I find that it entirely covers the present case, and bears out the decision to which this Court has come.

[Plaintiff's Attorneys: Reid and Nephew. Defendant's Attorneys: Findlay and Tait.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

GIBBS V. HOGGARD. { 1905.
 { Aug. 25th.

This was an action in which John Gibbs sued Charles Wm. Hoggard of Observatory, for payment of £144 ls.

3d., with interest *a tempore morae*, for a pumping apparatus supplied. The defendant in his plea alleged that the apparatus was totally defective, and the sum of £37 claimed was expended by the plaintiff in repairing the machinery. In reconvention defendant claimed £60.

Mr. McGregor, with him Mr. Lewis, was for the plaintiff, whilst the defendant was in default.

John Henry Gibbs produced his books, showing the defendants receipts for the goods supplied.

Judgment as prayed, with costs, was granted.

GENERAL MOTIONS.

SCHKEEPERS V. FOSTER.

Attorney—Lien on documents entrusted to him.

An attorney has no lien for costs on documents entrusted to him, unless he has drafted, or done work on those documents.

This was an application for an order compelling the respondent to hand over certain papers, title deeds, etc.

The applicant's affidavit stated that she was widow of the late Johannes Scheepers, of Oudtshoorn, on the 19th October, 1900. Upon the death of her husband she placed some of the documents, papers, and title deeds connected with the immovable estate of the deceased in the hands of the respondent, who was an attorney, and resided at Oudtshoorn, as it was incumbent on her to do under the will of the deceased to enable her to take out letters of administration. She had applied to him for the return of the papers, but he refused to give them up.

The affidavit of James Alexander Foster stated that at the time of the death of the husband of applicant most of the title deeds, etc., were in his hands. There were considerable liabilities due by the estate, and it was with great difficulty that the estate was realised. The applicant owed him £379 13s. 4d. in all, and he submitted that he was quite right in retaining the papers in question.

Mr. Benjamin moved.

Mr. Close for respondent.

Mr. Benjamin submitted that the respondent was not an executor, and therefore could lay no claim to the documents, and held no pledge for them.

Mr. Close argued on behalf of the respondent that an attorney was entitled to his out-of-pocket expenses in transferring deeds, etc., besides receiving his 6s. 8d. for writing each one.

Maasdorp, J., said it seemed that the respondent in this case rendered certain professional services to the applicant in

respect of the administration of an estate in which she was executrix. He had now in his possession certain documents which came into his possession in his professional capacity, these appeared to be the deeds of transfer of property belonging to this estate. He claimed to retain these documents by virtue of a right of retention existing in respect of the debt due for the work done by him. A large number of items of indebtedness had been referred to which clearly had nothing to do with the administration of the estate. Then there were items which were for work done in respect of the general administration of the estate, but there was not a single item for the drafting or execution of the documents in question. Now, no authority had been cited for the doctrine that such documents could be retained for work specially done in respect of these documents. He was of opinion that the respondent was not entitled to retain these title deeds for the work he did for the applicant in the administration of the estate. There had been a statement that in respect of one item there was an expressed arrangement that the documents could be retained. In considering the whole of the case, and the fact that this alleged pledge was in respect of only one item, and in respect of that item such an expressed pledge was denied, the Court arrived at the conclusion that it had not been proved, and under the circumstances the Court ordered the respondent to deliver up the title deeds of the property in his possession and to pay the costs of the application.

Ex parte THE GRAND JUNCTION RAILWAY.

Mr. Russell moved for leave to file a certain affidavit.

Mr. Upington opposed the motion on behalf of the Receiver (Mr. E. R. Syfret).

Mr. Russell read the affidavit of John Walker, managing partner in the joint venture, and who in that capacity was being sued. He stated on the 12th December, 1904, the respondents presented to the Court a list of claims, and on the 27th January the petitioner made an affidavit setting forth his objection to certain claims. Before the report of the respondents was confirmed the affidavit was sent to Cape Town to be filed, but owing to the applicant finding it necessary to change his attorneys in Cape Town, some time was lost, and in the interim the report was confirmed by the Court. Petitioner had been awaiting an action to be taken on the report, and consequently had delayed in bringing this motion.

The affidavit of E. R. Syfret, one of the Receivers in the estate, stated that ample time was allowed by the Court for the filing of the affidavit before the

report was confirmed. The report was presented on the 23rd December, when an order was made for it to be allowed to remain open for inspection until February 14. Copies of it were also published, amongst other papers, in the London "Times" and the Cape Town papers. The affidavit which the applicant wished to file contained many misleading statements, which might prejudice the Court in other cases now proceeding.

Maasdorp, J., said the applicant in this matter moved to have an affidavit filed in a matter which had already been disposed of by order of the Court. It seemed that the Receivers for the Grand Junction Railway had brought up their report after making full inquiry, in so far as it lay in their power. The applicant now stated he was in possession of certain information, which he could have put before the Court, but was prevented from doing so owing to certain circumstances that arose. If the applicant wished to reopen the report of the Receivers, he could do so, and put the necessary evidence before the Court for so doing, but the application in its present form would have to be refused, and the applicant would have to pay the costs.

CHRIST V. CHRIST.

This was an application for an order for the personal attachment of the respondent, John Christ, for contempt of Court, by reason of his failing and refusing to comply with the terms of an order of Court of the 19th April last, ordering the respondent to deliver up to the applicant all her jewellery and personal effects.

The affidavit of Margarita Elizabeth Christ, the applicant, stated that on the 19th April last she obtained a decree of judicial separation against the respondent. In terms of the order of Court, the respondent should have delivered to her her jewellery and personal belongings. The latter consisted of, amongst other things, three dresses-lengths, three pairs of shoes, one opera cloak, one dress-stand, stockings and handkerchiefs, a trinket set, the jewellery consisted of a gold watch and chain, bracelet, brooch, diamond ring, and pair of ear-rings. At the time she left home all of these articles were in good condition. The respondent delivered up all the jewellery through her attorneys, but they were in a much damaged state, and she had to have them repaired, at a cost of £3 or £4, and she believed that her husband intentionally and maliciously damaged same, so as to make them useless. Of her personal belongings, she only received the dress-stand and a few old handkerchiefs, and she believed that the

respondent maliciously withheld the other articles.

A supporting affidavit was made by Bertha Christ, daughter of the applicant.

The affidavit of Herman Wolters, watchmaker, stated that he examined the watch referred to by applicant, and he came to the conclusion that it had been broken in such a manner as could only be done by somebody deliberately forcing up the works.

The affidavit of John Christ (the respondent) stated that he had handed over to the applicant all the personal belongings for which she had applied that he was aware of. The dress lengths, shoes, opera cloak, stockings, handkerchiefs, and trinket set he had absolutely no knowledge of. They were not in his possession, nor had he any use for them. With regard to the jewellery: when it was handed over, it was carefully examined by applicant's attorney, but no remark whatever was made as to its state. He emphatically denied that he had tampered with or injured in any way same.

A supporting affidavit was filed by Charles Christ, son of the respondent.

The replying affidavit of the applicant denied that the respondent had handed up to her all personal belongings. When she left home, the respondent took possession of all her jewellery, and when she received the watch, it was in a most damaged condition.

Dr. Greer for the applicant. Mr. Benjamin for the respondent.

Maasdorp, J., said that the parties in this case seemed to be persons of some considerable means. A judicial separation was obtained by the wife against the husband in April last, and the division of the property was proceeding. At the time that the order was made for such division, the Court also ordered the husband to give up to the wife certain jewellery and clothing which remained in the house after the wife left. She now applied for personal attachment against him for failing to comply with that order of Court. She stated that the jewellery was handed up, but that it had been wilfully damaged, and that some articles of clothing had been retained altogether. It seemed that when she left the house, she must have taken away the bulk of her possessions, and what she left behind seemed to have been a few small pieces of jewellery and a few trifling articles of clothing, apparently of little value compared with the means of these people. She stated that the jewellery had been delivered up, but in a condition showing that it had been wilfully damaged. Now, he was not satisfied that it was wilfully damaged. There had been a statement put in by a jeweller that the works of the watch seemed to have been forced. That was only the opinion of

the jeweller, and the Court could not take the mere opinion of the watchmaker as conclusive on that point, especially when they had the denial of the respondent that he did do so. Then they had the statement of the respondent that the articles of clothing were not in the house at all. These articles appeared to be of very trifling value, and her mere statement that she left these articles behind had not proved that the respondent had these articles in his possession, and wilfully withheld them. In the opinion of the Court, this was an unnecessary application. It was quite clear that when the Court made the order for the delivery of the jewels and clothing the impression was that they were articles of great value. They appeared to be trifles, and there was no proof, to his satisfaction, that anything was done by the respondent to justify the application being brought into court. The application would be refused, with costs. It was a very strong measure for a wife to take, to make an attempt to put her husband in gaol.

APPEAL.

FWLER V. JOUBERT.

Magistrate's jurisdiction—Judgment to pay debt by instalments.

This was an appeal from the decision of the Resident Magistrate of Montagu, ordering that the offer of 5s. in the £ made by the defendant, Frederick Jacobus Joubert, be paid at once, and the balance within one year from date, to carry interest at 6 per cent.

The reasons given by the Magistrate for his decision were as follows: "I deemed the offer of an immediate payment of 5s. in the £ and the balance in a year's time to be a fair offer, in view of the circumstances of the defendant, which were those of a struggling farmer, who has been only two years on the farm, which he works on shares, and that about six of his creditors being business firms and others in this village, had agreed to these terms, the plaintiff alone holding out. The defendant, if judgment had been given for the full amount, would have been forced to surrender, and the plaintiff, besides having to wait for the distribution, would finally not get as much as the present judgment has secured him. The defendant has considerable liabilities, approaching £400, and depends on his brandy crop to assist in meeting them, and he is thus only able to promise payment of the balance in a year's time. The Court deems the judgment to be in the interests of all parties, and accepted the voluntary

statements made, not deeming it necessary to call for evidence."

Mr. Russell appeared for appellant, who was plaintiff in the Court below. The respondent was not represented.

Mr. Russell contended that the Magistrate should have called evidence before making the order.

His Lordship said the Magistrate seemed to have tried to do what he considered equitable and fair, but he had no power to do so. The appeal would be allowed, and the judgment would be altered into judgment for the plaintiff for the amount claimed with costs.

SUPREME COURT FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

SMUTS V. ACKERMAN. { 1895.
{ Aug. 28th.

It appeared from the pleadings that this was an action for damages for wrongful impounding arising out of an action for slander brought by the plaintiff in the Supreme Court for £500 damage, against the defendant, who claimed in reconvention £20 damages for seizing and impounding certain cattle. The plaintiff withdrew his summons in the Supreme Court, and sued in the Magistrate's Court for £20 damages for slander, and the Magistrate refused to go into the case, while his case was still pending in the Supreme Court.

Mr. Burton for plaintiff; Mr. J. E. R. de Villiers for defendant.

Nicholaas Smuts, dairyman, at Maitland, stated in December last year his cows were impounded by the defendant. In a conversation a Mr. Blankenberg said that the defendant's cows had been impounded. Witness said it was a very good thing, and then the defendant went away, and impounded those belonging to witness. The defendant treated the cows very badly, beating them with a horse-whip.

Cross-examined by Mr. De Villiers: The poundmaster was wrong in saying that the cows had only a few dust marks. He had only paid 8s. 9d. for the impounding of the cattle; there was no doctoring of the cows.

Harry Sherer, dairyman, at Maitland, said he heard the defendant say he would

send the plaintiff's cows to the pound, because Smuts said it was a good thing the defendant's cows had been impounded.

Christoffel van Dyk also gave evidence as to the impounding.

The defendant said the plaintiff's cows had frequently troubled him, as the boys did not look after them. He chased them away three times that morning from his property. He only gave two or three cuts to one cow. Witness had no spite against the plaintiff, and did not drive his cows in to get his own back.

By Mr. Burton: Witness was fined by the Court for assaulting one of the inspectors. Blankenberg sent him a challenge to come and have a fight—

All the witnesses for the plaintiff were lying. The poundmaster, whose son was married to witness's sister, would tell the truth to the Court.

The Poundmaster of Maitland said the cows were not being whipped when he saw them approaching the pound. The cows were in good condition, only one of the cattle having a couple of whip marks. The cattle were not violently treated. Witness had occasionally to use a whip to get other people's cattle into the pound.

Other witnesses gave evidence of the trespass, and denied any unnecessary cruelty to the plaintiff's cows.

Buchanan, A.C.J.: The plaintiff, Ackerman, sued the defendant Smuts in this court for defamation of character, and £20 damages. His declaration was pleaded to by the defendants, who filed a claim in reconvention for alleged maltreating and illegal impounding of certain cattle belonging to defendant. When the case had gone so far as this the plaintiff's attorney agreed to pay the whole of the defendant's costs, and he wished to withdraw the case in the Supreme Court. Unfortunately for his client, he did not withdraw the case, he only withdrew the summons, and took out a fresh summons in the Magistrate's Court, and he was non-suited in the Magistrate's Court, on the ground that the same cause of action was pending in the Supreme Court. The defendant Smuts, who is plaintiff in reconvention, says he would not have instituted any action at all but for the action brought by the plaintiff, and I must say he was very badly advised when the other party withdrew his case and paid the costs in full in insisting upon going on in this Court. His lordship, after reviewing the evidence as to the impounding and the maltreating of the cattle, held that there was no damage suffered by the defendant as to the maltreatment, but as to the impounding, according to the Pound Act, the plaintiff was liable to pay to the owner all damages, costs and charges arising out of such proceedings, together with two shillings

for every animal impounded. The plaintiff has paid 8s. 9d. to release her cattle and he is entitled to judgment in that sum, together with 2s. per head for the cattle, making in all 18s. 9d. Judgment will be for the plaintiff in reconvention for 18s. 9d., with Magistrate's Court costs.

[Before the Acting Chief Justice (the Hon. Sir JOHN BUCHANAN) and the Hon. Mr. Justice HOPLEY.]

CAPE ELECTRIC TRAM CO. V. } 1905.
COLONIAL GOVERNMENT. { Aug. 28th.

This was an application by the Cape Electric Tramway Co. to restrain the Colonial Government from trespassing on the Sea Point line. A consent paper recognising the rights of the applicants was made a Rule of Court.

Sir H. Juta said he had submitted the following paper to Mr. Searle: "That the applicants, without prejudice to their rights, consent to the Government taking immediate possession of the line of railway, known as the Sea Point Railway, and that the compensation to be paid to the applicants therefor be settled by arbitration in terms of the Lands and Arbitration Clauses Act of 1882, such arbitration to be held over pending an action to be brought for a declaration that the applicants were the purchasers of the said railway as a going concern, and are entitled to compensation upon the basis of the value of the said railway as a going concern." Counsel said his learned friend (Mr. Searle) had suggested the insertion of the words: "Under the Act 44 of 1905" after "and that compensation to be paid." Counsel had asked his learned friend not to insist upon these words, because that would really be determined by the action.

Mr. Searle said the Act of 1905 was really the only Act under which these proceedings could be taken. It must be clearly understood that this arbitration is taking place under this particular Act.

[Hopley, J.: You could not be in court only for that Act. There is no necessity for inserting it in this paper. Everyone will understand that this is the basis of the whole thing.]

Sir H. Juta, on the question of costs, urged that his clients were entitled to costs, as they were forced into court by the untenable position taken up by the Government, who took up a different position in court from the original one of refusing any compensation.

Mr. Searle said that the proper procedure for the other side was to go to arbitration under the deed and not to apply for an interdict restraining the Government from taking possession.

Buchanan, A.C.J.: The Act 44 of 1905 authorises the Government to take over

a line of railway known as the "Metropolitan and Suburban Railway" at a cost to be settled failing agreement by arbitration. Under the Arbitration Act of 1882 the Government, without giving any specific notice to the applicants, who were the owners of the line and were in possession, entered upon the property and took possession thereof, and the Government, under the letters which were written by their attorneys and the affidavit filed by the Commissioner, distinctly repudiated and denied the title of the applicants to the property. They were forced into court, as the Government ignored them entirely. Counsel for the Government admits that this position was not tenable, but wishes to raise the question whether or not the applicants, though owners of the railway line, could exercise running powers over it. This and the other points raised will have to be considered when the amount to be paid as compensation for expropriation is under consideration. As the matter stood when the application was brought into Court, the Government denied that the applicants were owners of the line or had any right thereto. The applicants have shown that they are the concessionaires of the previous owners, and are in possession, and this possession is most material to the claim of the applicants. I think the Court would have granted an interdict restraining the Government if they had not admitted the rights of the owners. Fortunately, however, the parties have come to an agreement, the Government to take possession of this property in terms of a consent paper put in, and in this consent paper the question of the extent of ownership will have to be decided in an action to be tried hereafter. In making this consent paper an order of Court, the Court will do so, with costs, as it is clear but for the action of the Government this application never would have been made.

Hopley, J., concurred.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

WEST AND ELCOATE V. LON- } 1905.
DON ASSURANCE CO. { Aug. 28th.

This was an action by the assignees in the assigned estate of West and Elcoate to recover the amount of an insurance policy.

The amount involved was £1,579, the value of certain merchandise and stock in a store occupied by West and Elcoate at Salt River, destroyed by fire in January last.

The plaintiff, Carl Friedrich W. Becker, in his declaration, stated he was the duly appointed assignee of the assigned estate of Robert Turnbull West and Bertram Weatherly Elcoate, trading as the firm of West and Elcoate. On the 30th December last the firm entered into a contract of insurance against fire with the defendant, by which the defendant agreed that in consideration of the payment of the sum of £10 8s., which the firm duly paid to the defendant, the latter would, if a fire occurred and the stock was destroyed, have to pay £1,500. At that date the goods insured were the property of the firm. On or about 13th January the premises were burnt, and the goods were totally destroyed by fire, save as to certain goods of the value of £21, and at that date the contract was of full force and effect. The defendant firm had refused to pay the amount, wherefore the plaintiff claimed £1,579, with interest *a tempore morae* and costs.

The defendant company, in their plea, admitted insuring the property, but stated that in the proposal form for the policy of insurance, which was written out by the agent of the defendant company at the request and dictation of West, the said West and Elcoate represented that the risk had never been declined by any office of insurance. This statement was wholly incorrect and untrue, inasmuch as the said West and Elcoate had made proposals for insurance to several other companies with regard to the stock and fixtures, but the companies had declined to accept the same or to insure the stock or fixtures. By reason of the said misrepresentation the policy of insurance effected with the defendant company and sued upon was null and void. The defendant company would not have accepted the risk had not the material facts been concealed. The defendant prayed that the case be dismissed with costs.

Sir H. Juta, K.C. (with him Mr. Benjamin), was for the plaintiffs, and Mr. W. M. Searle, K.C. (with him Mr. Swift), was for the defendant company.

Robert Turnbull West, a partner in the assigned estate of West and Elcoate, said that the estate had been assigned to a Mr. Carl Becker since a fire had occurred at the premises in January last. An agent of the defendant company visited the premises in December last, and was shown all over the place. Witness told him that he had tried to get the place insured, and showed him letters from other companies that had declined the risk owing to lack of fire brigades. One company had refused witness's proposal because the billiard room was kept open late, and went on to say that some other company less critically disposed might accept the risk, and if witness desired any assistance in the matter he was to let the company know. Some of the proposals were made

verbally and others in writing. Witness could not have shown them to the agent, because they were not in the possession of the firm. Witness asked the agent what he thought of the letters he had seen, and the agent replied that the companies were apparently afraid to accept because of the number of fires there had been in the suburbs. Witness told the agent that he (witness) considered the letters to be refusals, and told him that it was due to the bondholders, Messrs. J. H. Sturk and Co., pressing the firm, that it was so anxious to insure. The agent said that he would fix the firm up, and, producing a proposal form, proceeded to fill it up. Witness dictated nothing to the agent, but gave him a balance-sheet for perusal. Witness was serving several customers whilst the agent filled in the form. The agent had wanted to make the policy £2,000, and witness thought that £1,200 would be sufficient, but after a while they split the difference and made it £1,600.

Cross-examined: Witness did not read the proposal form before he signed it. He had filled in no forms before, neither had he signed any. His partner had. The day previously Elcoate made a proposal to the Commercial Company. Witness never satisfied himself that the particulars stated in the proposal form were correct. Witness had not the time to read it. Witness called at the "Union." He did not see the proposal form.

I put it to you that you urged Mr. Shawe to take up this insurance?—I asked him to do so.

All the proposal forms state that you had never been declined by any other company?—I didn't know it, but I do now.

Elcoate says that this was inadvertently put in?—I know nothing about it.

There was considerable difficulty about getting this insurance?—Yes.

Can you explain why in all the proposal forms put in it is stated that you were not refused by any other company?—I didn't fill them in; Elcoate did.

You had a conversation with Mr. Mowitt after the fire, and told him that Elcoate had not tried other companies and been declined?—I did not.

Mr. Searle explained that the fire took place a few days after the insurance was effected. In further cross-examination, witness admitted telling Mr. Jowitt that he had insured in another company before he took Elcoate in as partner.

You told him that you allowed the policy to lapse?—I don't remember doing so.

He also says you told him that the company would not renew?—I may have done so.

Did you mention anything about making a proposal to the Commercial?—I believe I told him that Mr. Elcoate had been there.

In re-examination, witness said the actual refusal from the Commercial did not come until the day before the fire.

Bertram W. Elcoate was next examined. He stated he was in partnership with the last witness. They were anxious to effect an insurance on their property. He remembered the agent from the defendant company waiting on him with regard to an insurance. The agent was shown over the place by Mr. West. West asked witness for the correspondence from the other insurance companies. Witness got it for him, and handed it to the agent. Witness took no further part in the insurance of the property.

Cross-examined: Witness knew Mr. Wilson, the manager of the "New Zealand." They were both Australians. In September, witness applied to Mr. Wilson for an increase to £2,000 on his property. Wilson gave what he called a "cover," and went out to inspect the place. The policy was cancelled by Mr. Wilson in October. They remained uninsured. Witness did not remember Mr. Wilson telling him that if he tried to insure again he would be asked if he was declined or refused by another company, and he would have to explain what had been done.

Didn't he tell you to refer them to him, and he would tell them the reasons for cancelling, and that it was not because he had anything against you?—No.

Mr. Wilson goes on to say that you met him and told him that the defendant company refused to pay, and that you had inadvertently stated that you had not been refused by another company?—No.

Didn't he tell you that you had done exactly what he told you not to?—No.

You signed several of these proposal forms?—Yes.

But you state in them that you had not been refused by any other company?—Neither had I.

But the New Zealand refused you?—I didn't take it as a refusal.

But Mr. Wilson wrote to you cancelling the insurance. Do you mean to say that was not a refusal. Do you contend that you were justified in your answer to the inquiries?—Yes.

Surely, you knew it was an important thing to state that you had been refused?—No.

But you are acquainted with the general tenor of a proposal form?—Yes.

So that you know one of the questions would be as to whether you were declined or refused?—I don't know that.

It is a question sometimes put?—Yes.

And knowing that do you tell us that you did not read this proposal through?—Yes.

Mr. Bird, of the Commercial, says he asked you every question carefully?—I don't remember.

And you may have said that you were not previously refused?—Yes.

Is your position that you attach no importance to the question?—Yes. I think it did not matter much.

You saw Mr. Mowitt after the fire?—Yes.

Did West tell him in your presence that he had never been declined?—No.

James Block stated that in December last he was in the employment of the plaintiffs. He remembered the agent being shown round the shop by West. Witness heard West telling Elcoate to bring the correspondence from the other companies. He did so.

Cross-examined: Witness took no part in the insurance business. A good many agents went out to the business about that time.

Sir H. Juta closed his case.

John Harold Glover, examined for the defence, stated he had been about 3½ years in the employment of the defendant company. In consequence of what a friend of his told him, witness went out to see West and Elcoate. They went over the premises together. West put a value on the articles. After they had been over the premises, witness brought out the proposal form, and began to fill it up. West was called away, and witness filled up some of the questions in his absence, and left others which he could not fill until he returned. Amongst the questions witness asked him were if he had been declined or refused by any other company, and he replied, "No." It was erroneous to state that West asked Elcoate to hand witness the correspondence from other offices. Witness made the usual inquiries for references, and as they were satisfactory the risk was taken. Witness did not recollect having seen Elcoate on that occasion.

Cross-examined: The references must have been good, because you quoted lower than other offices? I quoted the usual rates—12s. 6d. per cent.

How are you paid?—By salary and commission.

Did you discuss nothing with West as to other companies being afraid to take on insurance because of suburban fires?—No.

West has assigned his estate, and has no interest in this case, and can you say why he should perjure himself? You know you will suffer?—No.

[Maasdorp, J.: Do you know how you will suffer?]

The company I work for would not give me the "sack" for an insurance like this. If I took the risk, knowing that other companies had refused them, I would deserve to be dismissed on the spot.

Sir H. Juta: Then there is no truth in West's statement about this conversation?—As far as I am concerned, it is all fabrication.

[Maasdorp, J.: The policy has not been put in yet?]

Mr. Searle: The fire occurred before the policy was issued, but in the meantime was covered.

Vernon G. Mowitt, fire assessor, stated that at the instance of the defendant company he went out to see the premises. On January 14 witness saw West and Elcoate in his office. Witness took a note of what was said. West said they had not received the policy, but they had a receipt, which they had sent to their solicitors. They proposed to the London Insurance Company on the 30th December, and they paid the premium on that insurance. West said that up to February, 1904, he owned the business, but then took Elcoate into partnership. He was then insured in some company, but the policy lapsed in April. He was not sure whether he or the company cancelled the policy. West said he had never been declined by a company. Elcoate said he had called at the Central Company, but did not fill up a proposal form, as that company informed him they were not taking suburban risks. In consequence of that and what witness saw in the cash-books, he made certain inquiries.

In that examination witness said it was the usual thing to ask a person who was claiming insurance if they had been refused by any other company. Witness knew the plaintiffs had been refused. His object was to find out how many companies they had been to.

Harry Benson, in the employ of Bullen Bros., the agent of the defendant company, said that in 1904 he was in entire charge of the fire department. He went through West and Elcoate's proposal with the agent, and if he had known that they had been declined by other companies he would have refused their application. Witness issued a protection receipt.

William W. Bird, of the Commercial Union Company, said that West and Elcoate had made a proposal to his company prior to the date of the interview between West and the insurance agent.

Francis Allsop, of Searight and Co., agents for the Northern Assurance Company, said that in December last a proposal was made to the Northern Company by the firm, and witness went to Salt River and saw the place. On December 15 witness wrote that the Northern could not consider the risk unless the firm guaranteed to close by 11 p.m. The firm replied that they would close at that hour, but the Northern verbally refused to entertain the proposal.

Thomas Shaw, of the Union Company, told how West and Elcoate had made a proposal to his company, and had been refused.

Bernard Walshe, insurance broker, stated he filled up one of the proposals—the one to the Union Company for Elcoate, and took down his replies.

Alfred George McLeod, branch manager of the Central Company, stated a proposal to insure the premises in question was taken to his office. Witness went out and saw them, but he did not think a policy on it would be available.

[Maasdorp, J.: I don't see what that has to do with the case.]

Mr. Searle: I wish to show that a number of managers, and others went out to see the place, and declined the risk.

Robert Ruston, acting branch manager of the Commercial Union Company, said West and Elcoate made a proposal for insurance, but his firm declined to accept it.

Sir H. Juta: That is quite irrelevant to this case, as the letter was written after the insurance was accepted by the defendant company.

The evidence of Frank W. Wilson, manager of the New Zealand Company, taken on commission, was read. He stated his company had the place insured. On an application from West and Elcoate to increase the amount of the insurance, witness refused to do so, as some of the goods were under bonds, and it was not the custom of his company to insure such goods. The insurance was cancelled.

Mr. Searle closed his case.

Counsel for the plaintiff having been heard in argument,

Maasdorp, J., said that there was no need for him to hear Mr. Searle, and in giving judgment said that the plaintiff had sued the defendant for the recovery of a sum of money due under what was described in the declaration as a contract of insurance against fire, and in which contract it was stated that the defendant agreed to pay a sum of £1,600 in the case of any injury to the plaintiff's stock-in-trade by fire, in consideration of the payment of a premium of £10 8s. He was convinced that the question as to whether proposals by West and Elcoate had been refused by other companies was a material point, and he believed Mr. Glover when he said that had he known that the plaintiffs had been refused, he would not have accepted their proposal. It was a material point upon which the defendant should have been informed, and the non-disclosure of it rendered the action one of misrepresentation. With regard to the point raised that the question as to the refusal of the risk by any other office did not strike them as material. If the Court believed Mr. Wilson, then West and Elcoate were wrong in saying so, because Mr. Wilson, in his evidence, stated that at the time when he cancelled the policy, he told them that they should state the circumstances, because if they did not it might put them in an awkward position. It was clearly brought to their knowledge that their position would be a difficult one to get out of, because it was a matter of great

importance to give the correct information. However, a number of other proposals had been put before the Court, and it was found that after the cancellation by the New Zealand Company, they made proposals in which it was clearly their duty to state that this risk had previously been refused, and on three or four occasions they made the positive statement that that risk had not been refused. Now these statements were false, and they were false to the knowledge of West and Elcoate, and there was no evidence that they were misled by any agent of the company. They made these statements after they had been warned that the statement would be a matter of some importance. It seemed that after the New Zealand Company had cancelled their policy the partners were very anxious to get another insurance of the place, and Elcoate must have been aware of what West did, and West must have been aware of what Elcoate did. In that case the Court was not willing to accept their statements. Both of the partners must have been aware that on several occasions the risk was refused by other companies, and if the Court accepted that view in the present case they must arrive at the conclusion that the partners made false statements on several occasions. The Court was driven to the conclusion that in other respects the partners had stated what was not true. Mr. Mowitt stated that when he spoke to them they deliberately made the statement that their offer had never been declined. If this statement stood alone, it might not be of much importance, but Mr. Wilson gave his statement, and here again the Court was prepared to accept his statement; and then, again, they had the written evidence of documents signed by either West or Elcoate. The conclusion arrived at was that they had made statements that were not correct. Then, if their statements were brought face to face with that of Mr. Glover, the Court was forced to the same conclusion. If Mr. Glover had had before him that correspondence, he must have come to the conclusion that there had been a refusal. It was impossible to construe that correspondence otherwise than as a refusal. The partners could not conceal themselves behind that correspondence, because there was a good deal more. However, if Mr. Glover had seen that correspondence, he must have come to the conclusion that there had been a refusal, and it was impossible for the Court to understand why, under these circumstances, he should have put a false statement into the mouth of West with regard to this material inquiry. It very often happened that an agent got a small commission in these matters, and it might be said that he got a small inducement, but the question was, would Glover consider this? One had to inquire into the partners' previous trans-

actions in matters of this kind. The Court was forced to the conclusion that their evidence could not be accepted. He found that the representation was made, and it was material that it voided the contract. Judgment would be given for the defendants with costs.

[Plaintiff's Attorneys: Moore and Son; Defendant's Attorneys Syfret, Godlonton and Low.]

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

REX V. HEYNES, MATHEW { 1905.
AND CO. { Au. 28th.

Chemist and druggist—General dealer—Licence—Acts 15 of 1877 and 38 of 1887.

A licence to deal as a chemist and druggist does not under Act 38 of 1887 include the right to deal in any articles not directly connected with the business "as such."

Semble: A chemist and druggist may under his licence sell photographic "films" or other articles to the preparation of which a chemical process is essential.

This was an appeal brought by John Alfred Mathew, Alfred Harfield Mathew and Frank Carleton Mathew, trading as Messrs. Heynes, Mathew and Co., of Cape Town, against a conviction of the Acting Resident Magistrate of Cape Town, for trading in a general dealer's business without taking out the necessary licence as required by the Act 38 of 1887. Mr. Russell was for the applicants, and Mr. Nightingale appeared for the Crown. The appellants had sold a photographic film in contravention of the Act, and were fined 1s.

Mr. Russell contended that the appellants were entitled to sell any article included in a retail shopkeeper's licence under the Act of 1877, and that the subsequent Act of 1877 did not repeal that power, and the fact that retail shopkeepers' licences did not now exist did not prevent the chemists from selling such goods.

Buchanan, A.C.J., said that if Mr. Russell's contention was sound, it meant that a chemist could sell anything that a retail shopkeeper could sell before 1887, such as tea, sugar, coffee, ironmongery, etc.

Mr. Russell said the chemist paid nearly double the licence of a general dealer.

Buchanan, A.C.J., pointed out that the chemists could hardly claim a prescriptive right to sell these goods.

Mr. Russell : Unfortunately not, my lord. Counsel, proceeding, said it was quite evident that for eighteen years the construction now attempted had never been put upon this Act.

[Buchanan, A.C.J. : I could see a great deal of force in your argument if you limit yourself to the film, which is a chemical production, but in the case of playing cards and tobacco there is a very great distinction, and you want to go as far as that.]

Mr. Russell : Oh, yes ; we want to go further than the film.

[Buchanan, A.C.J. : He had a chemist's and druggist's licence, and before 1887 he had all the privileges of a retail shopkeeper's licence, but that retail licence has now been taken away from him.]

Mr. Russell contended that a chemist never required the retail licence. Section 4 gave him all the powers without taking out a general dealer's licence—it gave him all the powers he had under the Act of 1877, and he submitted the defence set up was a perfectly good one, and that the conviction was wrong.

Mr. Nightingale, quoting other licences, contended if a chemist was not confined to his business "as such" a butcher could trade as a baker and a baker as an ostrich feather dealer. It was perfectly clear that the legitimate business of the chemist and druggist was connected either intimately with the science of chemistry or with the science of healing as in historic times.

Mr. Russell, replying to the historic meaning relied on by his learned friend, said if that interpretation was to be put on the trade, then a chemist might practise as a medical man, and he would also be entitled to practise as a "barber."

[Buchanan, A.C.J. : He can practise as a barber at present if he likes.]

Mr. Russell having been heard further in argument,

Buchanan, A.C.J. : By Act 15 of 1877, Section 4, the licence of a chemist or druggist covered as well all dealings of a retail shop dealer ; so that a chemist or druggist could sell anything which a retail shopkeeper could sell. In 1887 the Legislature altered the law by abolishing the retail shopkeeper's licence and substituting therefor a licence called a general dealer's licence. Act 38 of 1887, Section 4, exempts persons licensed to carry on certain trades and occupations from the necessity of taking out a general dealer's licence for the purpose of such trades or occupations. This section enacts, *inter alia*, that no one licensed as an apothecary, chemist or druggist, as such, shall be bound or required to take out a licence as a general dealer." It is contended, however, that

the privilege of retail trading is still continued to chemists or druggists. I do not think that was the intention of the Legislature. No doubt this matter has been complicated by the fact that the Act of 1877 has not been specifically repealed. But this Act of 1887 repeals in law anything inconsistent therewith. The retail shopkeeper's licence is no longer in existence, and I fail to see how a chemist or druggist can claim to carry on such a business and to have the privileges of a licence which no longer can be granted. Under the Act of 1887 the chemist is allowed to deal as such without having taken out a general dealer's licence. I think, therefore, that the provisions of the Act were intended to mean that a chemist does not require a general dealer's licence to sell goods connected with his business as a chemist or druggist. In this case, had the contention been confined to the selling of films for photographic apparatus, they might fairly have been held to come within the scope of a chemist's business. But the claim set up is to sell anything which retail shopkeepers could sell under the old Act. If the case had been confined to the film, I think the conviction might probably have been quashed, but as the claim is to sell goods not connected with a chemist's business the conviction must be confirmed and the appeal dismissed.

[Appellant's Attorneys: Van Zyl and Buissinné.]

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

APPEALS.

REX V. MARTIN AND OTHERS. { 1905.
Aug. 29th.

Native reserve — Ejectment —
Criminal proceedings — Act
37 of 1884.

The appellants, Europeans, had been ejected from a certain native reserve on a Magistrate's order granted against them after criminal proceedings had been taken. There was no

evidence that any natives were living on these lands.

Held, that as the place was not a native location in terms of Act 37 of 1884, the appellants were not liable, either civilly or criminally, and that the proceedings taken against them were irregular and must be quashed.

This was an appeal by Hendrik Martin, Wynand Martin, Gert Martin, Albert Lyons, and Gert Vermaak, from a decision of the Resident Magistrate of Mafeking on the 29th June last, ordering them to remove from the Molopo native reserve or location.

The appeal was based on the following grounds: (1) That the native reserves in Bechuanaland are not Crown lands in terms of the Native Location Act 37 of 1884; (2) that the appellants were wrongfully and unlawfully ordered to remove from the reserve under section 20 of Act 37 of 1884; and (3) that the conviction was contrary to law.

The Court below held that proclamation 62 B.B., which dealt with the control of the native reserves in Bechuanaland, having been repealed by proclamation 220 B.B., and on the promulgation of the Annexation Act of 1895, under section 2, the Native Location Act of 37 of 1884 came into force, and that the accused, being not such persons as were described in section 7 of that Act, were unlawfully on the Crown reserve or location, and must remove therefrom on receipt of written instructions from the Magistrate to that effect.

Counsel having been heard in argument,

Maasdorp, J., said it seemed to him that the procedure in this case was absolutely the wrong procedure adopted for the purpose intended by the Act. This proceeding was in the form of a criminal prosecution, and it was attempted to exclude certain people from what was called the native location under terms of section 20 of Act 37 of 1884. These proceedings were quite irregular, but no exception was taken to that, because the parties wished to have a certain point which was raised decided by that Court, and as the appeal was before the Court, the mere form of the proceedings might perhaps not have prevented the Court from deciding the point which was raised, which was whether the accused in this case were found on a native location on Crown lands as described by the Act. A native location was described as a number of huts or dwellings occupied by native races, the names of which were set forth. Now, there was no evidence in

this case of the existence of any native location at the place where these people resided, and consequently they could not be said to have been in a native location such as that in respect of which provision was made for the purposes of ejectment, consequently there was no evidence to prove that they became liable to these proceedings, whether civil or criminal. If it had been a criminal proceeding, the conviction would have had to be quashed, but there was no conviction to quash, and the only thing the Court could do would be to quash the proceedings, which were irregular in form, and in respect of which there was nothing to prove that any offence had been committed. The Court would hold that these people were not liable to proceedings, either civil or criminal, under this section, because they were not living in a native location such as was described under section 7. It was stated, however, that that was not the point which the parties wished the Court to decide, but that there was a larger question opened, upon which they wished for the ruling of the Court, and that larger question was whether the native reserve was Crown land for the purpose of making a location of such reserve. The parties in this case could not raise such a point, because they were not interested in the decision. The decision in this case must proceed on the facts which were directly before the Court. The accused appeared to be European farmers living on a native reserve, and the Court did not see what interest they could possibly have in having a decision of the Court as to whether a native reserve was Crown land or not, and the Court did not decide mere hypothetical matters in which the parties appearing before the Court were not interested. This was a criminal proceeding, and the Court could only say the proceedings must be quashed.

REX V. FERREIRA.

This was an appeal brought by Mamiel Ferreira against a sentence of the Assistant Resident Magistrate of Cape Town sentencing him to fourteen days' imprisonment for the theft of four bottles of whiskey.

The appeal was on the grounds that the evidence given for the prosecution did not disclose any criminal intent or conduct on the part of accused, that the conviction was not supported by the evidence, and that seeing there existed a reasonable doubt as to the guilt of accused, he should have been given the benefit thereof, that the evidence adduced by the defence preponderated in clearness, precision, and probability over the evidence given by the prosecution, and that illegal or incompetent evidence was admitted.

From the evidence given in the Court below, it appeared that accused was engaged by one D'Abreu as a handyman and bottle-washer at his hotel. D'Abreu and accused quarrelled on July 21, when the former turned him out without wages or notice. Accused then went to his agent to take proceedings to recover his wages, and after this he was arrested. The only bottle found on the premises owned by accused was one which was there when he took the premises over from D'Abreu.

Dr. Greer appeared for appellant, and Mr. Nightingale for the Crown.

Counsel having been heard.

Maasdorp, J., said the evidence given by the prosecution in this case was to the effect that four bottles of whiskey bearing a special mark disappeared from the place of business of the plaintiff, and that one of them was subsequently found at a place which was in the occupation of the accused including this particular bottle. The evidence showed that certain bottles were brought by the accused to this place, and that at the time that he delivered it he said he had taken it away from his master without his master's knowledge. Now this master appeared to be the complainant, and when prisoner was taxed with the theft he was said to have admitted that he had taken the whiskey without actually admitting that he had stolen it. If this evidence was believed by the Magistrate, then there was no reason why the Court should interfere. There were no circumstances in the case upon which the Court could come to the conclusion that the Magistrate was wrong in his finding, and under the circumstances the appeal would be dismissed.

DAVIDSON V. SIVERTSEN. { 1905.
Aug. 29th.

Joinder of parties—Magistrate's jurisdiction—Married woman—Public trader.

D., while under the age of majority and unmarried, leased certain premises for the purpose of her business. She afterwards married in community and was sued for rent amounting to £30. Exception was taken (1) that the amount was beyond the Magistrate's jurisdiction, (2) that D.'s husband and not D. should have been sued.

Held, (1) That the lease being a liquid document, the sum claimed thereon was within the jurisdiction. (2) That D. was

rightly sued for a debt contracted while she was a public trader.

This was an appeal against a judgment of the R.M. of the Cape, who had found for the respondent (plaintiff in the Court below), in an action for debt, £30, representing rent due, against Mrs. Davidson and Miss Robertson. Mr. Alexander was for the appellant, and Mr. J. E. R. de Villiers for the respondent.

Mr. Alexander urged that Mrs. Davidson, when he signed the lease of a shop, belonging to the respondent, was a minor. On March 15, she and her friend, by mutual agreement, gave up the drapery business they were running; and, in September, 1904, she married one Davidson in community of property. Not till after she was married was she summoned, and he (counsel) would submit that her husband, and not she, ought to have been summoned, as she was not a public trader; and that, if the action in the Court below had been for damages to the extent of £30, the R.M. had had no right to deal with it. The wife had no control over the property held in community; and he submitted that the Court would never give judgment against her to take effect on property with which she had nothing to do. Counsel quoted extensively from previous decisions of the Court, in support of his argument. Proceeding, he said that on page 247 of Van Zyl (enlarged edition) it was laid down that, where judgment for debt had been given against a woman, and she subsequently married, in default of satisfaction of the judgment, an order for imprisonment could be made against the husband, in respect of this antenuptial liability, without his being called upon to show cause against the imprisonment. He (Mr. Alexander) took it, of course, that this applied to marriage in community of property only, and should be read as such. His Lordship would see that the Magistrate, in his decision, did not deal at all with the legal aspects of the case. There was no attempt in Voet, nor any of the other authorities, to hold a woman liable for an antenuptial liability, when she was subsequently married in community, and had, therefore, no control over the administration of the property, except where the woman had been a public trader. In these circumstances, he submitted that the Magistrate's judgment was not a correct one.

Mr. De Villiers contended that a wife married in community of property could be sued. It was recognised that one could sue, on the wife's torts, the wife, assisted by the husband; and the question for the Court to decide in this case was if the point involved was to be regarded as analogous to a post-nuptial tort or post-nuptial contract.

Mr. Alexander, in reply, said that the contentions set up by his learned friend did not affect his argument.

Maasdorp, J.: The matter is now before the Court on appeal against the ruling of the Resident Magistrate of the Cape, upon exceptions taken in the Court below. The first is, that the amount claimed was beyond the jurisdiction of the Magistrate. The amount claimed is £48, and it is claimed upon a written lease, which clearly expresses the amounts payable and the times when they are to be paid. I am of opinion that it is a claim for rent, and is upon a liquid document, and clearly falls within the jurisdiction of a Magistrate. Then, there is a further exception taken: that the wife should not have been sued assisted by the husband as she has been, but that the husband himself should have been sued. This, in its nature, is a technical exception; but, if it is a good exception, and borne out by the practice of the Court, the Court would now have to hold that the present form of procedure is erroneous. I cannot say that any of the authorities that have been cited are directly in point in this case, and I do not find that this matter, as it now stands, has been clearly and distinctly dealt with. It appears that, under certain circumstances, for the debts of a wife before marriage the husband only can be sued, because, after marriage, all debts and assets come into community. But there is something special in the nature of this case. Exception is made to the rule in cases where a married woman is a trader, and, in her case, she is allowed to be sued personally for debts contracted by herself in respect of her trade; and in a suit against her, it is only necessary that she should be assisted by her husband. Now, it seems to me that in such a case, if the wife had ceased to be a public trader, she could still be sued in respect of transactions which she had entered into whilst a trader, notwithstanding the fact that she could no longer be described as a public trader. In this case, the defendant was a public trader before she married, and, in my opinion, in respect of debts contracted for that business, she would stand in the same position as a married woman who had dealt as a public trader after marriage. She could, consequently, be sued for matters which related to her trade by those who had given her credit in respect of that business. It appears that, in this case, the house was hired by herself and partner to carry on business in, and the debt was contracted by her in respect of rent due for the premises so hired. On the whole, I am inclined to think that, in such a case, she must be treated as a married woman, who is sued by those who dealt with her as a public trader in matters of such trade, and that the form was rightly adopted of suing her personally, duly assisted by

her husband. And, under the circumstances, I think the Magistrate was right in over-ruling that exception. It has been mentioned that she was a minor, but the Court cannot go into that question now, because minority, in itself, is not an excuse for the payment of debts due, but it may be taken advantage of as an exception. In this case the defendant did not set up the question of minority in the Magistrate's Court. With respect to the fixtures, the Magistrate seemed to have overlooked the fact that they should be dealt with, but the Court will not deal with the matter. If judgment were given, the respondent would be able to seize them in execution. The appeal is dismissed with costs.

[Appellant's Attorney: H. Hirschberg; Respondent's Attorneys: Herold and Gie.]

REX V. CARN AND OTHERS { 1905.
Aug. 29th,
Act 36 of 1902, Sec. 16.

Under Sec. 16 of Act 36 of 1902, any persons who use any house or place for the purpose of betting may be convicted.

This was an appeal on behalf of Israel Carn, Alexander Jacobs, George Wolstenholme Smith, and Hyman Kruger ("Trilby"), local bookmakers, from a sentence of the Resident Magistrate, Cape Town, fining them £40 each, or the alternative of one month's imprisonment, with hard labour, for contravening section 16 of Act 36 of 1902.

The evidence taken before the Magistrate was read, after which counsel were heard in argument.

Mr. J. T. Molteno appeared for the appellants, and Mr. Nightingale for the Crown.

Mr. Molteno said he believed this was the first time that an interpretation came up for the decision of the Supreme Court of the clause under which these men were charged—the 16th clause of the Act of 1902. There was a decision in the middle of the year dealing with section 6 of the same Act, which dealt with gaming houses, whilst part 3 of the Act dealt entirely with betting-houses. To put the matter shortly, a great number of books were put in before the magistrate, consisting of the constitution of the club, the articles and lists of the committee, and the rules, and it was clearly recognised there that there was no need to further define what Tattersall's Club was. It had a liquor licence, and also a club licence. Now, in this case the contention of the appellants was that under this section they should not have been sued, and that the proper parties to be sued

were the owners or the tenants of these premises. Under the section the proper persons to be sued were not individual persons who were members of the club, but those who governed Tattersall's Club. All through the Act it would be seen that a distinction was made between the people who owned or kept or ran either a betting or a gaming house, and the frequenters of such houses. If the Court would look at part 2, section 4, it would be seen that it was said that it shall be unlawful to keep or frequent any gaming house in the Colony or on territorial waters, and under section 12 it was laid down that it was unlawful to keep or frequent any house or place for betting within the Colony or territorial waters. Now, under part 2 of the Act, there had been a case in which three persons were charged under the sixth section with gaming, and they were all convicted and fined £100 by the Resident Magistrate of Cape Town. Their case came up for appeal, and was heard in the Supreme Court on the 3rd July. It was the case of *Ree v. Ah Foo* (15 C.T.R., 520). The Acting Chief Justice, in giving judgment, was reported in the "Cape Times" as saying that the two appellants based their appeal upon the ground that they were not the owners or keepers of the house, but were merely frequenters. The question turned upon the construction to be placed upon section 3 of what was commonly called the Morality Act. This section made the owner or keeper of a gambling house or brothel include the owner of a house, who was cognisant of the uses to which the property was put, and the tenant, or landlord, or lodger, or any person employed in any capacity other than that of a menial or domestic servant. Now the two appellants were neither owners, lodgers, nor tenants of this house. They were there playing a certain game, and on the evidence before the Court, he (the Acting Chief Justice) thought it would be difficult to hold that they were anything more than players frequenting the house. He thought the section must be taken to mean that persons so convicted must be either owners or persons who assisted in running the house for the benefit of the owner. There was no proof that these two were more than frequenters, or that they could be included under the title of owner or keeper. It was quite consistent with the evidence to say that they were only frequenters, and he thought the Magistrate had erred in convicting them as owners or keepers, especially where it was so conclusively proved who was the keeper and owner of the house—the tenant, who had been punished. The appeal should therefore be allowed, and the conviction against the two appellants quashed. The sixteenth section of the Act stated that whosoever opened, kept, or used any

house or place for any of the purposes mentioned in the fifteenth section, or knowingly and wilfully being the owner, tenant, occupier, or lodger, permitted the same to be opened, kept, or used for such purposes, or had the care or management of any such place was liable to a fine not exceeding £200. An owner or occupier was defined in the interpretation clause as a person who was cognisant of the purposes for which or uses to which his property was being used or put, and also a tenant, occupier, lodger, manager, banker, dealer, croupier, secretary, clerk, messenger, or any person employed in any house or a person employed in a place other than a menial or domestic capacity. His contention was that these bookmakers, who were members of Tattersall's Club, were like every member of a club, only frequenting a club. These men were there frequenting the club, and it was not denied that bets were made, and it was contended that the proper persons to be sued were not the individual members of the club, but the persons who governed or controlled the club—the committee. If the Crown had wished to get at this Tattersall's Club the proper persons to be sued were the owners of 78, Longmarket-street, or if the owners had sub-let the premises to anybody else, who had let them to Tattersall's, then the sub-lessee. He contended that the appellants should not have been convicted, and he did not think the Legislature intended that a fine of £200 should be imposed under these circumstances. The only betting that was legal was provided for under section 21, which held that the only betting that was legal by bookmakers was betting on a racecourse on the races on which were run in accordance with the rules and regulations of the Jockey Club of South Africa. Under that section they could only bet upon races which were being run on the particular day they were there. For instance, it would be illegal for a bookmaker to stand up at Kenilworth Racecourse and bet on a race that was being run in England or Kimberley, or elsewhere. He was only protected if betting on a race run at the meeting at which he was present, and then only if he had the consent of the authorities to stand up. Counsel did not for a moment contend that these persons were acting legally, but under this section the proper persons to be sued were not the individual members of the club, but the body that governed the club. It was put in at the Magistrate's Court as evidence that there were 400 members of this club. The police, if they had wished, could have taken their choice. They could have run in the committee of the club by means of the president and executive, or the owners of the premises, but the section of the Act never intended that the individual members of the club should be brought up. For those rea-

sons be submitted that the conviction was wrong, just as it was wrong in the case where they were dealing with gaming-houses in the case of *Ree v. Ah Foo*, and for a like reason he submitted that the conviction should be quashed. Of course, it remained open to the Crown if any illegal practices were carried on at Tattersall's to prevent the breaking of the law by taking proceedings against the governing body, and not coming down on private members, who were not responsible for the management of the club.

Mr. Nightingale said he thought his learned friend was not quite correct in his information about the case of *Ah Foo*. He thought it was necessary to see how the charge against these men differed from the charge in the present case. In that case the circumstances were that the police made a raid on a gaming-house and arrested everybody there. It was found that only the owners and keepers could be charged under the particular section on which they were charged, and the frequenters under another section. Now, in the section under which the men in the present case were charged, the wording was different. The charge-sheet said nothing about opening or keeping a betting place. The charge against the accused was that they did wrongfully and unlawfully use a certain place, viz., Tattersall's Club, for purposes which were illegal. His learned friend might be correct in saying that the committee of Tattersall's Club might be prosecuted, but the Court were not entering into that point.

[Maasdorp, J.: But this club is not supposed to be kept as a gaming-house.]

Mr. Nightingale: Oh, no; but if the committee allow this place to be used for betting they can be prosecuted.

Continuing, counsel contended that this particular prosecution was exactly such a case as the English Act was intended to meet, but there was a slight difference between the English and Colonial Acts in that they had not taken over the preamble of the English Act, which read: "Whereas a kind of gaming has of late sprung up tending to the injury and demoralisation of improvident persons by the opening of places called betting-houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf on their promises to pay money on events of horse races and the like contingencies." It was quite clear that the English Act specified charges. For instance, under the English Act, if betting took place in a public-house it was not the publican who was charged, but the bookmakers who made the bet. The point with which the Court was dealing was this. A number of bookmakers were members of Tattersall's Club, and apparently one of the objects of that membership was contravention of

this Act. Instead of standing about the streets for a similar purpose, they had their desks and their notice boards, and carried out betting transactions with outsiders inside the club. That was the sort of betting that this Act was passed to put a stop to. Undoubtedly, if one read the preamble of the English Act, they would find that it was to prevent outside betting. The betting complained of in the present case was really outside betting, because none of the men who risked their money on the occasion of the prosecution had anything to do with Tattersall's Club. The bookmakers did not deny that they habitually bet with outsiders. Under these circumstances the case of *Ah Foo* had nothing to do with this case.

Maasdorp, J., said section 15 was rather an awkward section. Supposing two people bet in a room, they, under that section, clearly used that place for betting. That was rather a long jump.

Mr. Nightingale said he thought that arose from the transcript of the English Act, which had not been transcribed verbatim. The English Act held that every house, room, office, or place open for the purpose of betting shall be taken to be a gaming house within the meaning of another Act. The Act of 1902 really incorporated two English Acts. It incorporated the English Act of 17 and 18 Victoria and 15 and 16 Victoria, and apparently the Act of 1902 followed the wording of the English Act, which really only defined what a betting house was. If the preamble of the English Act was adopted, it would be made quite clear that this outside betting was the sort that should be put a stop to. His learned friend had assumed that the people were charged with keeping and opening a house, whereas they were only charged with wrongfully using the place for betting.

Mr. Molteno: The whole thing hangs on the interpretation of the word place.

Mr. Nightingale: A place is almost anything.

His Lordship: It was held in the House of Lords that a racecourse is not a place after the Court of Appeal had decided that it was.

Mr. Nightingale: An umbrella can be considered a place. Continuing, he contended that the members of this club did not confine their operations of betting to one another, but did so with anybody that came along. If the point raised by his learned friend to the effect that these people were not to be prosecuted for contravening the section, but only as frequenters, then they would have them going into the premises of some friend and starting bookmaking there. It was difficult to see what the Act was intended to do if it was not intended to meet cases of this kind.

Mr. Molteno mentioned that in the case of *Ah Foo* 36 men were charged, 33 of whom were convicted as frequenters.

The fact of the matter was that Tattersall's Club was purely a betting club.

Mr. Nightingale: Are you a member?

Mr. Molteno replied that he was not. This club was purely a betting club, and they had a licence for liquor. That was why the rules were put in. If Mr. Nightingale was correct, then there would not be a house in the Peninsula of which the occupiers would not be liable to prosecution. In fact, one could not have a small game of bridge without laying himself open to prosecution. He felt sure the Legislature, when they passed that Act, never had that intention. He concluded by again contending that the committee of the club should have been prosecuted, and not the individual members.

Maasdorp, J.: The accused are charged in this case with contravening section 16 of Act 36 of 1902, in that they used certain rooms and a passage at 78, Longmarket-street, as a betting-house. They pleaded "Not Guilty," but were found "Guilty," and each of them was fined £40, or, in default, one month's imprisonment, with hard labour. It is argued that in accordance with the finding of the Court in the case of *Rez v. Ah Foo* the Court should now hold that only the owner or occupier of the betting-house could be charged with contravention of section 16, and not those who are merely frequenters of the place. It seems to me that there is a distinction between this case and that of *Ah Foo*. There is a provision made under section 6 for the punishment of persons who own or keep gaming-houses, and then there is a further provision for the punishment of those who frequent or use such places. In that case certain persons who were found upon the premises as frequenters were charged with keeping and owning a gaming-house. Upon appeal the Court held that there was no evidence that they were the occupiers or owners, and, consequently, they were charged under the wrong section, which provides for a much more severe penalty than the subsequent section, but in that case it was quite clear that the accused could have been charged as frequenters of the gaming-house, and would have been liable to a less penalty. What the Court held was that they were not owners or occupiers of the gaming-house, and that they were charged under the wrong section. Under section 16 of the Act provision is made for a penalty to be inflicted on those who own or keep betting-houses, but under the same section there is also provision in respect of those who use places for the purpose of betting, and there is no other section making provision as to how persons using places for the purpose of betting are to be dealt with. The accused are charged with using these rooms as a betting-house, and it appears that a place is to be regarded as being used as a betting-house when

betting takes place in it or money is kept in it as stakes for the purpose of betting. The rooms they used in this case appear to be the rooms of a club called Tattersall's Club, and it is argued that those who keep a club as the managing committee, are really the guilty persons, and that members who are found betting in it cannot be charged under this section. It seems to me that these sections have a very wide scope, and they include those who merely use any house or place for the purpose of betting. I think it is clearly proved in this case that it was not merely an odd case—an odd instance of a bet between one or two persons that took place in these rooms, for the rooms were fully furnished for the purpose of betting. They were frequented by the accused, and it was found that they kept their books and their materials for the purpose of betting in these rooms, in fact, they were actually detected engaged in the act of betting in these rooms, and under the circumstances of this case I think it has been abundantly proved that they themselves used these rooms for the purposes of betting. I am of opinion that the appeal should be dismissed.

[Appellant's Attorney: D. Tennant, jun.]

SECOND DIVISION.

[Before the Hon Mr. Justice HOPLEY.]

DREWITT V. STEER. { 1905.
Aug. 29th.

Mr. Burton moved, as a matter of urgency, for an order calling on the respondent to show cause why he should not hand over to the applicant £800 with interest at 6 per cent., from 3rd inst., and costs. Counsel said the applicant had known the respondent some years ago, and in July last he called on the respondent and mentioned that he had some money to invest, and asked him if he could offer a good mortgage on first bond. Eight hundred pounds were handed to the respondent in respect of certain property, which was to be hypothecated. The respondent was instructed that the money was to be invested in the name of his minor daughter Gladys Stella Drewitt. After calling on the respondent several times without avail, the applicant discovered that the bond was not a first mortgage, there being two others, one of £750 and another for £50, and it further appeared that the property had been attached. Only one-half share of the property had been hypothecated, and the bond was not passed in favour of the daughter as a minor.

Mr. Russell, who appeared for the respondent, put in an answering affidavit, in which the respondent set out that he explained to the applicant that the farm in question was the property of two brothers, and the farm had been divided by order of the Supreme Court, one of the brothers having surrendered his estate. It was explained to the applicant that the loan of £800 was to satisfy the judgment of the Court, and the whole nature of the investment was discussed with the applicant, who was cognisant of all the circumstances. The respondent was confident that the minor daughter was fully secured.

Counsel having been heard in argument on the facts.

Hopley, J.: It is perfectly clear that the Court cannot make an order on the present affidavits. There is a serious conflict of evidence, and it is impossible to say whether there has been anything in the way of a breach of trust or a dereliction of duty on the part of the respondent. On the facts disclosed to the Court, it seems to me that the applicant has adopted a wrong procedure in coming to the Court in this manner for a summary order. He must have known that if he had any remedies in the premises, he would have to institute an action in the ordinary way. There will be no order, and as the applicant has adopted a wrong course of procedure and so incurred unnecessary and avoidable expense, I am of opinion that he should pay the costs of the application, but the notice of motion may stand as a summons in the action to be instituted, and the costs of such notice will be costs in the cause.

VAN DER HOOF AND FISHER { 1905.
V BECHUANALAND ESTATE { Aug. 29th.
SYNDICATE. { Sept. 4th.

Principal and agent—Private instructions—Knowledge of third persons.

This was an action for an order of transfer of certain property at Vryburg, where the plaintiffs carried on business, the defendants being the trustees of the Bechuanaland Estate Syndicate. On the 15th May, 1905, the plaintiff (Van der Hoff) bought from the syndicate certain three farms for £900, the terms being cash against transfer. The claim was for an order directing the defendant to pass transfer on the plaintiff tendering £900, or, in the alternative, to pay the sum of £1,000. The defendants, in their plea, set out that no such sale had taken place. No sale had been made on behalf of the syndicate. It was admitted that one Rosenblatt in 1903 was authorised to deal with the properties on certain conditions, but the authority had never

been exercised, nor the said conditions fulfilled. When Rosenblatt purported to sell the farms, he did so without authority, and it was denied that Rosenblatt was the duly authorised agent of the syndicate for the purpose of a sale.

Sir H. Juta, K.C. (with him Dr. Rainsford) was for the plaintiffs, and Mr. Burton (with him Mr. Van Zyl) was for the defendant.

Reginald de Beer, partner in the firm of Rosenblatt and De Beer, solicitors, of Vryburg, said that before witness entered into partnership Rosenblatt had all the title deeds of these farms in his possession, and the firm held the power of attorney to sell the farms which power had never been revoked. As the result of proceedings by the Government for arrears of quitrent, the farms were put up to auction, and three were sold. Plaintiff was making inquiries, and subsequently purchased the farms in question. Witness, who had charge of the matter, advised the defendants' attorneys, who cabled that the farms had been already sold. Witness had received no intimation of this, nor had his power of attorney ever been revoked.

Cross-examined by Mr. Burton: From August, 1904, to the best of his recollection all the properties were under attachment. On behalf of Mr. Cullinan, witness bought another farm at the sale in execution. In less than five minutes Van der Hoff bought the farms, and the reason of the hurry was that he (witness) was afraid Wessels would go behind his back. The sale to Wessels was a better business for the syndicate than that of witness to Van der Hoff. Witness thought Van der Hoff very foolish to buy the farms. Witness had never joined the plaintiff in land speculation.

By Hopley, J.: When Rosenblatt knew of witness's action in disposing of the farm he approved of it.

Herman Rosenblatt, who acted for the defendant syndicate for some fifteen years before the last witness joined him, said that what De Beer did was with his approval.

Peter Van der Hoff, partner in the plaintiff firm, stated that before the execution sale, he approached the solicitors with a view to a purchase, and at the sale, and afterwards in May he negotiated for the farms. In consequence of what Wessels said as to being able to purchase the farms, witness asked De Beer to show his power of attorney.

Cross-examined by Mr. Burton: He told Wessels that he "thought" he had made an offer of £300 each for the farms through Rosenblatt. When witness mentioned Rosenblatt having the authority to sell, Wessels said: "For God's sake don't tell De Beer anything about it."

Sir H. Juta closed his case.

Daniel Wessels, attorney, at Vryburg, who at present represents the defendant syndicate, stated that he conducted the

sale on the 25th March. After the auction, witness made an offer for certain of the farms by cable, which was accepted on the 3rd May. That offer was made on behalf of principals. On the 15th May the defendants cabled him with regard to two other farms, and he spoke to the plaintiff, who he thought was a likely buyer. The plaintiff could not understand it, as he said Rosenblatt and De Beer had a power. The plaintiff promised to see witness again, and witness did not see him again on the matter. The farms were attached, and transfer had not yet been given to witness's principals.

Cross-examined by Sir H. Juta: Witness did not know that Rosenblatt and De Beer had power to sell. He did not communicate with Rosenblatt and De Beer's principals in London.

Mr. Burton closed his case.

Counsel were heard in argument on the facts.

Cur. Adv. Vult.

Postea (September 4).

Hopley, J.: The defendant syndicate, which is domiciled in and managed from London, had been before 1903, and then still was, the owner of a considerable extent of landed property in British Bechuanaland. In that year the Colonial Government took proceedings against the defendants for the recovery of arrear quitrents, which had accumulated to a considerable amount, and the defendants then became anxious to get rid of their properties on the best terms possible. With that object in view, they sent, in December, 1903, a power of attorney to Mr. Rosenblatt, an attorney-at-law practising at Vryburg, constituting him, with power of substitution, their agent to sell the said properties, or any of them, for such price or prices, and upon such terms and conditions, and generally in such manner as he should think fit, and authorising him to do all acts necessary for such purposes as fully as his principals, if present, could themselves do. This power was sent in a letter, which, to a certain extent, and for his private instruction, modified these ample powers; but in the view I take of the facts of the case, I do not think it necessary to enter upon the nature or extent of such limitations. It appears that Rosenblatt passed over the active control and management of this matter to his partner, Mr. De Beer, that the latter made some attempts to dispose of the land, but unsuccessfully, and that eventually in the course of 1904 the Government attached the properties to found jurisdiction, sued for their quitrents, obtained judgment, and sold two of the farms at prices which covered their claim, and left a surplus in their hands for the benefit of the defendants. These proceedings were concluded in

March, 1905; and at about that date Mr. Wessels, who is an attorney-at-law, also practising at Vryburg, and Deputy Sheriff of that district, wrote to the defendants, making them an offer on behalf of a certain principal for one of these farms, and making suggestions as to the disposal of others through his firm. Mr. Wessels says that he was entirely ignorant of the fact that Mr. Rosenblatt held a power to deal with them, and that he wrote to the defendants at the address which he had ascertained to be theirs, in consequence of the services of the various legal processes in the proceedings which had passed through his hands in his capacity as sheriff. The plaintiffs were at about that time desirous of buying some of the properties, and approached De Beer in the matter, who, however, thought, when first approached, that the defendants' letter in 1903 debarred him from selling the farms at the prices then procurable by him, and he accordingly wrote for instructions. This letter went by the same mail as Wessels's letter, making his offer, and the defendants on receiving the two letters decided to accept Wessels's offer, and telegraphed to him on May 3 that they had done so, but they sent no telegraphic communication to Rosenblatt, to whom they wrote on May 6, acquainting him of the fact that they had sold their farm "Southey" through Wessels, and that they had authorised him to sell other of the properties at prices suggested by him. Before this letter had reached Rosenblatt, and about May 15, Wessels offered one of the defendant's farms to the plaintiffs, and then went to De Beer and told him that they were being approached by Wessels. This caused De Beer to examine more carefully than he had previously done the defendant's letter of December, 1903, and finding then that he had misread his private instructions, and that in his opinion he could carry out the wishes of the defendants by concluding a sale with the plaintiffs, he sent for Van der Hoff, one of the plaintiffs, and informed him that he was ready to conclude a contract of sale with him for such of the properties as he might require. Van der Hoff, in view of what had taken place between himself and Wessels, then inquired whether De Beer had power to dispose of the land, and De Beer produced and exhibited to him the power of attorney of December, 1903. This satisfied Van der Hoff, who thereupon purchased from him the farm "Southey" for £400, the one-half of "Tlaping," owned by the defendants, for £200, and their one-half of "Vyflingspan," for £300, the terms being cash against transfer. Of these properties, Southey had been previously sold by the defendants through Wessels, and he had also, acting on his instructions received by telegram, disposed of the half of Tlaping before

May 15. As soon as he had concluded the sales to the plaintiffs, De Beer telegraphed to the defendants, who then by telegraph repudiated his authority, and on May 17 they revoked the power of December 18, 1903, in favour of Rosenblatt.

Now, I am in this action not concerned with questions that may arise between the defendants and Rosenblatt, and have only to deal with the matter as it rests between the plaintiffs and the defendants. I have carefully considered the evidence to ascertain whether the plaintiffs were in any way aware of any limitations to Rosenblatt's powers, or whether they were put upon inquiry as to whether the ostensible powers with which he was clothed had been curtailed. The only argument that has been used against the plaintiffs on this point is that they were aware that De Beer had in April written for special instructions and that such instructions had not been received; but then the effect of that is nullified by De Beer's statement to Van der Hoff on 15th May when he sent for him and explained that the writing for instructions had been done under a misapprehension of his position which no longer existed, and that he was empowered to act in terms of the ample powers which he exhibited. I find that there was no knowledge on the part of the plaintiffs of any limitations to such full powers, and the legal consequence is that the defendants must be held bound by the contract of their agent. It should be observed that Rosenblatt himself was not in Vryburg on 15th May, or at all events not during the business hours of the day; but he was told of the sale to plaintiffs on the next day and entirely approved of what had been done; and moreover it appears to me, in view of the power of substitution contained in the power of attorney and of the manner in which, in consequence thereof, Rosenblatt had actually substituted De Beer for himself in the management of this business, that the act of De Beer must be taken to be the act of Rosenblatt and consequently of the defendants. The defendants are still the registered owners of all the properties, and it may be possible for them to give transfer of them all to the plaintiffs, but seeing that two of the farms have been sold twice over there will as to them be an alternative order. The judgment of the Court is that the defendants do give transfer to the plaintiffs of their one-half share of the farm Vyflingspan upon payment of the sum of £300; that they do give transfer of the farm Southey upon payment of the sum of £400, or in the alternative that they pay £100 as damages for breach of their contract of sale of the said farm; that they do give transfer of their half-share of Tlaping upon

payment of the sum of £200, or in the alternative, that they pay £50 as damages for their breach of contract in respect of the sale of the said farm; and that the defendants do pay the costs of suit.

[Plaintiffs' Attorneys: Fairbridge, Arderne and Lawton; Defendant's Attorneys: Not on record.]

SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

HEYDENRYCH V. BENNETT. } 1905.
 } Aug. 30th.

Mr. Burton who appeared for the plaintiff asked for a judgment in terms of a consent paper put in.

Judgment as prayed was granted.

NICHOLLAS AND CO. V. } 1905.
WHITE, RYAN AND CO. } Aug. 30th.
 } Sept. 30th.

Promissory note—Surety—Novation.

This was an action in which George Drossiades, Nicholas Coutelis and Leonidas Coutelis, trading as Nichollas and Co., sued Edwin George White and Pierce Ryan, trading as White, Ryan and Co., to recover possession of a promissory note for £500 given by plaintiffs, and for judgment for the sum of £9 17s. 6d. against the defendants, as refund for interest paid by plaintiffs in advance.

The plaintiffs' declaration was as follows:

1. The plaintiffs are George Drossiades, Nicholas Coutelis, and Leonidas Coutelis, trading in co-partnership, under the style and title of Nichollas and Co., merchants, of Grand Parade Buildings, Cape Town. The defendants are Edwin George White and Pierce Ryan, trading as White, Ryan and Co., of Burg-street, Cape Town, merchants.

2. An agreement bearing date the 1st day of August, 1902, was entered into between the plaintiffs and one Panos Vafidis (at that time a partner in the firm of Nichollas and Co.) of the one part and the defendants of the other.

3. By agreement bearing date the 30th day of April, 1903, the said Vafidis retired from the firm of Nichollas and Co., and for the consideration

therein appearing sold to his co-partners (the plaintiff) his share and interest in the said hotel. Notice of the dissolution of the said partnership was duly published in the "Government Gazette" of the 30th day of June, 1905.

4. In or about April, 1905, plaintiffs had reduced their indebtedness to the defendants in respect of the advance of £1,000 sterling, made in terms of agreement "A," to the sum of £500 sterling, for which amount on the 1st day of April, 1905, plaintiffs gave defendants a promissory note payable on the 31st day of July, 1905, and plaintiffs further paid to defendants the sum of £13 9s. 8d. sterling, as interest, in advance, for 4 months, at the rate of 8 per cent. per annum.

5. In or about April, 1905, plaintiffs entered into negotiations with one Dinah Myers for the sale of the Britannia Hotel, and by a verbal agreement made in the same month between plaintiffs and defendants, defendants consented to the sale of the said hotel by the plaintiffs to the said Dinah Myers, and the transfer to her of the plaintiffs' indebtedness to them and the release of the plaintiffs therefrom on condition that security to the satisfaction of the defendants was provided by the said Dinah Myers. The defendants accepted one Abraham Muller, who signed as surety, and the condition was thereby satisfied.

6. In consequence of the agreement in the last paragraph set out, plaintiffs sold the said hotel to the said Dinah Myers in terms of an agreement bearing date the 4th day of May, 1905, the terms of the said agreement were well-known to the defendants.

7. By agreement bearing date the 5th day of May, 1905, in pursuance of the said agreement in paragraph 5 set out, the defendants agreed to advance to the said Dinah Myers the sum of £500 sterling to enable her to purchase the said hotel. Such bills were actually given by the said Dinah Myers to the defendants, as were arranged in terms of an agreement by the defendants in satisfaction of the sum of £500 due from the plaintiffs to the defendants as in paragraph 4 hereof mentioned.

8. All things have happened, all times elapsed and all conditions been fulfilled to enable the plaintiffs to recover the possession of the said promissory note for £500 sterling, the same having been discharged by the agreement set forth in paragraph 5, but the defendants have refused or neglected, and still refuse or neglect, to return the said promissory note, though frequently requested so to do.

9. Plaintiffs further say that in the premises herein set forth, they became entitled to the refund from the defendants of the interest paid in advance from the 5th day of May till the 31st

day of July, 1905, to wit, the sum of £9 17s. 6d. sterling, but this sum the defendants have refused or neglected, and still refuse or neglect to refund, though often requested so to do.

Wherefore plaintiffs claim: (a) An order for the delivery of the said promissory note for the sum of £500 by the defendants to the plaintiffs. (b) Judgment for the said sum of £9 17s. 6d. against the defendants as and by way of refund for interest paid by plaintiffs in advance. (c) Alternative relief. (d) Costs of suit.

The defendants plea was as follows:

1. Paragraphs 1 and 2 of the declaration are admitted but the defendants say Vafidis is and was a partner.

2. The defendants have no knowledge of paragraph 3, and do not admit it. They had no notice or knowledge of the alleged retirement of Vafidis, and dealt with the firm of Nicholas and Co., as consisting of the plaintiffs' and Vafidis.

3. The defendants admit paragraph 4, save that for the plaintiffs must be read the firm of Nicholas and Co., consisting as aforesaid, and they say that the said promissory note was signed only by George Drossiades, but they admit that it was given for and on behalf of the said firm, and that the said firm had reduced their liability from £1,000 to £500.

4. The defendants admit the negotiations between the same firm and themselves.

5. Save as aforesaid, the defendants refused to release the said firm from its said liability, and thereupon it was agreed between the defendants and the said George Drossiades, acting for and on behalf of the said firm, that the defendants would agree to the sale to the said Dinah Meyers, who should become liable for the said debt of the firm, upon the express condition and provided that the said firm became liable in due form as sureties and co-principal debtors for the due payment of the said sum by the said Dinah Meyers, the defendants deny that there was any novation or release of the said firm or the plaintiffs, and they deny that they agreed to accept any security for the said debt other than that of the said firm, and they say that the said A. Muller became surety for the said Dinah Meyers, not at the instigation of or to the satisfaction of the defendants, but at the instigation and for the benefit of the said firm, who were still to remain liable for the said debt. Relying upon the said agreement, the defendants signed the agreement C, and took the promissory notes of the said Dinah Meyers, not in satisfaction of the said debt, but in pursuance of the premises, and they at the time submitted a document of suretyship as aforesaid to the said George Drossiades for signature by the said firm, which was accepted and taken

away by him for the said purpose, and the defendants refused to deliver up meanwhile the said promissory note, signed by the said Drossiades, as aforesaid.

6. Save as aforesaid, the defendants deny the allegations in paragraphs 5, 6, 7, 8 and 9, and they say that they are still ready and willing to deliver up the said promissory note, upon the undertaking of suretyship, as aforesaid, being given, but they say that the plaintiffs refuse to give any such suretyship, and refuse to carry out their said contract and claim to be released from all liability in breach of the terms thereof, and that, therefore, they are not entitled to claim back the said promissory note.

Wherefore the defendants pray that the plaintiffs claim may be dismissed, with costs.

Mr Close (with him Dr. Greer) for the plaintiffs; Sir H. Juta (with him Mr. Gardiner) for the defendants.

Geo. Drossiades, one of the plaintiffs, stated that in 1902 when his firm entered into the agreement with the defendants they were carrying on different kinds of business. Witness himself went to Messrs. White Ryan and Co., and after that he took on the Britannia Hotel section of the business alone for the benefit of the partnership. A number of promissory notes were made from time to time, always being renewed before the date due and gradually reducing the amount. Finally on April 1, 1905, the amount stood at £500, and witness signed a renewal note that day. On April 1 he paid a cheque for £63 11s. 7d. That represented the last payment of £50 in the reduction of the promissory notes, and £13 11s. 7d. interest on the debt, which he always paid in advance. Witness soon afterwards was anxious to go to England, but his partners did not want to carry on the Britannia Hotel. Witness tried to arrange for someone taking over the business. Witness went and saw Mr. Mann, of Messrs. White, Ryan and Co. Witness told him that he wanted to sell the business, and to see if White, Ryan and Co. would consent to the transfer of witness's liability to the purchaser. The following day Mr. Mann told witness that Mr. Ryan had consented to the suggested arrangement, provided witness got a good purchaser. Subsequently, about the beginning or middle of April of this year, witness saw Mr. Ryan, who said that he was willing to accept Mrs. Dinah Myers as the purchaser of the hotel business, provided a good surety could be obtained. Witness then pointed to Muller, who was present, suggesting him as surety. Mr. Ryan said, "All right," and added that he would have the agreement drawn up. Witness did not agree or offer, or ever heard it suggested that he should remain as a surety for Mrs.

Myers, who agreed to take over witness's liability to White, Ryan and Co. Mrs. Myers signed the agreement produced on May 15. Nothing was said then about witness standing security for Mrs. Myers. On May 22 or 23 witness got a message from White, Ryan and Co. He went to the firm's offices and saw Mr. White, who complained that Muller had gone bankrupt. Mr. White said that witness should give him £100 under clause 4 of the agreement. Witness declined to pay this money, as he had lost by the transaction. After some conversation, Mr. White turned to Mr. Mann, the manager, and said, "You must draw up a proper legal agreement and make Drossiades sign." Two days later, witness was summoned to White, Ryan and Co.'s office. Mr. Mann, the manager, presented him with a draft agreement, bringing in witness as a surety for Mrs. Muller. Mann urged that witness was under a moral obligation to sign the paper, as he had introduced an insolvent man, Muller, to the firm. Witness did not sign the paper.

Cross-examined by Sir H. Juta: He did not promise to White, Ryan and Co. that his partners would sign the suretyship. On the 6th June he received a letter to the effect that as he had not returned the security they would hold him to the clauses thereof. Witness did not know that Muller's estate was assigned.

Re-examined by Mr. Close: It was not until he saw his attorneys that he attached any importance to the promissory note. An advance was always made on the goodwill; not to the individual. It was in the agreement if Dinah Myers did not get the transfer the business was to fall through, and White, Ryan and Co. must have known of this.

Nicholas Contelis, partner in the plaintiff firm, said the matter of the Britannia Hotel had been managed by the last witness. It was only on the letter of the 6th June that he knew that White, Ryan and Co. wanted the firm to go as security.

Mr. Close closed his case.

Pierce Ryan stated he had transactions with the plaintiff firm for years. In April last Drossiades came to see him with a view to a transfer of the liability to a new purchaser. At the time witness thought that Muller, whom Drossiades brought in, was the purchaser. It was not true that he accepted Muller as surety. The property did not belong to witness; it was merely a trading house to the firm. Witness was very explicit in explaining to Drossiades that his firm would have to remain as surety.

Cross-examined by Mr. Close: Mr. Muller was a perfect stranger to him; he made no inquiries whatsoever about him.

Mrs. Myers's name might have been mentioned that same day. Witness understood that Mr. Muller was the principal party.

Alfred Mann, confidential clerk to the defendant firm, gave confirmatory evidence as to the arrangement between the parties.

Reginald Simpson, of the firm of Syfret, Godlonton and Low, stated Mr. Mann called on his firm a few days prior to May 10, and, in consequence of what he said, the agreement (produced) was drawn up.

Edwin George White, partner in the defendant firm, stated he was acquainted with the agreements. Witness had been the person who conducted these matters. When the transaction took place between Mr. Ryan and the plaintiffs witness was away from home, but on his return he was acquainted with the facts. Witness first took part in the matter early in May. Drossiades was in the office. Witness tried to speak to him, but he left the office somewhat hurriedly. On his second visit witness spoke a few words to him. After that witness sent for Mr. Drossiades, as witness had heard he was ill, and wanted the agreement signed.

[Hopley, J.: But there was no agreement then.]

Witness: I thought Mr. Mann had had it drawn up. Continuing, witness said that he understood that Drossiades was leaving the country, and wished to put other people in his place, and the defendant firm wished the plaintiff firm to sign as security. The defendant firm wanted them to sign for Dinah Myers.

[Hopley, J.: But she was taking it as a purchaser.]

Witness: But we would not release Drossiades.

Sir H. Juta: You mean they were to remain liable for the due performance of the contract.

Witness: Just so. Continuing, witness said he sent for Drossiades, who saw Mr. Mann. Witness left instructions for him to sign the agreement. He did not do so. Witness sent for him, and told him that he wanted him to pay the £100, and to see that Mrs. Myers paid £50 before she settled anything. Drossiades asked witness to take the promissory notes and give £1,000 for them. Witness declined, as he considered it was a banker's business. Drossiades had three businesses, and he was always making excuses for not giving witness's firm the business. Drossiades said there was no profit in the business. Mr. Mann submitted the deed of suretyship to him, and he took it away. He was wrong if he said Mr. Mann was excited. He brought the deed back, and said his partners would not sign it.

[Hopley, J.: Were they his words?]

Witness: He was speaking to Mr. Mann, and I went away, and Mr. Mann

said, "He's going down to get his partners to sign it." He took it away, and did not return.

It was not the business of the firm to give up a security without knowing what the standing of the other person was. This was not an isolated case.

[Hopley, J.: But Mr. Mann said it was.]

Witness: Mr. Mann was very excited, and made many remarks—

[Hopley, J.: Do you mean to say that Mr. Mann's evidence was incorrect?]

Witness: He was very excited. In the liability book I can show many such instances.

[Hopley, J.: What are they?—Parkes, Freeman, and Hoffman.]

[Hopley, J.: Will it show that in the ledger?]

Witness: I think not; we generally had a separate agreement.

[Hopley, J.: Do you say that Mr. Mann is wrong in his statement, and that in many instances you have kept the old security in the case of taking over a new?]

Witness: I would not think of doing otherwise.

Witness (continuing) denied that he said to Drossiades that he had no business to take them such a transaction as Muller was insolvent. If that had been so, witness would have found it out before the transaction was entered into.

[Hopley, J.: Did you find out after the 5th May anything about Muller's position?]

Witness: We all knew that he had been dabbling in property, and that we would have to be very careful.

Witness further stated that he knew Muller's position before the end of April.

The examination of George Edwin White, one of the partners in the defendant firm, was resumed.

Cross-examined by Mr. Close, witness stated that the question of the payment of £100 profit arose when Drossiades went to the shop for the third time. Mr. Ryan knew nothing about it. Witness, considering the circumstances, felt justified in claiming it. Witness could not say anything about the demand for £613 19s. 10d. Drossiades had always dealt fairly with the defendant firm.

To the Court: Witness was under the impression that Drossiades took the agreement away twice. He took it away on the first occasion, and must have brought it back to Mr. Mann. Witness did not know what he said when he brought it back.

Sir H. Juta closed his case, and counsel were heard in argument on the facts.

Cur. Adv. Vult.

Postea (September 6).

Hopley, J.: The plaintiffs carry on business in Cape Town, and in August,

1902, they borrowed from the defendants, who are merchants in a large way of business, the sum of £1,000, for the purpose of acquiring the goodwill of a certain hotel business in Cape Town, known as the Britannia Hotel. An agreement was at that time entered into whereby the plaintiffs covenanted *inter alia* to purchase certain classes of goods from the defendants, and to give them promissory notes, bearing interest at 8 per cent., for the sum of £1,000, or for such lesser sum as from time to time might be due, according as at the stipulated periods they reduced the amount of the indebtedness, which they contracted to do at each renewal; and they further agreed that, in the event of their wishing to dispose of the said hotel business, they would, before transferring it, pay to the defendants the whole of their indebtedness. Amicable business relations thereafter subsisted between the parties, and by April, 1905, the debt had been, by successive payments on account, reduced to £500, for which amount the plaintiffs, on 1st April gave a promissory note, payable on 1st August, 1905, and they further paid a sum of £13 9s. 8d., being the interest in advance upon the said sum of £500 from the period of the currency of the note. The plaintiffs had throughout managed this hotel business, through one of their partners, Mr. Drossiades, and in the defendants' books the goods supplied for such business, and the general account of such business, were entered to the name of Drossiades, who seems to have made the promissory note, and signed the cheques which from time to time passed in connection with the said business between himself and the defendants. In April, 1905, Drossiades was anxious to get rid of the hotel, in order that he might be free to make a trip to Turkey, and he entered into negotiations with one Muller, with a view to selling the goodwill and other rights in the hotel to which he was entitled. Muller professed to be acting for his mother-in-law, Mrs. Dinah Myers, and though he was willing to buy out the plaintiffs for £4,000, he was not able to pay the whole of that sum in cash, so that, to carry the transaction through, it became necessary to get the defendants to consent to the substitution of the new tenants for the plaintiffs in the indebtedness of £500, such portion of the purchase price to be satisfied in that manner in case the defendants should agree. At this time Mr. White, who manages such matters for the defendants, happened to be on a visit to Natal, and a meeting was arranged between Muller and Drossiades and Mr. Ryan, with the object of obtaining the defendant firm's consent to the proposed arrangement. Such meeting took place on 8th April, and Drossiades deposes that it was then

arranged that Mrs. Myers should step into his place, that she should be accepted as the debtor for the £500 still owing, and that nothing was said as to any continuing liability of himself or of his firm, nor about any undertaking by them to remain liable as sureties for the incoming tenant. He contends therefore that there was a complete novation of the contract, and that on that date the plaintiff firm was completely freed from any further liability or claim; and it is upon such contention that the plaintiffs claim the relief sought for by them in the present action. Before stating the defendants' version of the new agreement, it is convenient here to set forth the subsequent course of events. Mr. White returned from Natal towards the end of April, and was informed of what had taken place by Mr. Ryan, and Mr. Mann, an employee of the defendants in charge of the financial branch of their business, who had arranged and been present at the interview of 8th April, and thereafter Mr. Ryan took no further share or part in the matter, except that what happened was reported to him. On May 4 the plaintiffs sold their rights in the hotel to Mrs. Myers for £4,000, of which sum £500 was satisfied by her taking over the liability to the defendants—the wording of the agreement on that point being in the following terms: "Purchaser assumes present liability of vendor to Messrs. White, Ryan and Co., Cape Town, and indemnifies them in respect thereof in the sum of £500." Another clause in the agreement stipulates that the contract should be null and void, and as if not entered into if the licensing authorities or the police should refuse to transfer the licences of the said hotel to the purchaser. It is clear, therefore, that this agreement could not be considered as finally settled until the authorities had consented to the transfer of the licence, which consent as a matter of fact was in due course given on May 23. Apparently in anticipation that no difficulty would be raised, Mrs. Myers and her son-in-law were taken by Drossiades to defendants' office on May 5, and an agreement was there entered into and signed by her, acknowledging an advance of £500 by defendants to her to enable her to purchase the licence, goodwill, etc., of the Britannia Hotel, undertaking to purchase certain supplies entirely from defendants while she remained owner of the said business, and undertaking to sign promissory notes for the amount of £500, and to pay interest at 8 per cent. thereon, the notes to be renewed at due dates, but to be reduced at each renewal by £50 at least. She did on that date sign a promissory note in favour of the defendants payable on September 1, 1905, for £513 19s. 10d., being for the said sum of £500, taken over from Dros-

siades with interest to September 1 added. This note was signed by both Mrs. Myers and Muller, and the defendants, after getting Muller also to endorse it as surety and co-principal debtor, negotiated it in the ordinary way of business with their bank. They, moreover, at that date, transferred the Britannia Hotel account in their ledger from Drossiades to Dinah Myers, the former being credited with the £500, proceeding from the promissory note of the latter. A line was then drawn below his account, which was apparently closed, and a credit was started in the name of Dinah Myers, for the Britannia Hotel, on the same folio of the ledger. Drossiades's note for £500 was not, however, retired, nor was any return of interest made to him, though the defendants now admit that they could not claim to receive double interest on their money, and that they should have returned, and must account to the plaintiffs for a *pro rata* share of the £13 9s. 8d. for the period between May 5 and August 1. In the defendants' journal, moreover, appears an entry in the month of June in reference to this account in the handwriting of one of their bookkeepers to the effect that the liability had been transferred from Drossiades to Myers. Now, if the matter rested upon the documents, and the books alone, the facts, as above stated, would certainly seem to point to a novation completely exonerating the plaintiffs from all further liability in the matter: but the defendants say that all that was a mere matter of book-keeping, so entered for convenience sake, and that there was co-existing with their written agreement with Mrs. Myers and with this state of the entries in their books, an express verbal undertaking by Drossiades that the defendants were still to retain the security of his firm for the due fulfilment of her obligations by Dinah Myers. It is clear that neither Mann nor Mr. Ryan knew anything of the financial standing of either Muller or Mrs. Myers, and Mr. Ryan is very positive that he told Drossiades at the interview on 8th April that he had, of course, no objection to his selling to Muller or Myers, but that his firm was to have the security of the plaintiffs as theretofore, until the liability was extinguished by repayment in full of their loan. He states that Drossiades agreed to this, and that all the subsequent transactions were carried through on the basis of such understanding. Mann, though he was not a clear witness, was equally emphatic on this point; and I believe that both he and Mr. Ryan are absolutely honest in their evidence as to that being the way in which they understood the arrangement. Mr. Ryan is corroborated by a pencil memorandum copied by him into the "Supported Accounts Book," on the folio devoted to Drossiades and the Britannia Hotel,

from a note taken on a loose piece of paper, since destroyed, of the propositions made to him by Muller and Drossiades at the interview of 8th April. The genuineness of this entry is, to my mind, beyond doubt, and it is in the following terms: "Mr. Muller pays £4,000 for goodwill; own cash, £1,700; Bosman-Powis, £500; W.R. and Co., £500; Drossiades, £1,500; pay Drossiades £15 per month off remaining capital; Muller undertakes to carry out the agreement of Drossiades—the latter to be surety for fulfilment of same.—April 8, 1905, as per interview of Drossiades and Muller." It is true that the above terms of payment were not eventually literally adhered to; but that was a matter between Muller and Drossiades, and there was ample time for a modification of them between 8th April and 4th May; but Mr. Ryan can hardly have made any mistake as to the undertaking to remain surety on the part of Drossiades. Mr. White, too, to whom the matter was reported on his return, swears that it never entered his mind that the plaintiffs, whose financial position was satisfactory, should be released, and that their obligations should be replaced by the unsecured liability of Mrs. Myers and Mr. Muller, of whose position nothing was known, save that Muller was somewhat involved in speculations in immovable property and rather "shaky" in consequence; and Mr. White also is a witness on whose veracity I feel satisfied that I can safely rely. As to him, as well as Messrs. Ryan and Mann, I think the utmost that can with effect be said, is that they misunderstood what Drossiades considered to be the contract; but as to what they themselves understood, I do not think that they could have been under any misapprehension. It is clear that after 5th May neither the plaintiffs nor the defendants took any immediate steps, the one side to get back their promissory note and *pro rata* interest, or the other to get a deed of security signed; and each explains that the delay was partly due to their trust in the other; but the defendants also say that they were waiting to see what the action of the Licensing Board would be; and it is clear that shortly after the transfer to Mrs. Myers was sanctioned, the defendants sent for Mr. Drossiades, and asked him to sign a deed of suretyship, and to get his partners to sign it also. It has been suggested that this step was taken by them because of knowledge as to Muller's position, which may have reached them about that date; but there is no evidence of anything of the kind, and I accept Mr. White's statement that he practically knew Muller's position immediately after his return from Natal, or about April 25. When the

deed of suretyship was drawn and presented to Drosiades (and this was about May 26), he took it away with him, and White and Mann say that he took it to procure his partners' signatures, and they also say that he returned in a few days, saying that his partners refused to sign any deed of the kind. Drosiades denies this, and says that he took the deed away accidentally, and inadvertently being at the time agitated by a somewhat stormy scene with White, who insisted that he was morally bound to sign such document, and he swears that he never presented the deed to his partners, who corroborate him on this point. Here it appears to me that the balance of probabilities is against Drosiades. He does not seem to be a man who would lose his head, or be flustered, and I am inclined to believe that when he took the deed he intended to present it to his partners for signature. What happened between them it is, of course, difficult to conjecture, and it may even be that Drosiades had promised more than he was authorised to, and that he shirked the task of laying the document before his partners; but the probabilities are rather that, on consideration of what had happened, and of what they knew to be the state of the books and documents, they considered that they would no longer be held to be in any way bound, and that they might safely refuse to sign such a document. Whatever reasons may have actuated him, it is clear that Drosiades did refuse to sign the deed, and about a week later defendants wrote telling him that they would hold his firm to their original agreement as to their immediate indebtedness for their unpaid liability. The defendants replied on June 9, though their attorney setting up the novation, repudiating liability to become sureties and demanding (then for the first time) the return of their promissory note for £500, and the *pro rata* return of the interest. It will thus be seen that the direct contradiction between Drosiades and the defendants is on the point whether or no there was any verbal undertaking by him that in spite of the introduction of Dinah Myers, and the sale of the hotel to her, he and his firm could remain answerable as sureties to the plaintiffs. For the uncertainty and possibility of doubt and contradiction which exists, both parties are blameable. They are all business men, and whichever side is right it would have been so simple to have placed the matter beyond all doubt by a business-like record of the agreement. As matters stand, it is possible that the parties may not have understood one another, on April 8, upon this point, and in that case there would never have been a consensus to a novation; or it may be that though the parties then quite understood each other, one or other is now endeavouring to obtain an advantage for which he did not

then bargain. The plaintiffs in this action seek to get their promissory note returned in such a manner as would amount to a declaration by the Court that there was a complete novation, and that they are freed from all further liability to the defendants, whatever the future conduct or default of Mrs. Myers or Muller may be. I cannot say that their evidence convinces me that such was the real contract between them, and I do not feel safe in giving a final judgment which would have that effect, or be capable of bearing that interpretation. On the other hand, the defendants resist the claim by a plea that, before handing over the note, they are entitled to obtain from the plaintiffs an undertaking of suretyship for the due fulfilment of her obligations by Mrs. Myers; but they make no claim in reconvention asking for an order to that effect upon the plaintiffs; and it is possible that had they done so, and had the burden of proof been upon them, they might have failed in convincing the Court that they were entitled, in the face of the state of their books and of the documentary evidence, to any such order. As the burden of proof in the present case rests upon the plaintiffs, and as they have failed to satisfy me that there was a complete novation entirely freeing them from all obligations, upon which fact their whole claim rests, there will be abolution from the instance on the claim in convention, in so far as a return of the note is claimed. The effect of this will be that the defendants will not be ordered to give up the plaintiffs' promissory note, which is now overdue; but the Court is not called upon to pronounce, and will not declare what remedies they still have upon the note, or how such remedies are to be exercised. With regard to the plaintiffs' claim for £9 17s. 6d., which is admitted by the defendants to be valid, there will be judgment in favour of the plaintiffs. As both parties seem to me to be equally responsible for the *imbroglio* which exists, and for the state of uncertainty in which their respective rights are involved, there will be no order as to costs. The order which the Court makes is that there be judgment for the plaintiffs for £9 17s. 6d., and no order as to costs.

[Plaintiff's Attorney: Stanley-Jones; Defendant's Attorneys: Syfret, Godlonton and Low.]

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the
Hon. Sir JOHN BUCHANAN.]

REX V. BOYD. { 1905.
{ Aug. 31st.

Stock theft—Act 7 of 1905—
Hard labour — Magistrate's
jurisdiction.

*In cases of stock theft where a
fine has been imposed with the
alternative of imprisonment,
the Magistrate may not sentence
to such term of imprisonment
with hard labour.*

Buchanan, A. C. J., said that the case of Frederick Boyd, of Calvinia, and a number of other cases, had come before him in Chambers, and these cases raised the question whether the Magistrate, in default of a fine being paid, in cases of theft of stock, could, under the Act of 1905, with the alternative imprisonment, add the imposition of hard labour. In the Eastern Districts the sentences of Magistrates who had imposed hard labour in default of payment of the fine, had been confirmed, probably without attention being called to the wording of the Act, and His Lordship believed several cases had also been passed here. The attention of the Attorney-General had been called to the wording of the Act, and he was not prepared to support the imposition of hard labour in cases of imprisonment in default of payment of the fine. There was nothing in the section of the Act as to hard labour, and in the cases which had come before him the sentences would be confirmed, but the portion referring to hard labour must be omitted.

ADMISSIONS.

Mr. J. E. R. de Villiers applied for the admission of Benjamin Godlieb Heydenrich as an attorney, notary, and conveyancer.

Granted.

Oaths administered.

Mr. J. E. R. de Villiers applied for the admission of Mortimer Jooste as an attorney. He asked that permission be granted to take the oaths before the Commissioner of Oaths in Johannesburg.

The Acting Chief Justice said that it had been pointed out before, that it was

only reasonable that, when persons wished to be admitted, they should take the oaths either in Cape Town or before some officer of the Supreme Court. He would suggest that the applicant might take the oaths at Kimberley or at the Eastern Districts Court.

Mr. De Villiers said that he thought the Eastern Districts Court would suit the applicant.

Granted, applicant to take the oaths before the Eastern Districts Court.

Mr. H. S. van Zyl applied for the admission of Archibald Henderson as a notary. He asked that the applicant be allowed to take the oaths before the Resident Magistrate of Griquatown.

Granted, the applicant to take the oath before the Resident Magistrate of Griquatown.

PROVISIONAL ROLL.

ESTATE OF HUTT V. PAYNE. { 1905.
{ Aug. 31st.

Dr. Greer applied for provisional sentence on an I.O.U. The matter had previously been before the Court, when leave was granted to sue by edictal citation; and publication had been duly made, as ordered.

Provisional sentence, as prayed.

BRUSSEL AND CO. V. SNYMAN.

Dr. Greer asked that the provisional order of sequestration granted by the Court in October be discharged. (14 C.T.R., 820.)

Order granted.

BARTHOLOMEW V. DELMORE.

Mr. P. Jones asked for provisional sentence on a mortgage bond for £100, with interest at 6 per cent., and that the property specially hypothecated be declared executable.

Order granted.

GARLAND V. DELMORE.

Mr. Gutsche produced an affidavit to show that the respondent had been duly summoned to appear. He now asked for provisional sentence for £1,100, with interest from December, 1902, at 6 per cent., less £158 15s., paid on account, due by reason of non-payment of interest, and that the property specially hypothecated be declared executable.

Order granted.

GRIQUALAND WEST LOAN, TRUST AND AGENCY CO. V. FORSYTH.

Mr. Benjamin applied for provisional sentence on two mortgage bonds for

£750 and £500, with interest at 10 per cent. from April 1, 1905, due by reason of non-payment of instalments, and that the property specially hypothecated be declared executable.

Order granted.

TREGIDGA V. SPENGLER.

Mr. Payne applied for provisional sentence on two mortgage bonds for £1,800 and £250, with interest from July 21, 1904, and September 18, 1903, respectively due by reason of non-payment of interest; and that the property specially hypothecated be declared executable.

Order granted.

FAURE V. GIBBONS.

Mr. Benjamin applied for provisional sentence on a mortgage bond for £400, with interest at 6 per cent., less £10 paid on account, due by reason of non-payment of interest; and that the property specially hypothecated be declared executable.

Order granted.

BERRANGE V. SHAW.

Mr. D. Buchanan applied for the final adjudication of the respondent's estate as insolvent.

Order granted.

KLEIN V. STEIN.

Mr. Lewis applied for the final adjudication of the respondent's estate as insolvent.

Order granted.

TURKINGTON V. HUMPHREYS.

Mr. Long applied for provisional sentence on a promissory note for £25, with interest from June 1, 1905, at 10 per cent.

Order granted.

INGLESBY V. JACKMAN.

Mr. D. Buchanan applied for provisional sentence on a mortgage bond for £1,100, with interest from January 1, 1905, due by reason of non-payment of interest, and that the property specially hypothecated be declared executable.

Order granted.

HAMMERSCHLAG V. ESTERHUISEN.

Mr. De Waal applied for provisional sentence on two notarial bonds, one for

£133 18s., dated August 2, 1904, and bearing interest at 6 per cent. from August 1, and one for £100, dated February 25, 1906, and bearing interest at 8 per cent. from February 1. Payment became due by reason of the bonds having been called in. He also asked for judgment under Rule 329d there appeared to be no default with regard to the second application. Provisional sentence would therefore be for £58 16s. 4d., for goods sold and delivered, and interest *a tempore morae*.

Buchanan, A. C. J., said that there appeared to be no default with regard to the second application. Provisional sentence would therefore be given on the two notarial bonds.

ROWLAND HILL AND CO. V. SCHAPERA.

Mr. Payne applied for provisional sentence on a promissory note for £100, less £10 paid on account, and judgment under Rule 329d for interest on the sum of £90, balance due, and costs.

Order granted.

BENDHEIM V. GOLDSTEIN.

Application was made for the final adjudication of the respondent's estate as insolvent. The provisional order of sequestration was granted by the Court on August 8.

Order granted.

FICK V. TANNER.

Mr. Roux moved for the final adjudication of the respondent's estate as insolvent. Mr. Benjamin opposed the application.

The plaintiff's affidavit set forth that a judgment had been obtained against the respondent for £700. The plaintiff sold certain land to the respondent, on condition that £100 be paid down, and that transfer should be passed at the end of four months, on payment of the balance of the purchase price (£700). When the four months expired plaintiff owing to certain legal difficulties, was not able to pass transfer. Since then the respondent had disposed of certain plots of the ground.

Mr. Benjamin read the affidavit of the Rev. W. C. Collins, which stated that he was present when payment of the balance of the purchase money was tendered. It was entirely owing to the reports spread by Fick that the sale of plots of the ground were interfered with. The affidavit of Mr. McLeod stated that the present state of the respondent's affairs was due to the action of the plaintiff. Counsel stated that the affidavits showed that Fick had told the persons who had purchased lots

Granted, delivery to be made within 14 days.

GENERAL MOTIONS.

Ex parte GREEFF AND } 1905.
BOUWER. } Aug. 31st.

Mr. Searle moved to make absolute the rule *nisi*, under the Derelict Lands Act. Mr. Benjamin opposed the application.

Counsel for the petitioners explained that this application was made under the Derelict Lands Act, and that day was the return day of the rule *nisi*. This matter had been before the Court before, when it was suggested that the present petitioners should divide the erf in question between them, and then a rule *nisi* was made by the Court to have the erf registered in both their names. Now another party stepped in and opposed the application.

Mr. Benjamin asked for a postponement, in order to allow the opposing party to file an affidavit.

Buchanan, A. C. J., directed that the matter be postponed until October 16, affidavits to be filed by the opposing party within three weeks.

Ex parte VAN NIEKERK.

Mr. Le Roux moved to make absolute a rule *nisi*, under the Derelict Lands Act.

Granted.

Ex parte KOEKEMOER.

Mr. Gutsche moved to make absolute the rule *nisi*, under the Derelict Lands Act.

Granted.

Ex parte CARELSE.

Mr. Van Zyl moved for leave to sell certain property in terms of the petition. There were no minors in the estate concerned, and all the majors had given their consent to the sale.

Granted.

Ex parte SAMSON.

Mr. Swift moved for an order authorising the Registrar of Deeds to pass transfer of certain property.

Granted.

Ex parte ESTATE OF BOTHA.

Mr. Benjamin moved for an interdict restraining the Registrar of Deeds from passing transfer of certain property, pending an action to be instituted. Mr. Searle opposed the application.

Mr. Benjamin read affidavits in support of the application.

Mr. Searle read answering affidavits, and pointed out that the estate would not have been insolvent but for the low

value put on the property by Mrs. Botha.

Buchanan, A. C. J., said he would like to have some explanation of the trustee's extraordinary conduct in disposing of the property the day after the meeting of creditors, without advertising it in the "Gazette."

The matter was ordered to stand over for trial at the Circuit Court, the notice to stand as summons, costs to be left to the discretion of the Circuit Court.

Ex parte VUSO.

Mr. Lewis moved for an order as to service on the defendant, whom the applicant was suing for divorce.

Buchanan, A. C. J., said service of notice at the defendant's last-named place of residence—namely, the defendant's father's house—would be sufficient.

INCORPORATED LAW SOCIETY V. O'BRIEN.

Mr. Benjamin moved to make absolute an order calling on the respondent to show cause why his name should not be removed from the roll of attorneys, on the ground of his having misappropriated certain moneys handed to him for the purpose of conducting certain cases.

Order as prayed, with costs.

Ex parte LADAM.

Mr. M. Bisset moved to make absolute a rule *nisi* calling on all persons concerned to show cause why certain property should not be transferred to the applicant.

Granted.

Ex parte KILILI.

Mr. Roux moved for an order authorising the Registrar of Deeds to transfer certain land to the petitioner.

A rule *nisi* was granted, calling on all concerned to show cause why transfer should not be passed, to be published once in "Imvo" and the "Kokstad Advertiser."

CAPE MARINE SUBURBS V. RECREATION SYNDICATE, LTD.

Mr. Roux moved for an order for the winding up of the Recreation Syndicate, and for the appointment of an official liquidator.

A rule *nisi* was granted, returnable on the 12th September, calling on all concerned to show cause why the prayer should not be granted, one publication in the "Cape Times."

Ex parte ALLEN AND CO.

Dr. Rainsford moved for an order authorizing the enregistrement of certain letters patent.

Order as prayed, without prejudice to any rights to set aside the registration.

CAROLESEN V. PAULSE.

Mr. P. S. T. Jones moved to have an award of the arbitrator made a rule of Court, with costs against the defendant.

Award made a rule of Court, with costs, the respondent being ordered to pay the costs of suit.

Ex parte VAN WYE.

Mr. Bailey moved for leave to mortgage certain property in the estate of the petitioner's late father, in order to pay the debts due by the estate.

Granted.

GOURLAY V. BAUMGARTEN AND GATES.

Dr. Rainsford moved for an order calling on the respondents to show cause why a certain partnership should not be liquidated, and for the appointment of a receiver in the defendants' estate, the order to act as an interdict to restrain the respondents from alienating any of the assets of the partnership.

A rule nisi was granted calling on all concerned to show cause why the partnership should not be placed in liquidation, the order to act as an interim interdict, and further cause to be shown whereby Mr. Close should not be appointed as receiver, personal service if possible, failing which one publication in the "Daily Telegraph," London, and one in the "Umtata Herald."

On the application of Dr. Rainsford, the order was made returnable on November 2.

Ex parte VENTER.

Mr. Roux moved for an order, authorizing the payment of certain moneys. Counsel explained that there were eight minor heirs in the estate, three of whom wanted certain sums, held for them under a certain bond, paid over to them, in order that they might buy sheep to stock their farm. One of the minors was dead. The report of the Master of the Supreme Court was most favourable. It recommended that the three minors in question be allowed to purchase sheep, as desired; that the money due to the deceased minor under the bond be paid into the Guardian Fund; that £100 each be paid to the four remaining children; and that the original bond, fixing £100

each on the eight children be cancelled. The petitioner now asked that £100 be paid into the Guardian Fund, in respect of the deceased child's share; that £100 each be paid to four of the minors; that to himself and the remaining two £100 each be paid, in order that they might buy stock; and that the original bond be cancelled.

Order granted, in terms of the Master's report.

Ex parte VAN RENSBURG.

Mr. Bailey moved for the confirmation of the sale of certain property, sold in terms of the will of the late Johannes Frederick van Rensburg. The petitioner and another were appointed executors testamentary in the deceased's estate. Counsel read affidavits to show that the property was sold at a fair price, and that the sale was *bona fide*.

The Acting Chief Justice: The Court will not confirm the sale, but will authorize the Registrar of Deeds to pass transfer.

Ex parte HAZELL.

Mr. P. Jones moved for an order releasing the petitioner from his curatorship of one Edward Everton, on the ground that Everton was restored to his sound mind again. The applicant had rendered a full account of his administration of the estate. On November 6 Everton was placed under the curatorship of the petitioner; but, in August of the present year, he was certified by Dr. Black, of Valkenberg, as being of sound mind.

Buchanan, A. C. J., asked if Everton had been released from the asylum, because the notice of motion appeared to have been served on him at the institution.

Mr. Jones replied that he understood that the man had been released since the notice was served.

It was ordered that the matter should stand over, pending the production of an affidavit to show that Everton had been released from the asylum.

Ex parte HOLMES.

Mr. Swift applied for a certain award to be made a Rule of Court. Counsel stated that the petitioner and another, named Schumar, had a dispute regarding certain water rights. An umpire was appointed by mutual consent, and he had made the award, which it was now sought to make a Rule of Court.

The matter was allowed to stand over, for the production of an affidavit, showing that the other party, Schumar, offered no objection.

WHITE, RYAN AND CO. V. FLORIDA.

Mr. Lewis applied for an extension of the return day of a rule *nisi* granted by the Court in this matter. When the case was before the Court on a previous occasion, leave was granted to sue the defendant by edictal citation, he having left Cape Town and gone to Ontario, Canada. It was believed, however, that since then Florida had left Ontario and gone to Manila, in the Philippine Islands. An extension of time was, therefore, asked for, and direction as to service.

The return day was extended to February 1, personal service to be effected, if possible, failing which application in one issue of the "Gazette," and in a newspaper circulating in Manila.

Ex parte **KRIGE.**

Mr. De Waal made application for an order, authorising the transfer of certain property.

Order granted.

Ex parte **McKILLOP.**

Mr. J. E. R. de Villiers moved for the confirmation of the sale of certain property. Counsel read the petition of A. K. Wolfe, setting forth that the petitioner had been appointed curator of James Henry McKillop, who had been declared a prodigal. There were at present debts against the estate to the amount of £435. The assets consisted of immovable property, which was sold to meet the liabilities, and petitioner now prayed for an order confirming the sale of the property and the authorisation of transfer.

Granted.

ROSEN V. EARLS AND SCHMITZ.

This was an application for an order directing the restoration of certain property. Mr. P. Jones appeared for the plaintiff, and Mr. Le Roux for the second respondent, Schmitz.

Mr. Jones read the affidavit of Morris Rosen, a furniture dealer, which set forth that certain property was sold by him, on the hire purchase system, to Earls, and delivered at the Mount Pleasant Hotel. The purchase price was £49. Up to March 10, Earls paid £5 in respect of the furniture. On March 10 Earls left the hotel, and handed it over, with furniture and fittings, to Schmitz. The amount now owing in respect of the furniture was £29 9s. 2d. Counsel stated that the matter had come before the Court on a previous occasion, when Schmitz appeared, and put in an agreement which had been entered into between

him and Earls. On that occasion Mr. Justice Maasdorp granted an order, restraining Schmitz from parting with the furniture, and suggested that the parties might try to come to some arrangement. The matter now came before the Court again.

The Court ordered that the respondent Schmitz, unless he pay the sum of £20 on or before the 4th September, should deliver up to the applicant all the furniture, the property of the applicant, and pay the costs of this action, and costs of the previous motion granted against both respondents.

MORRISON V. MUNNICK.

Mr. P. S. T. Jones moved for leave to attach certain property, and sue the defendant by edictal citation for £70 due to the plaintiff.

Granted, personal service, if possible, the edict returnable on the 30th September, with leave to serve the *intendit* with notice of trial.

SUPREME COURT**FIRST DIVISION.**

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

TRIAL CAUSE.

WALKER V. BARSDORF. { 1905.
Sept. 1st.

This was an action brought by John Lumsden Walker, an attorney, formerly practising at Claremont, and now at Cape Town, against Edward Barsdorf, a broker and general dealer, of Cape Town, for the recovery of £50, money lent, and £6 0s. 9d., for professional services.

The plaintiff's declaration set forth that he was entitled to £50, money advanced to the defendant, and £6 0s. 9d., in respect of professional services. The defendant admitted that £50 was advanced to him, but stated that the plaintiff purchased from him in July, 1903, two plots of ground on the Heathfield Estate, Diep River, for £230. The conditions of the sale provided that in the event of the plaintiff failing to pay any of the instalments, which should be at least £1 per month per plot, the pro-

party should be put up for sale, the plaintiff being held liable for all expenses and any loss which might arise in connection with the re-sale. Plaintiff paid £10 on account of the purchase, but failed to pay the other instalments, and, according to the conditions of sale, the property was re-sold by public auction for £92, leaving in all a balance due by the plaintiff of £88. This sum defendant claimed in reconvention. The plaintiff, in his rejoinder, alleged that subsequent to the payment of the £10 on account of the land, the sale was cancelled by mutual consent, and in satisfaction of the £10 paid out, he accepted from the defendant a certain sum. Further, in contravention of the agreement, the property was sold, in the re-sale, privately, and not by public auction. Liability for £5 5s. for goods sold and £1 money advanced was admitted. Defendant admitted the cancellation of the original sale, but denied that it released the plaintiff from his liability for the loss sustained in the re-sale.

After the pleadings had been read, the Acting Chief Justice held that the onus of proof lay with the defendant.

Mr. M. Bisset appeared for the plaintiff, and Dr. Greer for the defendant.

Edward Barsdorf, the defendant in the claim in convention, and the plaintiff in the claim in reconvention, stated that he was the owner of certain lots of ground on the Heathfield Estate, two plots of which he sold through Mr. Marous, an auctioneer, to Mr. Walker. About seven or eight months after the sale, Mr. Walker asked witness if he might re-sell the land for him, as he thought he had paid too high a price for it. Witness asked what price Walker would want, and Walker replied that any sum in reason would do. It was then arranged that Messrs. I. and J. Hermann should sell the plots, with certain others. Walker clearly understood that the re-sale would be at his profit or loss. Messrs. Hermann sold the plots for £92. The sale was a public one, and advertised in the papers. Witness asked Walker several times for the balance of the original purchase price. He saw Mr. Walker daily, and made repeated application for the balance due. About September, 1904, witness asked Walker if he could spare him some money, as he was hard pressed. Walker gave witness £50. Witness intended that this money should be a set-off to the balance owing by Walker. He never intended to repay the money; he never gave any I.O.U. or acknowledgment for it, and he gave Walker credit for it in his books. Subsequently Walker spoke to him about the £50, and witness then said that he had set off the amount against the land purchased. Walker then remarked that though he had not intended the £50 to go against

the land, it was all right. Two other persons were present on that occasion.

Cross-examined by Mr. Bisset: Witness thought that while Walker lent him £50, he would not have paid £50 on account of the land purchased. Witness made the entry of the £50 in the Heathfield books some months ago, when he parted with Mr. Porter. Prior to that Mr. Porter used to keep the books, as agent for the seller. It was not correct to state that when the sale was cancelled witness was short of money and wanted to sell the land to someone who would pay ready cash. In the cancellation paper put in there was no reservation whatever. He denied that the sale in question was his, and he did not believe that he had received any consideration in respect of it.

Re-examined by Dr. Greer: Witness's sole reason for signing the cancellation was that he was informed that he could not re-sell the property without his doing so. He did not think it was an out and out cancellation.

George Hunter stated that he was a clerk in the employ of the defendant. On one occasion he heard Mr. Walker say to Barsdorf, in his office, "By the way, I'm deuced hard up; what about that loan of £50." Barsdorf replied, "I put that against the land at Diep River." Walker said, "If that is so, it's all right."

William Ellis stated that he was present at the conversation mentioned by the witness Hunter, and gave corroborative evidence.

John Marcus, who was auctioneer on the occasion of the first sale, stated that about four or five months after the purchase Mr. Walker said to him that he thought that he had paid too much for the ground, and would like to sell it.

Thomas Herbert Hazell, administering trustee in the insolvent estate of Philip Porter, gave evidence as to certain entries in the Heathfield books.

Dr. Greer closed his case.

John Hamilton Walker, the plaintiff, said that he purchased the two lots for £230, and paid £10 down. He did part of the conveyancing work of the Heathfield Estate. He had never been asked to pay any instalments on account of the purchase of the land, after the cancellation of the sale. Witness had a running account with Porter, and his account could easily have been debited with the instalments alleged to have been due. Barsdorf came to him and said that he was anxious to sell the land for cash, and asked that the sale should be cancelled to enable him to do so. Witness did not remember anything of the conversation spoken of by Barsdorf, Hunter, and Ellis. He frequently asked for the return of the £50. With regard to the sale, he asked Barsdorf for a refund of the £10 paid, after the cancellation of

the sale, Barsdorp pleaded that he was short of money at the moment, adding that there was, however, a safe which witness might take in satisfaction of the £10. Witness agreed to do this.

Cross-examined by Dr. Greer: He was willing to accept the safe in satisfaction of the £10 paid on account of the purchase of the ground. Witness always looked upon Mr. Porter as the person with whom he dealt; Barsdorp was only Porter's clerk. He did not even know that Barsdorp was the owner of the Heathfield Estate until transfer was being passed. That was some months after the sale. Barsdorp told him that he had a cash purchaser for the ground, and witness believed that the land was sold for cash. That was why his plea said that the re-sale had been private. Witness would say that the conversation spoken of as having taken place in Barsdorp's office in connection with the £50 did not take place. Philip John Porter stated that he had recently been carrying on business as broker and general agent at Claremont. He acted as agent for the seller in the sale of Heathfield Estate. He had an arrangement with Barsdorp at that time giving him a half-share in the profits of any business he brought to witness's office. When the declaration of the cancellation of the sale of the two plots to Walker was made before witness, no mention of any reservation was made. Witness understood that the cancellation was out and out. Mr. Walker was never debited with the loss on the re-sale, although, in the ordinary cases of loss on re-sale, this was done to other persons.

By Dr. Greer: There were other losses on re-sales which were not debited to the original buyers in the books. Witness thought that the agreement as to the cancellation was come to in Walker's private office.

Buchanan, A.C.J., said that the plaintiff sued the defendant for the sum of £50, money lent, and for professional work done. His claim as it now stood was for £49 15s. 9d. The defendant set up a counter claim, an reconvention. He claimed that he had lost on the sale of certain property purchased by the plaintiff. It appeared that the plaintiff bought two plots of ground, in respect of which he paid £10, the balance to be paid in instalments of not less than £1 per month, within four years. The conditions of sale were made out by an auctioneer, "instructed thereto by Mr. Philip Porter, of Claremont." Walker alleged that shortly afterwards, the defendant came to him and said that he (Barsdorp) was short of money, and would he (Walker) cancel the sale? It was not unreasonable that Barsdorp should do this, because, on the one hand, he would be able to sell the ground for cash, if the sale were cancelled; whereas,

on the other hand, he would receive only £1 per month from Walker. With regard to the cancellation, they had Barsdorp making a solemn declaration to this effect: "I declare that I have not received any money, or other valuable consideration, for this purchase, and I agree to cancel the sale; and I have not received, nor am I to receive, any consideration for the cancellation." There was no default by the plaintiff under the conditions of sale, and there was no re-sale under the conditions of sale. There was a re-sale; but that was by virtue of an agreement between the defendant and plaintiff. After the re-sale, until the present action no claim was made on Walker. With regard to the loan of £50, Barsdorp candidly acknowledged that he did not think that Walker intended the money to be a payment on account of the ground; he even said that he did not think that Walker would have given it to him, had he asked for it as a payment in respect of the land. Then, there was no entry made in Barsdorp's books, in support of his statement that he took the money as a payment on account, until a few months ago. Here Barsdorp's conduct was totally inconsistent with the idea that he thought that the sale was not cancelled out-and-out. In June, Barsdorp, in a letter to the plaintiff, mentioned that he had a counter-claim; and, in reply, Walker wrote asking to be supplied with particulars of the counter-claim, but received no reply. In the face of the declaration of cancellation, and looking at the conduct of Barsdorp in the matter, the Court could not hold with the defendant. As far as the claim in reconvention was concerned, there had been no re-sale on the conditions of sale, but on a contract between Walker and Barsdorp. The re-sale was effected for Barsdorp's benefit. There was another allegation, that Walker had agreed with Barsdorp to share his fees on work brought to him by the defendant. He (the Acting Chief Justice) did not like that attorneys of the Court should enter into such an arrangement; but here again Barsdorp had failed to establish a contract, entitling him to a half share of the fees. In these circumstances, judgment would be for the plaintiff for £49 15s. 9d., with costs, on the claim in convention, and for the defendant in the claim in reconvention.

[Plaintiff's Attorneys: Fairbridge, Arderne and Lawton; Defendant's Attorney: D. Tennant, jun.]

REX V. ARENS AND { 1905.
ANOTHER. } Sept. 1st.

Buchanan, A.C.J., said that the case had come before him from Bredasdorp of Rex. v. Arens and Kuroko, two coloured men, convicted of stock theft. The men were each sentenced to one year's imprisonment, and to pay a fine

of 30s., or, in default, two months' imprisonment. In the case of one of the men there was an addition to the two months' imprisonment of "with hard labour," and in the case of the other there was no such addition. This was one of the cases which came under the Act to which he had referred on the previous day (15 C.T.R. p. 733); and the sentence of the second man, including hard labour, would have to be amended, as far as the hard labour was concerned. The words "with hard labour," would be struck out; otherwise the sentence would be confirmed.

NDANGANDA V. NOTI.

This was an appeal from a decision of the Assistant Resident Magistrate of Middle Drift in a case in which the plaintiff in the Court below claimed £20 damages for the detention of a heifer. The respondent denied liability.

The Magistrate found for the plaintiff, and awarded damages at £12. From the evidence, it appeared that the plaintiff and defendant used to freely exchange cattle. Noti lent a certain heifer to the defendant, which, it was alleged, was heavy in calf. It was further stated that the plaintiff gave instructions that the animal should not be used for ploughing. The heifer was worked at the plough, and died the day after it was borrowed. That was the first occasion during the present year on which the heifer in question was put to plough. For the defence, it was alleged in the Magistrate's Court that the heifer was suffering from lung and gall sickness, and had not died as a consequence of being put to plough while in calf, as another animal in the same condition, which was ploughing at the same time, was unaffected.

Mr. Gardiner was for the appellant, and Mr. J. E. R. de Villiers for the respondent.

Mr. Gardiner urged that when the heifer was borrowed Noti must have known that it was being taken, as he was at home at the time, and he must have known that the appellant could not want it for any other purpose than ploughing. The condition of the calf found in the heifer after death showed that the animal would not have calved for a few days more, and there was the further point to show that the heifer did not die as a consequence of being put to plough, that another animal in the same condition was unaffected, though it, too, was ploughing at the same time.

Buchanan, A.C.J., said that it was admitted that the appeal was on a question of fact, and it was also admitted that the heifer was in calf. The plaintiff in the Court below said that it was heavy in calf;

the defendant, on the other hand, maintained that it was less so. It was clear that the heifer was used to plough against the express instructions of the plaintiff, and that it had died while being so worked. He thought that the evidence did not show that the animal was suffering from sickness. In these circumstances, the Magistrate found for the plaintiff. On a question of fact of this kind, he did not think that the Court could alter the decision of the Magistrate, and the amount allowed by the Magistrate as damages appeared to be a fair one. The appeal would be dismissed, with costs.

MORGAN V. KING ELECTRIC LIGHT CO.

This was an appeal from the decision of the Resident Magistrate of King William's Town, awarding the respondent £8 17s. 6d. in respect of damages caused to an electric lighting pole by the collision therewith of a pair of runaway horses and wagon belonging to W. S. Morgan, the appellant.

From the evidence in the Court below, it appeared that the defendant's wagon was being loaded with barrels in the street, when one of the barrels, either rolling off or being blown off by the wind, fell on one of the horses. The animal balked, other barrels falling off as it ran, and further frightening it, and came into collision with the Light Company's pole.

Mr. Upington appeared for the appellant, and Mr. Gardiner for the respondent.

Mr. Upington urged that the Magistrate should have allowed the application made in the Court below, on behalf of the defendant, at the end of the plaintiff's case, for absolution from the instance, without compelling the defendant to go into his case, because there was no evidence of any kind to show negligence. Counsel went on to argue that there had been no negligence on the part of the driver, as alleged in the summons, and that the falling off of the barrel, as a consequence of which the collision took place, was a pure accident.

Buchanan, A.C.J., said that the Magistrate having decided the case on the evidence as a whole, he felt bound to take the evidence as laid before him. Looking upon the whole evidence, then, the Magistrate had found that there was negligence on the part of the defendant. He (the Acting Chief Justice) was of opinion that the Magistrate was justified in saying that what had happened was just what might have been expected to happen under the circumstances. He thought that all the facts justified the Magistrate in saying that there was negligence, and the appeal would therefore be dismissed, with costs.

BOTH A V. ESTATE PHILLIPS.

This was an appeal from a decision of the R.M. of Mount Fletcher, in an action brought by James Phillips against Andries Botha, for £77 11s., money lent and goods sold. The Magistrate gave judgment for the sum claimed, less £8 8s., an amount of compound interest which he deducted.

When the case came on in the Court below Mr. Hargreaves, the agent for plaintiff, applied to substitute his name as assignee in place of that of Phillips and the Magistrate allowed the amendment.

The Magistrate, in his reasons for judgment, said the plaintiff sued the defendant for £77 11s. 8d., which included interest for goods sold and money lent. The amendment was allowed, the Court holding that the substitution of the name did not prejudice the defendant. Hargreaves, as assignee of the estate, swore the account is correct, and the defendant never disputed it. The item of £8 8s. interest was deducted, as it was not included in the last account rendered. The Court considered the evidence of the bookkeeper, and the extracts from the books sufficient proof and judgment would be given for £69 3s. 8d.

Mr. Gutche was for the appellant and Mr. Close for the respondent.

Counsel, having been heard in argument on the facts,

Buchanan, A.C.J.: In the Magistrate's Court a summons was taken out by one Phillips against Botha. When the case came on, Mr. Hargreaves, the agent, applied to substitute his name as assignee in the place of that of Phillips. The defendant's agent objected and the Magistrate allowed the amendment. In the course of the evidence it was proved that Mr. Hargreaves was not the assignee, at all, but held the power of attorney of Mr. Myers. The objection against Hargreaves suing is a good one. If this technical objection be sustained, it would be ground for allowing the appeal; but the Court has very extensive powers in appeals from the Magistrates' Courts to render speedy justice. The order will be that the record be amended by substituting Mr. Myers's name as assignee, in place of Hargreaves. There is another objection to the charges made for interest, £17 in all. The Magistrate might have been justified in allowing interest up to January 31, 1901, when, on Botha's own evidence, the account was correct. Since that date, £12 15s. 10d. has been allowed, being interest on an account, for goods sold and delivered. Now, this could not be chargeable without an express agreement; and there is no evidence given by the plaintiff that there ever was any such agreement. On the contrary, he knows nothing about the account. Under the circumstances, therefore, this £12 15s. 10d. must be deducted from the account, which will

make the correct judgment £56 7s. 10d.; and that will be entered with costs in the Magistrate's Court. But as the defendant has come to this court with a very substantial objection, he will have his costs of appeal.

SUPREME COURT

[Before the Acting Chief Justice (the Hon. Sir JOHN BUCHANAN), the Hon. Mr. Justice MAAS-ORP, and the Hon. Mr. Justice HOPLEY.]

LAWMON V. ALLNUTT. { 1905.
Sept. 4th.

Mr. Rowson moved as a matter of urgency for a temporary interdict restraining the respondent from removing any materials from the applicant's blacksmith shop, at No. 2, Lesar-street, pending an action for a declaration of rights.

Rule nisi, to operate as an interim interdict granted, the action to be instituted forthwith, with leave to the respondent to move to have the rule set aside.

MILLS V. BIDLI.

{ 1905.
Sept. 4th
Nov. 6th.

Native — Marriage — Lobola — Interpleader.

D. W. M. had obtained a judgment in a Transkeian R.M. Court against A. M. D. W. M. took out a writ of execution, and thereunder attached certain cattle in possession of B. B. asserted that these cattle had been paid to him as "Lobola" by A. M. The marriage, however, between A. M. and B.'s daughter not having taken place, the Magistrate decided that the dominium of the cattle was in A. M., and that they were therefore attachable for his debts. On appeal, the Circuit Court reversed this decision of the R.M.

Held on further appeal to the Supreme Court, that the judg-

ment of the Circuit Court must be affirmed.

Peacock v. Ben Rango (12 C.T.R., 545) distinguished.

This was an appeal brought against a decision of Mr. Justice Kotze in the Circuit Court at Butterworth. The matter was first heard before the Resident Magistrate of Butterworth, when the appellant Mills, a European trader, obtained judgment against a native for £18 10s. A writ of execution was issued, and certain cattle that were in the possession of Bidli were attached, and thereupon an interpleader action was instituted, and Bidli claimed that these cattle could not be attached under the judgment which the plaintiff obtained against the native Myataza. It was admitted that the cattle was given by Myataza to Bidli as a dowry, and that the marriage had not taken place. The Magistrate held that the cattle were still the property of Myataza. The matter came up on appeal to the Circuit Court, sitting at Butterworth.

Kotze, J., allowed the appeal, and gave his reasons as follows:—This matter comes before me by way of appeal from the decision of the Resident Magistrate of Idutywa. The facts were as follows:—One D. W. Mills, a European trader, had obtained a judgment for the sum of £18 10s. 6d. against a native called Andries Myataza. A writ of execution was issued for the recovery of this amount, together with the sum of £2 10s. 4d. for costs. Under this writ certain cattle were attached which were in the possession of the appellant, Mfuleni Bidli, who maintained that the cattle, having been given to him as lobola by Andries Myataza, in view of a contemplated marriage with the appellant's daughter, were not liable to attachment. In the interpleader suit brought by Mfuleni Bidli the Magistrate decided against him, on the ground that, as the marriage had not yet taken place, the property in the cattle was still in Andries Myataza. The parties, by their counsel appeared before me, and it was mutually understood that the argument should proceed on the case as stated by Mr. Henley in the Court below, viz.: Mr. Henley wishes to place on record that these cattle were seized from Mfuleni Bidli, that these cattle had been paid to him by Andries Myataza as dowry eighteen months ago, that the marriage has not yet been consummated, and that the parties desire a ruling of the Court whether these cattle are executable or not." The case was argued by Mr. Gane for the appellant, and Mr. Currey for the respondent. Upon the statement of the case as submitted to me I had to presume that the parties to

the intended marriage were able and willing in due time to carry out and perform the contract. There was nothing to show that such was not their intention, and in the absence of any evidence to the contrary, the presumption is that the parties intend to carry out and complete their contract or engagement. This material fact distinguishes the case from *Pearock v. Ben Rango* (12 C.T. 545), upon which the respondent relied in support of the seizure of the cattle under the writ of attachment. Without in least questioning the propriety of the decision in that case, by which I consider myself bound, I do not think the judgment of the Supreme Court should be extended beyond the circumstances of the case then before it. In *Pearock v. Ben Rango* the respondent had delivered certain cattle as dowry to the father of the intended bride, but she subsequently refused to marry him, and he thereupon claimed back the dowry cattle from her father, who had meanwhile sold some of the cattle to the appellant. The Supreme Court, following the view taken by the Chief Magistrate of the Transkei, laid down that the ownership in the dowry cattle did not pass until the marriage had taken place, and that consequently the respondent was entitled to claim back the cattle. That the respondent was entitled to claim back the cattle because the girl had refused to enter into marriage seems a sound and reasonable custom. While the general rule may be that the property in lobola cattle does not pass until the intended marriage takes place, it does not follow that under all circumstances, where the marriage is not completed, the dowry cattle can be recovered. Thus, in the case of *William Ntjwa v. Samuel Vuba*, decided by the Court of Appeal in the Transkei on the 4th March, 1903, where the intended bridegroom had broken off the contemplated marriage and his father, who had paid six head of dowry cattle for him to the father of the girl, claimed back the cattle with the increase amounting to ten head, the Court held that the plaintiff was not under the circumstances entitled to recover the cattle, and gave judgment in favour of the defendant with costs. This was decided a year after *Pearock v. Ben Rango*, and is duly entered and recorded in the official record book of the Court of Appeal for the Transkei. In the present instance, as already pointed out, there is apparently nothing to prevent the contemplated marriage from taking place. By native law and custom the payment of lobola or dowry cattle is a very important and serious transaction. According to the report of the South African Native Affairs Commission of 1905, Art. 302, "Ukulobola may be taken to be a contract between the father and the intending husband of his daughter, by which the father promises

his consent to the marriage of his daughter, and to protect her in case of necessity, either during or after such marriage, and by which in return he obtains from the husband valuable consideration, partly for such consent and partly as a guarantee by the husband of his good conduct towards his daughter and wife. Such a contract does not imply the compulsory marriage of the woman." Such being the view of lobola, according to native law and custom, it seems to me that if the parties are willing to enter into the intended marriage, and the present case falls under this description, then the dowry cattle given in pursuance of, and in consideration for such intended marriage, are not attachable at the instance of a third party who has obtained a judgment against the intended bridegroom or the person who has handed over the dowry cattle to the father of the intended bride. Such a rule seems to me to be a sound and reasonable one, and, I am assured by many an experienced Magistrate in the Transkei, is strictly in accordance with native law and custom. It does not follow then that because the ownership remains in the giver of dowry cattle until the intended marriage takes place, such cattle are seizable in execution at the instance of a third party. They would not have been so seizable in the case of *William Njiva v. Samuel Fuba* already mentioned by me, and I need but refer to a similar and well-known rule of our own law that a pledge of moveables accompanied by delivery cannot be attached in execution by a judgment creditor of the pledgor, although the property in the moveables remain in the pledgor.

But, be this as it may, it was contended by Mr. Gane, for the appellant, that as the respondent Mills is a European, and the question is one between him and a native, the 23rd section of Proclamation 110 of 1879 applies, under which the law of the Colony must regulate and determine the dispute between them. Such is also my own view. As the appellant, as father of the future bride, had received delivery of the dowry cattle and held them as consideration for the intended marriage, which could at any time be consummated, and which the parties presumably wished to be completed, I am of opinion that he cannot be disturbed in his possession of the cattle. In other words, that the cattle are not under the circumstances liable to attachment at the suit of a third party. My judgment is therefore in favour of the appellant, Mfuleni Bidli, with costs.

Sir H. Juta: Marriage is a valuable consideration. If a man settles property in view of marriage, that marriage must take place or else the dowry is attachable. A father cannot be the trustee for a wife. A man cannot give a portion of his property to a prospec-

tive spouse and thereby deprive his creditors of their rights. Goods can be attached under a judgment; but in the case of a pledge there is a *jus in rem*. In this case there was no contract between the father-in-law and the son-in-law. If there was a contract between them it is immaterial where the property was. When the Court has had occasion to analyse this contract of lobola, it held that the girl's father held the cattle in trust for the bridegroom. In *Pearock v. Rango* (12. C.T.R. 545) the Court held that the father had no interest in the dowry cattle beyond keeping them in security. There the principle *mobilia non habent sequelam* was relied upon, and the Court held that the contract was neither a security nor a pledge. In the case of lobola, the father-in-law is merely a trustee, and he has no rights against a creditor.

Mr. Benjamin: As to Lobola, see p. 16 of the judgment. That is quite consistent with the judgment in *Pearock v. Rango*. Lobola is either a pledge or it is in the nature of a contract.

[Hopley, J.: The father has to hand over his daughter in consideration of the cattle. Until he has handed over his daughter he has no right to the cattle.]

The father in law, it is true, has not *dominium* of the cattle, but he has certain rights which may ripen into *dominium*. Suppose the son-in-law unreasonably refuses to marry?

[Hopley J.: Possibly the forfeiture of the cattle may be intended as a penalty for breach of promise.]

If my view is correct the judgment in *Nombombo v. Stoffle* (12. C.T.R. 596) is perfectly reconcilable with the cases cited on the other side. A pledgor cannot convey greater rights than he himself possesses (3. Burge. 578). This case is not on all fours with Rango's case. The creditor of a creditor cannot attach the property of the original debtor in satisfaction for a debt. (See *Brown v. Messenger* (Buch. 1876. p. 49.)

[Hopley, J.: You cannot put this on the ground of pledge for he can be made to marry the girl.]

After further argument,

Cur. Adc. Fult.

Postea (November 6th).

Buchanan, A. C. J.: The issue in this appeal is, whether or not certain cattle which had been paid by one Andries Mytassa to respondent, Mfuleni Bidli, as so-called "dowry" under a contract for a marriage in accordance with native customs, and which cattle are in the possession of respondent (Bidli), are liable to attachment in execution of a writ taken out by appellant (Mills) upon a judgment obtained by him against Andries Mytassa. The Magistrate of Idutywa, in an interpleader just heard by him, decided in favour of appellant, but on appeal so

the Circuit Court at Butterworth the Magistrate's decision was reversed. After many conflicting expressions of opinion the validity of the custom of lobola prevailing among the natives of the Transkei may be taken to have been finally settled by the decision of the full Court in the case of *Yggabela v. Sibele* (10 Juta, 346), and the agreement to give "dowry" has since been recognised as lawful contract among natives. The definition of the contract of "ukulobola" cited in the Circuit Court judgment, taken from the report of the South African Native Affairs Commission of 1905, agrees with the finding of the Cape Native Affairs Commission of 1883, and may be accepted as now generally received. The validity of the contract in this case was recognised in both the other Courts, and is not raised on appeal. It is the question of the incidents or consequences of the contract which is involved in the present dispute. It may, I think, be taken to have been settled by the numerous decisions which have been given on the subject of lobola, and by the opinions authoritatively expressed by experts on native law, that where property—usually cattle, as in this case—has been given as dowry, and the marriage has been consummated, the dominium in the property passes to the father; but until the marriage has been consummated it remains in the intended husband. After the consummation of the marriage, on the wife's desertion, or for other good cause, the father may in certain cases be compelled to restore the property received by him under the contract. On the other hand, if there is a failure to complete the marriage due to the fault of the intended husband, he loses his property, and the father is not compellable to restore the dowry paid. The Magistrate decided that the cattle given for dowry in this case were exigible on the ground that as the marriage had not yet taken place the property therein was still in Myatasa. He relied on the decision of this Court in *Peacock v. Ben Rango* (19, S.C.R., 323). But as the learned Circuit Judge pointed out, the facts of that case differed very materially from those in the present action. In *Peacock v. Ben Rango*, the contract to marry had been broken through default of the father, or of the intended wife, and a judgment of the Magistrate's Court had already been obtained declaring the contract to be at an end, and the cattle ordered to be restored. De Villiers, C.J., in concurring in the view of the native custom taken by the Court of the Chief Magistrate, said that three very experienced magistrates had held, "that when cattle were paid as dowry on account of a marriage to be contracted, until that marriage had been contracted the ownership did not pass, and that if any died before marriage,

the intended husband bore the loss, and if any of them had progeny he was entitled to the increase. That would clearly show that it was not the intention of the intended bridegroom to pass any property at all, but that the father of the bride was merely to hold these cattle in trust for the bridegroom until the marriage took place. Until the marriage took place the father had no interest in the cattle beyond keeping them as security until the marriage took place." Accepting this to be a correct statement of native law on the question dealt with in that case, it does not dispose of the case under appeal. The Magistrate here omitted entirely to consider the position of the parties, where the contract to marry was still existent. It was taken for granted in this case that the parties were able and willing, and intended to complete and carry out their contract. As the case stands, therefore, though the dominium in the cattle was still vested in Myatasa, they were in the possession of Bidli, under a valid contract, which gave Bidli certain rights over the cattle. In the view I take of native law, until there was some default on the part of the other parties to the contract, Myatasa himself could not reclaim the cattle, which, under his contract he had handed over to Bidli. Myatasa was not entitled to break his contract, and then to take advantage of his wrongful act in so doing. If that is so, I fail to see good ground for holding that a creditor could claim greater rights than the owner of the cattle himself possessed. By the writ obtained by appellant the messenger of the Court was directed to make a levy on the property of the debtor. Where such property is in the possession of the debtor there would be no difficulty. But where possession has been parted with under a valid contract to a third person, who has thereby acquired a right over the property, the judgment creditor cannot ignore the rights of such third person. The fact that the dominium remains in the debtor is not sufficient to render the property liable to seizure under the writ, at any rate, not until the claim of the possessor is first discharged. The illustrations of the pledge of movables, which in pursuance of the contract of pledge, had been delivered to the pledgor, used by the learned Circuit Judge, seems to me directly in point. There is no suggestion of fraud in this case, and the payment of the dowry took place eighteen months before the case was heard by the Magistrate. In my opinion the judgment of the Circuit Court was correct, and this appeal therefore should be dismissed, with costs.

Mr. Justice Maasdorp: I concur.

Mr. Justice Hopley: The facts in this case are that one Myatasa handed over certain cattle to Bidli, the present respondent, as part of the ikazi, to be paid to him under a contract of ukulobola, in

consideration of receiving his daughter in marriage from Bidli at some future time—presumably when he was able to earn and pay the rest of the ikazi or lobola—and about eighteen months after such handing over of these cattle the present appellant, who had obtained a judgment against Myatasa for a debt, caused the cattle to be attached by virtue of a writ of execution issued in connection with such judgment. Bidli thereupon set up his claim that these cattle were not liable to attachment, as they had been handed to him under the said contract, which, as to their portion thereof, he and his daughter were ready and willing to perform. It was admitted that the actual marriage had not yet taken place, but that Myatasa was likewise still intending to carry out his contract.

In an interpleader suit, the Resident Magistrate decided that the cattle were liable to attachment, on the ground that, as the marriage had not taken place, the dominium of the animals had not passed from Myatasa. This judgment was reversed by appeal to the Circuit Judge, the learned Judge President of the Eastern Districts Court, against whose decision the present appeal is brought. The matter involved is one of considerable importance, owing to the fact that it is not uncommon for young Kafirs to engage themselves to marry in similar manner. They obtain the promise of the girl and her guardian and pay as much of the ikazi as they can afford. They then go away to earn enough to pay the balance of what has been agreed upon, and only when they have fully performed their share of the contract, by paying the full number of the cattle, can they claim that the marriage should take place. But upon the first payment the young man obtained an immediate hold upon the girl and her guardian, and the latter reciprocally has something in the nature of a security that the aspirant will fulfil his promise and carry out his contract. Should he fail to do so through his own fault or change of mind, he is punished for his inconsistency by being unable to reclaim any of the property which may have been banded over from the father or guardian, if the latter can reply that he and his daughter, or ward, are ready and willing to perform their share of the agreement. This was the decision in the case of *Nojiwa v. Vuba*, cited by the Judge-President in his judgment. That decision, based on Kafir law and custom, seems to me to be in accordance with our own ideas of law and equity, and it certainly establishes the position that a guardian, to whom instalments of cattle have been given by way of lobola, has a right of retention which may be converted into absolute dominium in certain cases. That he has not absolute dominium in such animals as soon as

they are handed over to him, has been clearly laid down in the case of *Peacock v. Ben Rango* (19 S.C., 323), which case defines his rights as those of a trustee for his prospective son-in-law: but in the same case it is pointed out by His Lordship the Chief Justice that the father has an interest in such cattle, which would enable him to hold them as security for the completion of the contract. He is the trustee (with such personal interest) as long as the contractual relations subsist unbroken on either side, and as long as he and the real owner are in the position of prospective father-in-law and future son-in-law. His trusteeship, however, is changed into absolute ownership in his own behalf upon completion of the marriage or upon refusal on the part of the young man to fulfil his contract. The trusteeship likewise comes to an end, and the absolute unrestricted ownership of the young man revives, should the father or his daughter commit a breach of the contract by refusing to complete the marriage, or in case the latter should be rendered unfit for the position implied by the contract. These are the main incidents of the contract of Ukulobola, before the completion of the marriage; and though it may be urged, as indeed it was urged in argument, that to hold that the rights acquired by the prospective father-in-law over such instalments of lobola cattle should prevail over those of a judgment creditor, who seeks to attach them, opens the door to frauds, it may, in reply, be pointed out that to deprive a father of the security by reason of which he has been reserving his daughter for the man with whom he has contracted to do so would certainly entail hardship; and that as to the perpetration of frauds each case would have to be inquired into on its own merits, and in case collusion were proved, the fraudulent arrangements would be set aside, just as, in similar circumstances, they would be set aside in the case of dishonest marriage settlements or other contracts among more civilised people. In the present case, the parties concerned seem to have acted in good faith, and I am of opinion that the appeal should be dismissed, with costs.

[Appellant's Attorneys: Walker and Jacobsohn. Respondent's Attorneys: Findlay and Tait.]

[Before the Acting Chief Justice, the Hon Sir JOHN BUCHANAN.]

REX V. GOURLAY AND { 1905.
CAVANAGH. { Sept. 4th.

Excise duty—Acts 36 of 1904,
Sec. 18, and 26 of 1905,
Sec. 4.

This was an appeal against the decision of the Acting Resident Magistrate of Cape Town, by which the appellants were convicted on a charge of having contravened section 18 of Act 36 of 1904 and section 4 of Act 26 of 1905, in that, on or about June 15, 1906, they both, each, one, or other of them, fraudulently made a false return to the Excise Receiver of the quantity of spirits in their possession, or under their control, by omitting to include a certain quantity of whisky; or, otherwise, with fraudulently failing to make a return of spirits. The accused were each fined £250, or in default one month's imprisonment. Mr. Burton appeared for the appellant, and Mr. Nightingale was for the Crown.

Mr. Burton said that the appeal was made, on notice to the Attorney-General, on the grounds that the conviction was not supported by the evidence, and was contrary to law. The charge was substantially based on the Act of 1904, which dealt with the Excise proper; and in section 18 the maximum penalty was laid down as £500 fine or one year's imprisonment. The only reason why the Act of 1905 was referred to in the charge was that, by that Act, the provisions of the Act of 1904 were made to apply to imported spirits. In reviewing the evidence given in the case in the Court below, counsel said that he might explain that, before the Act of 1905 came into force, there was an idea amongst the spirit merchants of the Peninsula that the payment of the extra duty on imported spirits, under that Act, might be avoided by the removal of the spirits from bond, before the Act was promulgated. Acting on this idea, the appellants had something like 4,000 cases of spirits removed from bond. They found, however, that they could not accommodate all that quantity at their stores, so some of it was sent to be stored in a store in the grounds of the private residence of Mr. Cavanagh, one of the partners, at Green Point. Some of the cases of spirit sent to Green Point were brought into town again, but 149 cases were left there, and were overlooked when the Excise return was made out. This was the cause of the whole trouble. The 149 cases represented an extra duty of about £90, and it was said that the appellants fraudulently made a false return in order to evade payment of that small amount. The omission to draw attention to the 149 cases lying at Green Point was made by Simpson, the man

in charge of the appellants' store in town. Gourlay, Cavanagh and Co. returned 6,000 gallons of spirits, to the Excise Department, on which they paid over £1000; yet it was now said that they tried to evade the payment of such a small amount as £90.

[Buchanan, A. C. J.: I cannot understand how a firm keeping books like this should not have noticed the shortage.]

The man who sent the cases out to Green Point failed to make a return to his employers.

[Buchanan, A. C. J.: But the books show it.]

No. The books and the return were checked by the Excise officers, and a difference of 10 gallons was found. Of course, that frequently occurs; a firm is a few gallons over or a few gallons short.

[Buchanan, A. C. J.: The books should show the total quantity, wherever the spirits might be.]

That was the storeman's fault.

[Buchanan, A. C. J.: But the books should show the total amount correctly.]

That would not be shown until they received their returns from the Customs. That is one of the elements in the case.

[Buchanan, A. C. J.: I could understand a mistake being made as to where the spirits were, but not as to the amount.]

Mr. Burton (proceeding) said that it was shown in the evidence that the Customs return agreed with the firm's stock book, an examination by the Excise officers showing that there were ten gallons out in both. It appeared that subsequently two gallons out of the ten were accounted for, bringing the amount down to eight gallons. Patrick Duffy, the firm's manager, stated in his evidence that he made out the return on which the prosecution was based, and signed it on behalf of the firm; he thought that it included the 149 gallons of whisky which were at Green Point. When the spirit was sent to Green Point the appellants were under no liability, accumulating or otherwise, for extra duty on whisky, so that it could not have been sent out in order to evade the Excise. The Magistrate found both the accused guilty, without saying on which charge; and said that he was satisfied that the spirit was taken to Green Point in order to evade the duty, and not that it was overlooked by mistake. The substantial point of the appeal was to have this stigma on the appellants, of having committed fraud, removed. From the very beginning the charge was extraordinary. The summons said that the omission was fraudulent and intentional. Now, all this was very improper, and not in accordance with the terms of the Act, which said that a man might be prosecuted for failing to make a return—not fraudulently omitting to do so, as the summons was worded. He

(counsel) submitted that the appellants had a right to come to Court to have this stigma on their character removed. It would have been reasonable had the accused been found guilty of not having made a return without a reasonable excuse, because one felt that the employees were negligent in not informing their principals of the fact that there was spirit at Green Point.

[Buchanan, A. C. J.: As the summons is worded, they would be found guilty of fraud in either case?]

Yes.

His Lordship inquired which count of the indictment the Magistrate convicted the appellants on. He would like before going further, to have the Magistrate's reasons.

Mr. Nightingale: It is possible that the evidence in this case might support the prosecution on both counts.

[Buchanan, A. C. J.: There is no charge on both counts.]

They were charged in the alternative.

[Buchanan, A.C.J.: I think it would be advisable to know before this case is argued which count they were convicted on. The Magistrate can, of course, only convict on one. I should like to know the count the Magistrate convicted on.]

Mr. Burton: That should certainly be made clear.

[Buchanan, A. C. J.: I think it is rather important in this case.]

It would appear from the newspaper report, which my learned friend had allowed me to refer to, that they were found guilty on the charge of making the false report.

[Buchanan, A. C. J.: I think it would be as well to get the Magistrate to decide the point. The Court will continue to hear appeals this week, and the Magistrate can send in his reasons.]

Mr. Burton: It is a matter of some importance.

[Buchanan, A. C. J.: If the Magistrate gives his reasons at once the hearing of the case can be continued during the coming week.]

Postea.

Mr. Burton said the Magistrate had now stated that he found the accused guilty on the alternative charge, of failing to send in a return. After hearing the evidence, he (the Magistrate) was satisfied that the accused had the liquor sent to Chantilly, Green Point, and had failed intentionally to make a return, with the object of evading the duty. Proceeding, Counsel said that the charge under the Act was one of failing to send in a return without reasonable excuse. Therefore, it was clear that the rest of the charges on the summons were mere trimming and unjustifiable verbiage. The Magistrate had been influenced by the form in which the charge was made out. The charge should have been worded in the terms

of the Act, which merely laid down that one could be charged with omitting to make a return, without reasonable excuse—not with fraudulent omission to make a return—and the conviction should have been confined to that. It was clear that the Magistrate came to the conclusion that the spirit was sent to Chantilly, and no return was made, because the accused desired to evade payment of the duty, and it was equally clear that he based the conviction on that finding. The finding of criminal intent should not be allowed to remain on the record; all the circumstances pointed to the absence of criminal intent. Because the appellants had omitted to include 149 cases in the large quantity returned, they were now held guilty of fraudulent intent. He would point out that the returns in question were compiled by employees, and only one of them was seen by one of the principals, who formally signed it on behalf of the firm. The spirit was sent to Green Point before it was liable to pay the extra duty; yet the Magistrate said that it was sent out with the object of evading the duty. The evidence showed that between 250 and 300 cases were sent out to Chantilly, Green Point, in the first instance. It was said that this was done to evade the duty, but what happened?—a large number of the cases was returned to town, leaving only the 149 cases, which were overlooked, at Green Point. One of the points to which he would draw attention was that it was practically impossible to evade the excise, except by collusion between the wholesale merchant and retailer. It would have been reasonable had the Magistrate found the appellants guilty of failing to send in a return, without reasonable excuse. Then would arise the question whether the overlooking of the spirit at Chantilly in the present case was a reasonable excuse. As to that, he was not prepared to argue; he was disposed to admit that the principal was responsible for the action of his employees. He (counsel) would then ask the Court to mark its disapprobation of the finding of the Magistrate, that there was fraudulent intent, by a reduction in the amount of the fine.

[Buchanan, A. C. J.: Has the Court power to do that. In the High Court of Griqualand West, it can be done, but I do not think it is so here.]

Mr. Burton: I think it has been done here.

[Buchanan, A. C. J.: Not in this Court; the conviction has been struck out altogether, but not the fine reduced. The Act of 1886 lays down that this Court cannot reduce the fine, but it can recommend to the Government mitigation of sentence.]

In that case, I would ask the Court to express an opinion as to the con-

viction, and to make a suggestion to the Executive as to the fine.

Mr. Nightingale said that he would draw particular attention to the fact that the returns on which the prosecution was based formed the basis of the Excise revenue. The dealers were bound by the Act to make full disclosures of the quantity of spirits in their possession. As to the difficulty of evading the Excise, it was quite possible for a dealer, who had not disclosed certain stock, to dispose of it without the knowledge of the Excise Department. He would point out that in this case the elements were, that there was no declaration of the presence of the spirit at Chantilly; that it was the partner Cavanagh who arranged with his father for the storage of the spirit at Green Point, and that the partner, Gourlay, was the person who instructed the men to have it taken out to Chantilly. And then there was one significant point. Simpson, in his evidence for the defence, said that when some of the cases originally sent to Green Point were brought in they were returned to bond, and subsequently removed to Sir Lowry-road. The inference was that the appellants wished it to be thought that these cases were coming from bond and not from the undeclared stock at Chantilly. There was ample evidence to show that though the return was completed by an employee, it was signed by one of the partners, and it was perfectly clear that the partners had a knowledge of the omission, and that the Magistrate was justified in coming to the conclusion that there was an element of fraud in the omission to make a return of the spirit at Chantilly.

Buchanan, A. C. J., said that the appellants in this case were large wholesale dealers in liquor; and, when it was being discussed in Parliament, whether or not any additional duty should be imposed on foreign spirits, they cleared from bond some 3,000 cases of spirit, on the supposition, that, once the spirit had been removed from bond, it would not be liable to pay the extra duty. However, Parliament decided to impose not an additional Customs duty but an excise on stocks in hand. At the time of the removal of the spirit from bond, it was immaterial to the Government where the spirit was stored. When the Act of last session was passed foreign spirits were rendered liable to the Excise, and dealers were required to send in a return of stocks in hand. The appellants sent in a return, showing the stock in their Short-street and Sir Lowry-road stores; but no return was sent in, in respect to that at Chantilly. When it was found that there was a stock of spirit at Chantilly, the appellants were prosecuted. They were charged, under the 18th section of Act 36 of 1904, with

making a false return; or, alternatively, with failing to make a return, without reasonable excuse. The Magistrate did not convict on the charge of making a false return, but he did on the charge of omitting to make a return. The alternative charge, of omitting to make a return, without reasonable excuse, was laid as having been done, that they did "wrongfully, intentionally, and fraudulently, etc." It was unnecessary to say that the omission was made with intent to defraud, except in so far as it might influence the Magistrate as to the punishment should there be a conviction. It was clear that the appellants did actually omit to make a return of the spirit at Chantilly. The excuse they gave was, that then Clerk Duffy, who made out the return, did so on information received from the bonding store manager, whom, he thought, included the cases at Chantilly. That excuse, the Magistrate held, was not a reasonable excuse for the conduct of the parties. When the case was before the Court in the first instance, he (Sir J. Buchanan) remarked, that, if the returns had been checked with the book, the omission to include the 149 cases at Green Point could not have been noticed; and he thought that the neglect to check the returns was such as to justify the Magistrate in saying that there was no reasonable excuse for the omission to make a return of the 149 cases. As to whether there had been fraudulent intent, it was very difficult to deal with that point. The Magistrate held that there had been fraudulent intent. The fine which was inflicted by the Magistrate had been imposed was one within his jurisdiction and under the 49th section of Act 20 of 1856, it was directed that on appeal or review no sentence of a Magistrate should be reversed or altered by reason merely that the degree of punishment awarded may appear to the Court to have been usually or unnecessarily severe. This Court therefore cannot now reduce the fine, though it is open to represent to the Governor its opinion that the sentence be mitigated. In a case such as this, one Magistrate would take one point of view, and another Magistrate another point of view; and it was probable that this Court would not have imposed the maximum fine. But the question now before the Court: Was the conviction justified by the evidence?—he thought that it was. Was the fine imposed within the jurisdiction of the Magistrate? It is clear that it was. In these circumstances, the Court would have to dismiss the appeal. If it were desired that he should give a personal opinion on the question of fraud, he would say that, under the circumstances, considering the position of the parties, he did not think that he would

have come to the same conclusion as the Magistrate had done on that question of fraud. The appeal would be dismissed, with costs.

[Appellant's Attorneys: Harsant and Harsant.]

REX V. PERKAAR.

This was an appeal by Bawa S. Peakaar from the decision of the A.R.M., Wynberg, sentencing him to a month's imprisonment with hard labour for receiving goods, knowing them to have been stolen. Mr. Burton appeared for the appellant, and Mr. Nightingale for the Crown.

The appeal was brought on the grounds that the conviction was not supported by evidence.

Mr. Burton, for the appellant, was heard in argument on the facts.

Without calling upon Mr. Nightingale Buchanan, A.C.J., said that in this case two persons were charged with the crime of theft or receiving stolen goods, knowing them to have been stolen. Of the two persons, one was a boy, who accompanied the driver of the prosecutor's bread cart, and the other was a shopkeeper, to whom bread was delivered. The boy pleaded guilty. The evidence showed that after the driver temporarily left the cart the boy gave the man a certain amount of bread. The bread, on the return of the cart was found to be short, and the evidence went on to show that a certain amount of bread was found in the man's shop, hidden away under the counter. The man stated that he had bought the bread from the driver, but the bread so bought was left on the counter, and the driver contradicted the prisoner as to the quantity bought. The man's conduct was not that of a *bona-fide* purchaser. The evidence was sufficient to justify the Magistrate, and the appeal would be dismissed.

GENERAL MOTION.

Ex parte NEWARK.

Mr. Russell moved for a rule *nisi* to attach certain property, in the estate of Thomas George Denbigh, to found jurisdiction, and for leave to sue by edictal citation for damages incurred by a breach of contract.

[Buchanan, A.C.J.: What goods is it desired to attach; in whose possession are they?]

Mr. Russell: They are at 70, Loopstreet, in the possession of Mr. Barforth. I do not know what is the nature of the goods.

[Buchanan, A.C.J.: What is the value of the goods in his possession?]
About £75.

[Buchanan, A.C.J.: What are the damages likely to be—£30 or £40?]
I am instructed £150.

[Buchanan, A.C.J.: Oh, no! That is out of the question altogether. The Court will grant a rule *nisi* to attach the goods in the possession of Barforth, to found jurisdiction, leave being allowed to the respondent to move to have the rule set aside, action to be commenced forthwith.

SUPREME COURT

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

HALVERSON V. ANDERSON. { 1905.
 { Sept. 5th.

Contract—Breach—Measure of damages.

This was an action in which Mrs. Gertrude E. Halverson, local manageress of the Viava Treatment Company, sued the South African proprietor, William Thomas Anderson, to recover £500 as damages for breach of contract.

The plaintiff's declaration was as follows:

1. The plaintiff is a widow, residing and carrying on business at Cape Town. The defendant resides at Johannesburg, and carries on business there under the style of the South African Viavi Company.

2. By order of this Honourable Court, dated the 22nd June, 1905, certain property of the defendant has been attached *ad fundandam jurisdictionem*.

3. On or about the 3rd January, 1905, the plaintiff and the defendant entered into a certain written contract.

4. Thereafter, the plaintiff hired and paid for rooms for the carrying on of the business set forth in the contract, engaged workers for the same, and did all things necessary to be done by her under the said contract.

5. On or about the 16th May, 1905, the plaintiff requested and required the defendant to replenish and supply her with a stock of the preparations and goods referred to in the contract. Particulars of the preparations and goods so required were furnished to the defendant.

6. The defendant, in breach of the said contract, refused and has wholly

failed to supply the plaintiff with any of the stock so required.

7. The plaintiff has been and is unable to obtain the said preparations and goods elsewhere, and by reason of the defendant's failure has lost profits which she would otherwise have obtained from the sale of the said preparations and goods, and has otherwise sustained damage.

8. The plaintiff estimates the damage sustained as in paragraph 7 set forth in the sum of £250.

9. The defendant still refuses to supply her with any preparation or goods, and has repudiated the said contract, though the plaintiff has always been ready and willing to perform her part of the said contract.

10. The plaintiff has been put to expense in hiring rooms, in engaging workers, and in other ways for carrying out the contract, and by reason of the defendant's repudiation will lose profits which she would have obtained during the unexpired portion of the contract.

11. The plaintiff estimates the damages caused to her, as in paragraph 10 set forth, by the defendant's repudiation in the sum of £250.

Wherefore the plaintiff claims: (a) £250 damages, as in paragraphs 7 and 8 set forth; (b) an order declaring that the said contract is cancelled by reason of the defendant's repudiation thereof; (c) £250 damages, as in paragraphs 10 and 11 set forth; (d) alternative relief; (e) costs of suit.

The defendant's plea was as follows:

1. The defendant admits paragraph 1 of the declaration, save that he says that the business of the South African Viavi Co. is not carried on by him alone, but by him and his brother Alexander Anderson in partnership, trading together under the said style.

2. As to paragraph 2, the defendant says that the property attached belongs, not to him, but to the partnership aforesaid.

3. The defendant admits paragraph 3.

4. Save as hereunder, the defendant denies paragraphs 4 and 10. The plaintiff was allowed to continue the use of the office provided by defendant, and to use the furniture therein as in the contract provided. Half of the monthly rental has each month since the date of the said contract been paid out of defendant's moneys.

5. The plaintiff's position under the contract aforesaid was that of manager at Cape Town for the defendant, and it was her duty, not only to carry out the contract, but to obey all lawful directions given by the defendant, and to supply all information lawfully required by defendant in connection with the business.

6. The defendant failed and neglected to carry out the terms of the contract aforesaid; more particularly she failed and neglected to hire and train the

necessary workers, as under the contract provided, and refused to give to the defendant proper particulars of what she was doing in this regard, though repeatedly requested by the defendant prior to May 15 last, and subsequently so to do.

7. The plaintiff further failed to give defendant proper financial statements, though called upon by him so to do.

8. The defendant is not under the contract bound to supply any fixed or definite quantities of the Viavi preparations; but is, and always has been, ready to forward reasonable quantities thereof to plaintiff. The plaintiff made no requisition for such preparations in May, 1905; but failed and refused till June 9, 1905, to furnish to defendant proper returns of the supplies of such preparations furnished by defendant, and still in her possession, though repeatedly requested so to do in April, 1905, and subsequently.

9. On the said 9th June, 1905, the said return of supplies was forwarded by plaintiff, with a financial statement, from which it appeared that plaintiff was retaining in her possession £46 15s. 3d. of defendant's moneys, which should under the agreement have been paid into defendant's bank.

10. Defendant denies that plaintiff was in need of Viavi supplies as set forth in her declaration; and says that he forwarded to plaintiff all such Viavi supplies as were reasonable under all the circumstances. He is, and has been, prepared to forward further supplies conditionally, on duly receiving the reports, information, and returns aforesaid, which he is lawfully entitled to, and on plaintiff duly carrying out her part of the contract; but the defendant says he was justified, by reason of the premises, in refusing to send further supplies, save upon such conditions being carried out.

11. Subject to the above, defendant denies paragraphs 5, 6, and 9.

12. As to paragraphs 7, 8, and 11, the defendant denies that plaintiff has suffered any damages as alleged in her declaration, and denies that he is in law liable for the same, even if she has suffered such damages.

Wherefore defendant prays that plaintiff's claim may be dismissed, with costs.

For a claim in reconvention, the defendant (now plaintiff) says:

14. The defendant wrongfully and unlawfully detains in her possession the sum of £46 15s. 3d., being amounts due to plaintiff under the agreement aforesaid, as part proceeds of sales effected by defendant.

15. The defendant by her negligence and breaches of contract aforesaid has greatly retarded the development of plaintiff's business, and has caused great loss of profits to plaintiff.

16. The plaintiff has suffered damages which he estimates at £500, by reason of the premises.

Wherefore plaintiff in reconvention claims: (a) Repayment by defendant of the sum of £46 15s. 3d., being moneys due to plaintiff, and wrongfully and unlawfully detained by defendant as aforesaid; (b) the sum of £500 as and for damages as aforesaid; (c) alternative relief; (d) costs.

The plaintiff's replication was as follows:

1. As to her position and duties, the plaintiff refers to the terms of the contract annexed to the interdict.

2. She says that she has hired and trained the necessary workers, has forwarded proper statements and reports, and has done all things which she is liable to do in respect of her contract.

3. She admits that from the amount shown in the financial statement forwarded in June, 1905, as due to the defendant she has deducted the sum of £29 13s. 9d., being an amount due to her by the defendant for passage money and travelling expenses from New Zealand to South Africa, but not paid to her or credited to her in the said statement or any previous statement. She admits that she retains the balance for the purpose of satisfying, to the extent of such balance, rent and other expenses incurred since the said statement in connection with the Viavi business in Cape Town, for which expenses the defendant is liable.

4. Save as above, and save in so far as the plea contains admissions, she denies all and singular the allegations of fact and conclusions of law therein contained and joins issue thereon, and again prays for judgment with costs.

For a rejoinder to the plaintiff's replication, the defendant says that he denies specially that plaintiff is or was entitled to deduct the sums referred to in paragraph 3 of the replication, as she alleges that she has done, or that defendant is liable as therein set forth. Otherwise, save for admissions, the defendant denies the allegations and conclusions in the replication contained, joins issue thereon, and again, as before, prays that the plaintiff's claim may be dismissed with costs.

Mr. Gardiner for plaintiff; Mr. Close (with him Mr. Sutton) for defendant.

Mrs. Gertrude E. Halvorsen, the plaintiff, stated she came to South Africa in May, 1904, under contract with the American Viavi Company, which was eventually taken over by Anderson, who was the local agent. In the letter appointing witness, which was written in the previous January, the company enclosed the contracts to be signed. No mention was made in that contract of witness's passage money. Witness was brought to South Africa to assist Mr. Anderson in organising the country, as she had had vast experience

in other countries. Witness arrived in South Africa, and travelled about the country. Viavi was a proprietary medicine, chiefly used by ladies. It was necessary to train ladies in different parts of the country to sell the medicine. Witness arrived in Cape Town in January last, when the contract was entered into with Anderson. When witness arrived in Cape Town, the contract was changed, as she then became manageress.

[Buchanan, A.C.J.: How did you train the workers?]

We taught them how to call on ladies, and to teach them what the remedy is.

Witness (continuing) said she travelled around the country giving lessons to workers, and also lecturing. Witness furnished weekly statements. Up to May she made on an average about £50 a month for herself. At first she had no reasons for complaint, but on May 1 she had to complain of the insufficiency of the stock. She had no reply, and she therefore sent an urgent wire, as she was refusing money daily because of the lack of supplies. On May 15 she received a letter from defendant containing a number of complaints, and making particular reference to her "disloyal attitude" and "sailing under false colours." Further correspondence passed between the parties, from which it appeared the defendant's main complaint against the plaintiff was because her notepaper was headed as if she were manageress of the South African business. By defendant's action, plaintiff had to refuse many orders.

In cross-examination, witness said she came to South Africa under a traveller's contract. Under the system, South Africa was divided into territories, each under a manager. The manager was not supposed to act as saleswoman. There was no question of security when witness took over Cape Town district; on the contrary, Mr. Anderson was very anxious for her to do so. Witness never had a letter complaining of her lack of energy. It was almost impossible to get ladies to work Viavi in Cape Town. One could not get workers made to order. Witness denied that her letters to defendant were of an antagonistic nature.

[Buchanan, A.C.J.: And is that the reason you didn't send more medicine?]

Mr. Close: We wanted particulars of accounts.

Witness (continuing) said she wrote to San Francisco every week, because the company there was interested in the company out here.

Mr. Close: But Mr. Anderson was the agent out here, and as long as he paid them it was quite sufficient. You wrote to San Francisco running the defendant down.

[Buchanan, A.C.J.: Is that the reason you refused to supply the medicine. If it is not it is quite irrelevant to the case.]

Examination continued: When witness found that defendant objected to her writing to San Francisco she stopped doing so.

Buchanan, A.C.J., said he could not stop the cross-examination, but counsel certainly seemed to be going outside the points relevant to the case. If these letters that were being read constituted a reason for stopping the supply of medicine he could understand cross-examination on them, but they did not.

Mr. Close said he regretted his lordship should have had to say that. The position taken up by the defendant was that he would have sent the medicine if the plaintiff had carried out her agreement loyally, but he contended that she had not done so, and the letters would prove his contention.

In further cross-examination, witness said she ran out of saleable stock, but she had other stock in hand.

By the Court: Very little stock had been put into the place after witness took it over.

Mr. Gardiner closed his case.

The defendant, William Thomas Anderson, in his evidence, bore out the statements made in his plea. After which he went into detail as to the different stock he decided not to order, as there was no sale for it. Some of the goods he did order were attached by the Court, and were at present in the King's Warehouse. Witness would have been able to supply the goods only for that reason. Tonics were not a very essential part of the treatment. The list of workers submitted by the plaintiff comprised a lot of persons, who were not workers, and a good many more whom she said she taught were working for the company before the arrival of the plaintiff in this country. Witness objected to one lady, who only gave lessons in French, and did no work. Witness first refused to supply stock, because he wanted to receive an account of the stock she had, and after that he refused, because she did not forward him the money which she told him she was holding over. Witness was quite willing to keep the contract on provided the plaintiff consented to prove that she was keeping her side. The action of the plaintiff about the heading of the newspaper did witness considerable harm.

[Buchanan, A.C.J.: You asked to have "Cape Town Branch" put on, and that was done.]

Witness: It was typewritten, and I wanted it printed, because one could easily be typed to me and the others could go out without it.

Mr. Close: Did you actually find letters that were sent out like that.

Mr. Gardiner: They must be produced.

Witness (continuing) said that when he engaged plaintiff he had his own office, but after a short time there plain-

tiff moved into another office. Witness did not agree to her taking an office on a three years' lease.

In cross-examination, witness said that out of his Johannesburg stock he had to supply seven or eight different places. He denied that complaints were received from various places with regard to the supply of stock.

I put it to you that you received complaints?—No.

The stock you would sell in Johannesburg would pay you better?—No; all branches received the same terms.

You could always tell how your stock was going on?—Yes.

Well, I put it to you that you did not require these lists?—Yes; I did.

Why this pressing necessity in May?—I wanted a return of the stock.

Witness (continuing) said good workers were hard to get. When he got complaints from Mrs. Halvorsen that ladies were ill and requiring the medicine, he thought he was justified in keeping it back until he got the information he was asking from the plaintiff. He claimed £500 damages, which on the basis of what was done in East London he calculated was his loss through Mrs. Halvorsen not going on.

Buchanan, A.C.J., remarked that in that case Mrs. Halvorsen could also claim £500 damages.

James Smith, shipping agent in Cape Town, said in May last he got a case of Viavi remedies for Mr. Anderson, and his instructions were to hold them for Mrs. Halvorsen pending instructions from Johannesburg.

Mr. Close closed his case, and counsel were heard in argument on the facts.

Buchanan, A.C.J., said an agreement was entered into in May last between the plaintiff and defendant, by which it was agreed that the plaintiff was to manage the Cape Town branch of the defendant's business, and was to hire and train workers for the business, and that she was to be supplied by defendant with the patent remedies used in the business, by the sale of which she was to be paid. The Cape Town branch had been opened some time before the plaintiff took it over, and at that time the business was a small one. The plaintiff began work in January, and worked on until May, at which time the business had greatly increased. In April the defendant refused to renew the stock, which was very low, and as a consequence plaintiff could not supply the orders received by her, and was prevented from earning her commission. As she was paid by results this was a matter of serious importance to her, and she eventually had to put the matter in the hands of her attorneys. Defendant in the ensuing correspondence made complaint of want of loyalty and the refusal to give information as to the branch business. But at most there was a delay owing to illness, not a refusal

to give the information asked for. The plea mentioned another ground of complaint, namely, that the plaintiff failed to carry out her contract in having failed to give proper financial statements. As a fact, she rendered regular statements, and it was only in the last statement that she mixed up the stock on hand with stock sold on credit and not yet paid for. There was nothing in all this to justify defendant breaking his contract. His Lordship held that defendant had broken his contract, and that the plaintiff was entitled to damages. The plaintiff said she had £49 in hand which she had not remitted, but held it pending this action. This amount would have been sent to defendant in the ordinary course had the contract gone on. The defendant in reconvention claimed that amount. Now, the question of damages was one that could not be settled on a mathematical basis, and the Court had to look at all the circumstances, and take into consideration future as well as past losses. As a juror he would feel justified in awarding her £150, and from that amount would be deducted the amount claimed in reconvention. There would be judgment for £100 and costs.

[Plaintiff's Attorneys: Van Zyl and Buissonne; Defendant's Attorneys: Tredgold, McIntyre and Bisset.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

REINEKE AND ANOTHER V. (1905.
LAKE.) Sept. 5th.

This was an appeal from a decision of the Resident Magistrate of Somerset East. Mr. Van Zyl was for the appellants.

Counsel said exception was taken to the summons on the ground that the one defendant Maasdorp, being a surety, it would be necessary for the principal debtor to be excused before Maasdorp could be sued. The Magistrate decided against the exception. The defendant Reineke admitted his signature to the note, and claimed in reconvention £4, by reason of wrongful detention of furniture by the plaintiff. The defendant Maasdorp denied liability, as the principal debtor had not been excused.

The Magistrate held that Lake was the bona-fide owner of a promissory note for £3, and Maasdorp, if he had not wished to be personally liable, could have added the words, "without recourse to me." Counsel contended that Maasdorp's exception should have been upheld, as Reineke had property in his

house at that time, and should therefore have been excused. The respondent had locked up Reineke's property, and sought to excuse himself by saying that Reineke had given his consent.

Hopley, J., upheld Maasdorp's appeal, with costs, in both Courts.

IMMELMAN AND MULLER V. DU PLESSIS.

This was an appeal against a decision of the Resident Magistrate, Calvinia. Mr. Burton was for the appellants. It appeared that the respondent, who was an agent of the London and Lancashire Insurance Co., had ordered certain goods from the appellants, and part of the goods which he had been charged for was chargeable to the account of the London and Lancashire Insurance Co.

Mr. Burton contended that the respondent had ordered the goods, and was liable to the appellants. The Magistrate had neglected the central point that the contract was one between the respondent and the appellants.

Hopley, J.: This is a paltry case, and unless there was something behind the matter, which does not appear in evidence, it seems to me the case ought never to have come even into the Magistrate's Court. If it is true that this amount is due on behalf of a wealthy company like the London and Lancashire Insurance Co., these people ought to experience no difficulty in recovering it from the agent, or from the company themselves. But it has been rightly contended on appeal that the legal point that was before the Magistrate was one as to with whom the contract was made in the first instance. It may very well be known, and probably is known, that a certain man is an agent for a company when he goes to a small business, and it may very well have been known in this town—Sutherland—that the respondent (Du Plessis) was the agent for the London and Lancashire Co. In this case a man goes to people who are general dealers, and buys some articles, which he places to his private account, and some articles which ought to have been paid for by his principals. Now, as a matter of fact and common sense, they contracted with the agent personally for everything he gets, and they leave the agent to settle with the principals. That, no doubt, was what happened in the present case, and that is what Muller, one of the plaintiffs in this case, swore was the course of business in this particular case. I have no doubt that such was the course of business. I think the Magistrate ought to have made Du Plessis responsible for the amount, and left him to settle with his principals. It seems to me that the Magistrate was wrong when, even if he held a guinea

was all that Du Plessis was liable for, he should not have made the appellants pay the costs of the action. Although Du Plessis admitted he owed a guinea, he never tendered it, not even at the trial. In my opinion, the Magistrate's judgment should be reversed, and judgment entered for the plaintiffs for the sum prayed in the Court below, with costs in both Courts.

ROSS AND CO. V. SMITH. } 1903.
 } Sept. 5th.

**Surety—Insolvency of principal
—Costs of excussion.**

S. had guaranteed certain debts of C. to the amount of £30. Shortly after S. had given his guarantee, C. made further purchases from the same dealer to the amount of near'y £5. A few days after entering into this latter transaction, C. paid to the vendor of the goods some £7 10s., and thereafter her estate was sequestrated. Some £2 costs were incurred in excussing her for the principal debt. In the Court below the Magistrate refused to give judgment for these costs.

Held on appeal, that a surety is liable for costs of excussion.

This was an appeal from a decision of the Resident Magistrate of Wynberg, wherein judgment was given for the plaintiffs for £12 13s., with costs. The defendant introduced one Mrs. Connolly to the plaintiffs, and guaranteed payment of the account in the event of non-payment by Mrs. Connolly. Provisional judgment was taken, with costs, against Mrs. Connolly, whose estate had been sequestrated. The original claim was for £29 17s. for a stove and utensils supplied to Mrs. Connolly, but to bring it within the jurisdiction of the Court the amount was reduced to £20. The Magistrate, in his reasons, held that the defendant did guarantee payment for the stove £30, and utensils £4 19s. 11d. On the account £7 10s. was paid, making the amount £27 9s. 11d., with costs of the action brought against the principal debtor, £2 7s. 1d., the amount stood at £29 17s. There was no evidence that the defendant was liable for £4 19s. 11d. for utensils and £2 7s. 1d., the costs against the principal debtor. Taking those amounts from the amount claimed, it left judgment for the plaintiffs for £12 13s., with costs. The plain-

tiffs appealed on the ground that they were entitled to judgment for the full amount of £20, an amount for which the Magistrate could have given judgment when he allowed for the waiver in the first instance.

Mr. P. S. T. Jones for the defendant; Mr. Burton for the respondent.

Counsel having been heard in argument on the facts.

Hopley, J.: In this case the defendant was sued as a surety to one Mrs. Connolly, whom he introduced to the plaintiffs as being a person worthy of credit, and for whom he promised to be surety in the matter of the purchase of a stove for £30, of which she was to pay instalments of £7 10s. Apparently some days afterwards she purchased utensils to the extent of £4 19s. 11d. A few days after she purchased this stove she paid off the first instalment of £7 10s., so that, with the utensils in the case there would have been owing, or at all events there would have been an amount standing in the books of the plaintiff of £22 10s., for which the defendant was surety to the plaintiffs in case of the failure of Mrs. Connolly. As a matter of fact, Mrs. Connolly never paid anything but the first instalment. She became insolvent, and notice was given to the surety that she would be excussed, and he would be held liable for any costs. She was excussed, and £2 7s. 1d. were the costs incurred. The surety thereupon became liable for the costs of the excussion, as well as for the debt for which he was surety, which amounted at that date to £24 17s. 1d. The plaintiff claimed from the defendant in the Court below the sum of £20, and he showed by his account how that was arrived at. It was arrived at by taking the items I have already enumerated, amounting to £24 17s. 1d., and adding to them £4 19s. 11d. for the utensils which Mrs. Connolly had bought. That brought the whole amount up to £29 17s., and the plaintiff professed to waive £9 17s., so as to bring the amount within the jurisdiction of the Magistrate's Court. The Magistrate found that the defendant was not surety for the utensils for £4 19s. 11d., and he therefore struck that amount out, and he also found that there was nothing to make him liable for the £2 7s. 1d., which appeared to have been the costs incurred, and I think it is quite clear that they are the costs of the excussion. I do not feel inclined to send the case back to the Magistrate's Court whereby further expenses would be incurred to prove that that amount was the costs incurred. The Magistrate simply overlooked the fact that a surety was liable by law for such costs when he had due notice that they were going to be incurred. Taking the items the plaintiff presented, it would appear that

his account would stand at £29 17s., and then he waived £9 17s. Now, what is the effect of the waiver, and what does it mean? I think it means that the plaintiff says in effect: "I have a claim for over your jurisdiction, and I show the various items, and I only ask you for judgment for £20, because that is all you can give me." Looking at it in that way, what was the state of affairs as it should have presented itself to the Magistrate's mind? There were the amounts fairly due to the plaintiffs by the surety of £24 17s. 1d. He is only asked of that amount to give judgment for £20, and he takes the whole waiver as being an amount of which he can reduce from anything he can find from the £20, and he gives the judgment for the balance. It does not seem to me in doing so he did full justice between the parties, because it is perfectly clear that the whole amount of £20 was properly and fairly owing by the defendant to the plaintiffs, and that the waiver was merely to bring the matter within his jurisdiction. In spite of the waiver when he found there was a fair debt of £20 owing, the Magistrate should have given judgment for the plaintiff for that amount. In my opinion, there should be judgment for the sum of £20 for the plaintiff, with costs.

[Appellant's Attorney: A. W. Steer.
Respondent's Attorneys: Friedlander
and Du Toit.]

TOBB V. ZIEHL.

This was an appeal from a decision of the Resident Magistrate at Cathcart, in an action in which the plaintiff (respondent) claimed from the appellant £15, being the balance on an exchange of certain carts. On 6th December, 1904, plaintiff and defendant exchanged carts by mutual consent, the defendant agreeing to pay £15, as the difference in value. The Magistrate held that the counter-claim of the defendant was not a *bona fide* one, and counsel, after reading the record, submitted the evidence did not justify that finding. In his reasons, the Magistrate stated that the plaintiff sued the defendant for £15, in terms of an agreement. The defendant, however, denied the debt, on the ground of *mala fides* on the part of the plaintiff, and claimed the cancellation of the agreement. He put in a claim in reconvention for the return of his cart, or its value (£30), and excepted to the jurisdiction of the Court. The Court held that the exception could not be entertained until the defendant substantiated the allegations, and the Court further held that the counter claim was not a *bona fide* one. The defendant noted an appeal on the ex-

ception to the counter-claim and to the jurisdiction of the Court.

Mr. Upington was for the appellant, and Mr. Burton was for the respondent.

Counsel submitted that the exception was properly taken. The counter-claim, if upheld, would have the effect of extinguishing the plaintiff's claim.

Mr. Burton contended that the Magistrate would have to satisfy himself about the *bona fides* of the defendant's counter-claim.

Hopley, J.: In this case the respondent sued the appellant for the sum of £15, which he alleged to be due to him as a balance from certain exchange of carts. It would appear from the evidence that the respondent did give a certain Raleigh cart to the appellant, who gave him in return an old cart of his own, and promised him in addition, or to boot, £15, to be paid at a future date. Before the arrival of the date when the cart was to be delivered, apparently the appellant had reason to examine more closely the cart which he had received from the respondent, and he says that he then found it was totally unfit for his use, and not in accordance with the representation made to him at the time of the exchange by the respondent, and that he immediately tried to rescind the contract by an amicable arrangement, but the respondent refused to meet him, and held him to his bargain. The time for the payment of the £15 passed, and the respondent sued in the Magistrate's Court the appellant for the sum of £15. Now, it seems to me perfectly clear that each cart in itself was value for over £20, or had been so treated by the parties. On the evidence in the Court below, the plaintiff valued his own cart at something like £40, and the defendant at something like £15 less. Everything the Magistrate had to decide grew out of the contract of exchange between the parties. The defendant pleaded that there had been practically fraudulent misrepresentations to him as to the condition of the cart. Taking the transaction as a whole, it seems to me there were matters involved which the Magistrate ought not to have tried as within his jurisdiction. When the defendant not only raised the issue of fraudulent misrepresentation, but a claim in reconvention for a rescission of the contract or the payment of the value of his cart (£30), it was beyond the Magistrate's jurisdiction. It became evident if such a plea was a *bona fide* one, and the counter-claim was a *bona fide* one, his jurisdiction was ousted. The defendant produced, not only his own evidence, but some strong evidence, which might go very far towards establishing his claim of misrepresentation. It is certainly clear that the cart was in a

disabled condition shortly after the sale. It seems to me that the Magistrate ought to have come to the conclusion that the defendant was going to set up this as a *bona fide* plea and a *bona fide* counter-claim, and it was not for the Magistrate to go into the merits of the case, but he should have referred it to a higher court. On the evidence given by the defendant, the Magistrate ought to have held that his jurisdiction was ousted. Judgment will be for the appellant on the appeal. The judgment in the Court below will be changed to "exception allowed, with costs," the appellant to have the costs of appeal.

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

CAPE TIMES, LTD. V. { 1905.
FISHER. { Sept. 6th.

This was an action brought by the Cape Times Ltd. against A. M. Fisher, broker, of Cape Town, to recover £86 9s., money due for advertisements.

From the pleadings it appeared that about six months ago the plaintiffs signed a deed of composition with other creditors, by which no claim would be made on the defendant, so long as he paid some money within six months, however small, but that was on condition that the defendant paid the legal expenses incurred in a previous summons, which the defendant had failed to do. The defendant, in his plea, denied there was any stipulation before the deed was signed, and stated that there was an understanding that the expenses were to go on to the principal sum. In accordance with the agreement to pay something, 5s. had been tendered to the plaintiffs yesterday. The debt was admitted.

Mr. Close was for the plaintiffs, and Dr. Greer was for the defendants.

[Buchanan, A. C. J.: The onus is on you to set up the defence. You admit the debt?]

Dr. Greer: Yes, my lord.

Joseph Fisher, son of the defendant, who acted in obtaining signatures on the deed of composition, stated at that time his father was very ill. His father

obtained the first signature, and witness completed the list. The managing director of the "Cape Times," Mr. F. L. St. Leger, agreed to sign the deed of composition. There was no one present at the time, and when the deed was signed a gentleman came over and asked about previous costs, and witness said the costs would be added on to the principal sum. None of the other creditors raised this question about costs. His father was too ill at the time to trouble him with any business.

Cross-examined by Mr. Close: The document was taken round after a summons for £86 9s. had been issued by the "Cape Times." Mr. St. Leger did not say that he would not sign the document unless the costs were paid. There was nothing said about the costs until the document was signed.

Adolph Marks Fisher, defendant in the case, stated that at the time the document was being signed, he was in a very weak state of health. It was only afterwards that he learned that his son had taken round the document and got the signatures. He was too ill to reply to the letter sent by Mr. Knox Baxter, reminding him of the agreement with the "Cape Times," and demanding the amount due, as he had failed to pay the costs. Witness subsequently wrote asking for time, and offering to pay the costs if any such promise had been made on his behalf. Each creditor was sent 5s. on Tuesday, in accordance with his agreement to pay something within six months, however small.

Cross-examined by Mr. Close: Before he sent his letter in reply to Mr. Baxter, he was satisfied that his son gave him the same version then as was given in the court.

[Buchanan, A. C. J.: Summons was taken out against you last February?]

Yes.

[Buchanan, A. C. J.: You had no defence in the action?—I cannot say.

[Buchanan, A. C. J.: Why did you enter an appearance then, and increase the costs?—I did not enter an appearance.

[Buchanan, A. C. J.: Is that your signature?—Yes.

[Buchanan, A. C. J.: You had no defence in the case—why did you enter an appearance?—I did not know anything about it.

[Buchanan, A. C. J.: You increased the costs by this conduct of yours, which is unnecessary.]

Dr. Greer closed his case.

F. L. St. Leger, manager of the plaintiff company, stated that in February last summons was taken out against the defendant, and witness was anxious to get the money in. The defendant's son called at the office when Mr. Wheeler was present. Mr. Wheeler said sum-

mons had been issued, and then witnesses asked about the costs, and Fisher said the costs would be paid. Witnesses would not have signed the document otherwise. Fisher was to settle the matter of costs with Mr. Baxter.

Cross-examined by Dr. Greer: Witness did not sign the document before there was any question of costs. When Fisher said he would see the costs paid witness did not think the costs were to be added to the principal amount.

William John Arthur Wheeler, assistant general manager of the "Cape Times," said he took young Fisher into Mr. St. Leger, and witness was present during the whole of the time the arrangement was being entered into. The question of costs was mentioned before the document was signed. Fisher went out to get the money for the costs, but did not return.

Cross-examined by Dr. Greer: Witness was positive that he was present during the whole of the conversation between Fisher and Mr. St. Leger.

Mr. Close closed his case, and counsel, having been heard in argument on the facts.

Buchanan, A. C. J.: The plaintiff sued the defendant in the beginning of February last for £86 odd due to the plaintiff for advertising charges, and appearance was entered to the summons, and on the 6th March, the defendant's son called on the plaintiff, and got him to sign the document produced, which gave time for the payment of the debt. The managing director of the plaintiff company says it was signed on condition that the legal expenses which had already been incurred should be paid forthwith. This had never been done. The case quoted by Dr. Greer might possibly have applied to this case if in consequence of the signature the other creditors of the defendant had been induced to forego any portion of their claims. But it was simply an agreement to wait, and not to take proceedings for six months, on condition some sum of money was paid on account. The whole of the liability remains exactly as it is. The document did not prejudice the other creditors; and it is a coincidence that the six months time allowed expired yesterday. The defendant has sent the sum of 5s. to the plaintiff, and he says, having paid 5s. within six months he is now entitled to further time. There is no further time stipulated for. This agreement to give time was, I think, entered into between the plaintiff and the defendant on the express condition that the legal expenses incurred should be paid. The defendant has had plenty of time within which to pay the legal expenses, and has not done so. The agreement was signed on the 6th March, and a demand was made in May for the legal expenses. The defendant then asked for a little time,

and not until June was a declaration filed, I can see no legal defence to the action brought. The defendant certainly seems to be in a bad financial position, but the plaintiff is entitled to his decree. Judgment will be given for the plaintiff, with costs.

BAKKER V. LUDOLPH. { 1905.
 { Sept. 6th.

Magistrate's jurisdiction—Counterclaim—Evidence of *bona fide*—Set off.

This was an appeal from a decision of the Resident Magistrate, of Wynberg. The appellant brought an action against respondent for trespass. The respondent let a house and certain surrounding land to the appellant. During the term of the appellant's tenancy, the respondent placed on this ground without the appellant's leave or licence certain building material for the purpose of erecting a stoep, whereupon the appellant brought an action for £20 damages in the Magistrate's Court, at Wynberg. The respondent counter-claimed a sum of £30, made up of two items of £5 odd, being a liquidated claim, and unliquidated claims for certain damages for waste of water and damage to certain trees. The Magistrate set off one unliquidated claim against the other, and dismissed the case. The appeal was on the ground that the finding of the Magistrate that the counter-claim was a *bona fide* one, was against the evidence, and his decision setting off the one unliquidated claim against the other was contrary to law. In his reasons, the Magistrate said the counter-claim was a mixed one. The plaintiff's claim was for damages, and he was of opinion that the defendant's claim could be set off. The amount claimed by the defendant exceeded the jurisdiction of the Court, and the Court was of opinion that the counter-claim was a *bona fide* one, and dismissed the case.

Mr. Rowson was for the appellant, and Mr. Gardiner was for the respondent.

Mr. Rowson: This appeal is brought on the grounds (1) that the evidence ought not to have convinced the Magistrate that the counter claim was a *bona fide* one. This is not a question of the Magistrate's finding on facts, but of the Magistrate's inferences from facts. The respondent candidly admits that he would never have claimed damages in re-convention had not damages been claimed against him. Then the price he sets on his wood and water is excessive. The appellant had a right to take wood for his own use, and there is nothing to show that he exercised this right unreasonably.

(2) Our chief ground of appeal is that the Magistrate's judgment was bad in

law. He set off one unliquidated claim against another unliquidated. An unliquidated claim cannot be set off against anything. *Van der Linden* (1—18—4—3, *Co.* (4—32—14—1). There are many decided cases which show that an unliquidated claim cannot be set off against a liquidated. See (*e.g.*) *Humphreys v. Humphreys* (14 C.T.R., 244), and the very full judgment of De Villiers, C.J. If an unliquidated claim cannot be set off against a liquidated, *a fortiori*, it cannot be set off against another unliquidated. On this point *Voet* (16—2—17) is explicit. The Magistrate should have heard appellant's claim for damages, liquidated it by his judgment, and then have tried the liquidated part of the counter-claim which was clearly within his jurisdiction. *Jooste v. Petzer* (11 S.C.R., 60). As to the exception regarding future rights, see *Mai v. Borana and Others* (13 C.T.R., 1151).

[Mr. Gardiner said he was prepared to uphold that exception.]

Counsel was proceeding to argue on the second exception to the effect that a landlord might be a trespasser on his own property, and cited *Woodfall on Landlord and Tenant* (C. 16, Sec. 3), when he was stopped by the Court.

[Buchanan, A.C.J.: The Magistrate gave no decision on these exceptions, so we need not discuss them.]

Mr. Gardiner: All the decided cases as to set-off refer to cases in which an unliquidated claim was set-off against one which was liquidated. That is not the present case, for here both the claims were unliquidated. The fact that the respondent admitted that he might not have claimed damages in reconvention had not damages first been claimed in convention is no evidence of *mala-fides*. A *bona-fide* claim is a claim which the person who makes it honestly believes he can substantiate; no matter whether he intends to enforce it or not. Then, was the counter-claim really unliquidated? There was a charge for certain trees and for water. These were really goods sold and delivered, and if the Court is with me in this view, I submit that the Magistrate's jurisdiction was ousted. See *Brady v. Michiel* (3 Juta, 178).

Without calling on Mr. Rowson, Buchanan, A. C. J.: The claim set up by the defendant was divisible, and the Magistrate has not dealt with the question as to whether a landlord could be guilty of trespass on his own land. He has simply satisfied himself that the defendant's claim was a *bona fide* one, but that was not sufficient. He should have heard plaintiff's claim, and the defendant's claim so far as it was competent to be set off. The appeal would be allowed, and the case ordered to be reheard by the Magistrate to whom the question of costs in both courts would be remitted.

HODGSON V. VAN SCHALKWYK.

Costs—Tender.

This was an appeal from a decision of the Resident Magistrate of Williston. The plaintiff claimed £20 damages for a trespass of sheep. The defendant had offered £5, previous to the case, although he did not tender it, and claimed in reconvention £10 for malicious prosecution. The appeal was brought on the ground that a legal tender had not been made, and that costs should not have been given to the defendant.

The Magistrate, in his reasons, held that the damage was fully covered by the tender of £5. It was contended on behalf of the plaintiff that no legal tender was made. In his opinion, the tender was practically a legal one, and there was sufficient evidence to show that the action was the outcome of a previous case. He held that the proceedings were malicious, and gave judgment for the defendant for £5, with costs.

Mr. Close for appellant. Mr. Benjamin for respondent.

Buchanan, A. C. J., said if the defendant had repeated his tender in the plea, the Magistrate would have been justified in making the plaintiff pay all costs subsequent to the date of the tender. But instead of repeating the tender the defendant claimed in reconvention £20 damages, alleged to have been occasioned by the plaintiff maliciously proceeding with the case. The plaintiff brought his action to recover damages, and the fact that a tender was made justified his taking legal proceedings. The mere fact that he refused the tender and proceeded to trial would not justify any Court in saying that the civil proceedings were malicious. The Magistrate decided that the proceedings were malicious, and gave judgment for £10, but this judgment of the Magistrate could not possibly be sustained. The appeal must be allowed, with costs. Judgment in the Court below will be entered for the plaintiff on the claim in convention for £5, and in the claim in reconvention for the defendant with costs.

STUPART V. CROSS.

Mr. Benjamin was for the appellant, and Mr. Gardiner was for the respondent. The appeal was from a judgment of the Acting Resident Magistrate of Somerset West, by which the defendant was ordered to pay £10 and costs for the removal of wood and material.

Counsel having been heard in argument,

His Lordship, in giving judgment, said: The plaintiff in this case bought a farm, and on this farm there was a stable at the time of the sale. Mrs.

Kruger lived on the farm, and he had professed an interest in the farm, and was allowed to remain for six months. The defendant, who had no right on the farm, had gone to live there three years before with one Joubert, who was the lessee of the farm. He had lived with Mrs. Kruger apparently, and while so living with her he built this stable. Having built the stable, he removed the roof before he left the farm. He certainly was not entitled to be put in any better position than a *mala fide* possessor. One of the principles in the case of *De Beers and the London and S.A. Exploration Company* (10 Juta 350) is that a *mala fide* possessor, who has affixed materials to the land, and before demand by the owner, has disannexed and removed them, is not deemed to have parted with his ownership in the materials. That was a very well-considered judgment, and must be deemed as an exposition of our law on the subject. The defendant, Stupart, removed these materials, which he had placed on the land, and having removed the materials, I think the rules laid down in the *De Beers* case must apply. It is with some hesitation I allow the appeal, with costs, and judgment, with absolution from the instance in the Court below, with costs.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

ESTATE STEENSMa V. { 1905.
STEENSMa. { Sept. 6th.

This was an action brought by the trustee in the insolvent estate of W. J. Steensma, jun., against W. J. Steensma, sen., insolvent's father, for an order for the cancellation of a certain deed of transfer of a certain piece of property, situated at Maitland, passed by the son in favour of the father.

The declaration set forth that the plaintiff was duly appointed trustee in the insolvent estate of W. J. Steensma, jun., and the defendant was the insolvent's father, residing at Maitland. On December 12, 1904, the insolvent's estate was compulsorily sequestrated. On November 16, 1903, W. J. Steensma, jun., obtained transfer of a certain piece of land, situated at Maitland; and on the same day a mortgage bond was passed on the property by the insolvent in favour of his father, W. J. Steensma, sen. On October 21, 1904, transfer of the land in question was passed by the son to the father, under cover of an alleged purchase and sale,

the purchase price being £2,000, of which £1,200 was covered by the bond, and £800 paid, it was alleged, in cash. In December of the same year the estate of W. J. Steensma, jun., was sequestrated; and the trustee alleged that no valuable consideration was given by the father, and that transfer was made when the liabilities in the estate exceeded the assets; or, alternatively, that the transaction was not *bona fide*, and was carried out with the object of defrauding the creditors in the estate. The defendant, in reply, said that the sale was *bona fide*.

[Hopley, J.: The whole point is whether there was a cash balance?]

Mr. Burton: Yes; and whether, if a cash balance was paid, the transaction was *bona fide*.

Mr. Burton (with him Mr. Van Zyl) appeared for the plaintiff; and Mr. Upington (with him Mr. D. Buchanan) was for the defendant.

Gother Mann stated that he was the plaintiff in the present action as the sole trustee in the insolvent estate of W. J. Steensma, jun. Upon the confirmation of witness's appointment, he called for the books and papers in the estate. After some trouble, the books were handed over; and witness now produced certain three ledgers. One appeared to refer to a shop business, which was carried on for about 18 months, stopping about December, 1903. Another ledger—it was journal and ledger combined—referred to the same business. In December, 1903, the whole stock of the shop was disposed of to Friedman. The third book referred to a forage business. In one of the books there was an index reference to the insolvent's private transactions; but the pages 210 to 215 were torn out of the book. Page 213, one of those torn out, was indicated in the book as referring to insolvent's private transactions. Otherwise, there was no reference to the insolvent's private transactions. There was considerable difficulty in getting information from the insolvent; and witness prosecuted him; and eventually the insolvent was sentenced to two months' imprisonment, for failing to attend a meeting of creditors. From June, 1904, the insolvent did not keep any banking account. Witness had prepared a statement of the insolvent's position on September 30, 1904. He set down the liabilities as follows: Unsecured liabilities, £628 2s. 2d.; bonds, £5,250. The assets consisted entirely of immovable property, which witness took at the municipal valuation. The statement showed a deficiency of £1,628. As a matter of fact, the total amount realised by the sale of the properties was less than the total municipal valuation. Witness produced the proofs of debts on the estate. The assets put in the statement did not include the pro-

party now in question, Steensdale, Maitland. Had Steensdale been taken in, it would have made a difference of about £300 in favour of the insolvent; the deficiency would have been brought down to about £1,528. The estate appeared to have been in an insolvent position for a long time—even at the time at which the first bond was passed.

Cross-examined by Mr. Upington: The only concurrent liabilities proved amounted to £326 2s. 11d. The first bond was passed in 1903 for £4,500; two others were passed, one in March, 1904, and the other in April of the same year. Witness considered that the municipal valuation of the properties in the estate was a fair one. The other entries in the book out of which the two pages were torn referred to transactions in 1898 and 1899. There had been a fraud with regard to the raising of a loan on an adjacent property. Witness had not prosecuted the insolvent for that. The loan purported to be on Steensdale, whereas it was put on the plot of land. You were deluded into the belief that the property valued at £1,500 was the adjacent plot. How can you explain that? The insolvent will be able to do that.

Witness (continuing) said that in September last none of the properties would have realised the municipal valuation. The bond for £500 on Steensdale was passed in March, 1904. Witness was not aware then that there was a bond on it for £1,200. The loan was granted subject to the land being free.

You never looked up the title deeds? That would have been looked into when the loan was passed.

There was no record of land transactions in the insolvent's books.

Johannes E. Neethling, auctioneer, and partner in Hofmeyr and Son, stated he had a good deal to do with landed property. He knew the property of the insolvent, Steensma. Witness was engaged to sell the place. He valued the property at the market value existing in September last at £2,500. There were tenements and a shop, and witness valued them at about £1,400. The insolvent had been owing him £37 since February, 1903, over the sale of two horses.

John Melville Marquard, bookkeeper for Marquard and Sons, said that since the end of 1903 the insolvent had owed his firm £290 3s. for goods supplied.

Pieter Steyn, farmer, Malmesbury, said Steensma, jun., had been owing him £53 for hay for more than a year.

Ernest John Richard Janson, plumber, Zonnebloem, said a sum of £40 had been owing him by the insolvent since August of last year. When he saw the old man the latter told him that he had lent £2,000 on the property, and was going to claim it.

Hubert Corder, clerk in the R.M.'s Court, Cape Town, produced extracts

from judgments in that court against Steensma, jun., for £26 17s. 3d. on September 23, 1904; for £60 2s. on September 27, 1904; decree of civil imprisonment for £20 3s. 6d., in September, 1904; and £52 on October 21, 1904.

William Muller, clerk in the Deeds Office, produced the transfer of the property, dated October 21, 1904.

Mr. Burton closed his case.

Anthony van Ryneveld, of Dempers and Van Ryneveld attorney, said the defendant was a client of his firm, and in 1903 the defendant had £1,100 on deposit. Later on defendant obtained £300 from another client, Mr. Le Roux, about February, 1904, and the bond for £1,200 was passed in November, 1903. The father and the son came on the occasions when the instalments on the £300 were paid, and went away together with the cheques. The transfer from Steensma, jun., to Steensma, son., was proposed by his firm, and the same day transfer was passed a mortgage was raised for £850; of that, £300 was utilised in paying Le Roux, and the balance was paid out according to the instructions of Steensma, jun.

William Jan Steensma, sen., father of the insolvent stated that in May, 1904, he advanced the insolvent £200 for the purpose of erecting a building on the property in question, for which amount he gave a promissory note, falling due on August 28. He also advanced him £1,200, for which a bond was passed on the property on November 16, 1903, and went off as part payment of the purchase amount of the property. In August, 1904, witness purchased the property for £2,000, £1,200 of which was deducted to pay off the bond. For the balance he raised a loan from Messrs. Dempers and Van Ryneveld, for which he passed a bond on October 21, 1904, simultaneously with the passing of the transfer. £318 was deducted by Messrs. Dempers and Van Ryneveld, being amount due by the insolvent to that firm. Witness paid £290 due to Messrs. Marquard and Co on a promissory note. When witness paid these amounts, and purchased the property he believed his son was quite solvent.

Cross-examined by Mr. Burton: Witness did not have to claim anything against the estate. Witness did not know of any judgments being obtained against the insolvent prior to September. The insolvent did not apply to witness for the loan of money to meet certain judgments obtained against him in May.

Do you read the papers?—Yes; I read the "News" and "One Land."

[Hopley, J.: Do you read the "Times"?]—I do occasionally.

[Hopley, J.: Mr. Burton wants to know if you read the proceedings at the Magistrate's Court.]

Mr. Upington: Cases of this sort are not reported.

Mr. Burton: There is a gazette published for the protection of merchants, which contains them.

[Hopley, J.: Do you read that gazette?]—I did when I was in business, but I don't now.

Witness (continuing) denied that he told Johnson that he had lent his son £2,000 on the property. He also denied having told Johnson that he was sorry for him, as he was the biggest creditor.

Witness remembered Steyn telling him that a cheque given by his son was not honoured at the bank. It was in August that witness agreed to purchase the property from his son.

Mr. Upington closed his case, and counsel were heard in argument on the facts.

Hopley, J., said the plaintiff in this case claimed that a certain transfer of a certain property at Maitland, made on or about the 31st of October, 1904, should be set aside under the terms of the 83rd section of the Insolvent Ordinance, or otherwise by virtue of the common law, as being an alienation in fraud of creditors. The allegations made in the declaration were very serious, and when the aid of the 83rd section was invoked, the onus on the plaintiff is very strong in order that the relief he sought might be granted. It had to be proved that the assets at the time of the alienation were less than the liabilities, and that the contract was not a *bona-fide* one. Then only could the prayer be granted. The circumstances of the present case seemed to show that the insolvent was carrying on business, and must have been able to get plenty of credit. He owned considerable immovable property, on which he appeared to have got big loans. Possibly on account of the depression that had recently taken place, the insolvent seemed to have got into financial difficulties. In December, 1903, he sold a business, but what the nature of his employment in 1904 was, was not known. During last year judgments were obtained against him, and it was proved that he was in monetary difficulties, and that the defendant must have known of it. One reason given was because the insolvent was the defendant's son. One fact was that a cheque of the son's was dishonoured in the July, and another fact was that the father went security for the son to Messrs. Marquard for the sum of £290. It was apparent that at this time the father intended purchasing one of the properties. These isolated circumstances did not necessarily bring to the attention of the father that the son was in financial difficulties, as he was well known to have other valuable properties, on one of which there was a bond of £4,500. Not a word had been

said to show that the defendant knew that the value of the property had dwindled so low. The father might very well have thought that his son would pull through all right, and that he was only temporarily embarrassed. His whole evidence tended to show that he was anxious to help his son but the evidence did not show that the son confided in his father, which would be a thing that he would not be likely to do, as it might tend to close up the fountain from which he was obtaining financial relief. It was evident that about September 1 the sale to the defendant was under consideration, as a power of attorney was made by him regarding it. All the documents tended to show that the sale must have taken place in September. All that made it impossible to get transfer before October 23. In September there was no knowledge on the part of the defendant of the insolvency of the son. It seemed to the Court that there had been a disastrous sale of a portion of this property, when the bondholder was the only bidder, and got the property for the amount of his bond. The amount of £800 had actually been paid by the defendant for the one property to the insolvent, in addition to the bond, and the Court believed that it was a *bona fide* transaction of the father to assist his son in his temporary embarrassment. If this was a *mala-fide* transaction, as was suggested, it was most peculiar that in every step of this transaction the defendant should have had the advice of an attorney of the Court. It seemed to the Court that the transactions were perfectly *bona fide*, and that the plaintiff must fail in his action as far as the 83rd section of the Insolvent Ordinance was concerned, and judgment would be for the defendant with costs.

[Plaintiff's Attorneys: Sauer and Standen. Defendant's Attorneys: Dempers and Van Ryneveld.]

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

VAN BIERCK AND CRAW—{ 1905.
FORD V. STABLEFORD. { Sept. 7th.

This was an appeal against a decision of the Resident Magistrate of Wynberg, in a case in which Van Bierck and

Crawford, of Cape Town, sued William Stableford for the recovery of £16, for goods alleged to have been sold and delivered.

The Magistrate gave judgment for the appellants for £5 3s. 6d. This sum was arrived at by taking from the amount claimed the charges for certain goods in dispute. The appeal was brought on the grounds that the evidence did not support the decision of the Magistrate, and that judgment should have been for the plaintiffs for the full amount claimed.

Mr. Alexander was for the appellants, the plaintiffs in the Court below; the respondent did not enter an appearance.

Mr. Alexander was heard in argument on the facts.

Buchanan, A.C.J., said that there was a direct conflict of evidence in this case, and the Magistrate disallowed some portions of the claim, and allowed other portions. It all depended on the credibility of the witnesses; and the Court could not say that the Magistrate was so utterly wrong in his judgment as to justify it in altering his decision. It was not possible for the Court, in a case depending solely on the credibility of witnesses, without having the witnesses before it, to set aside the finding of the Magistrate, who had had the witnesses before him. The appeal would be dismissed, with costs.

DE VILLIERS V. GROENEWALD AND ANOTHER.

This was an appeal from a decision of the Resident Magistrate of Murraysburg, in a case in which the plaintiff, the appellant on appeal, sued the defendants, the respondents on appeal, on a promissory note for £40. Dr. Greer appeared for the appellant, and Mr. Benjamin for the respondents.

Dr. Greer said that in the Court below one of the defendants, Doornik, confessed judgment, and the Magistrate refused to give judgment against the other, Groeneveldt. The one against whom judgment was given was worthless, and the appellant now sought to obtain judgment against the partnership. The plea was a denial of signature, and stated that Doornik had no right to sign for the partnership, in terms of the deed for partnership between the defendants, and that he had no right to sign a promissory note on the partnership for his private requirements. The appellant set up the case that the money was required for the purposes of the partnership, and not for Doornik's private requirements.

Buchanan, A.C.J., said the defendants Groeneveldt and Doornik were

partners under a written deed of partnership, and by the deed Groeneveldt had charge of the bookkeeping and the management of the accounts, and the cheques were to be signed by Groeneveldt. Doornik, at the express direction of his partners, bought the pair of mules. Under ordinary circumstances, one partner could bind the other. But in this case there was the express authorization to pledge the credit of the partnership, and the property bought went into the partnership assets, and were now in the actual possession of Groeneveldt, the objecting partner, who also when spoken to by the appellant, acknowledged his liability. Under these circumstances he thought the Magistrate erred in keeping to the wording of the deed of partnership between Doornik and Groeneveldt, when in this transaction it had been departed from by the parties thereto. The appeal would be allowed, with costs, and judgment entered for the appellant in the Court below, with costs.

SCHWARTZ V. LOUW.

Mr. Burton was for the appellant, and Mr. Benjamin was for the respondent. The appeal was from a decision of the Resident Magistrate of Wellington, in a claim by the plaintiff against the defendant for the delivery of a heifer, the property of the plaintiff, or its value (£15). The Magistrate upheld an exception that the name of the plaintiff's attorney was not disclosed, and dismissed the case.

Counsel for the respondent having been heard in argument,

Buchanan, A.C.J., said the summons was duly signed by the clerk of the Court, and was duly served on the defendant. The Magistrate's Court Act said nothing about the summons being also signed by an attorney. The exception ought never to have been allowed. The appeal would be allowed, with costs, and the exception overruled, and the case remitted to the Magistrate to be tried on its merits.

DU TOIT V. LILIENFELD BROS.

Mr. J. E. R. de Villiers was for the appellant, and Mr. Burton was for the respondents. The appeal was from a decision of the Resident Magistrate of Hope Town, in which the plaintiff claimed £20 for goods sold and delivered, the transaction being in respect of two guns, which the defendant contended were not in order. The Magistrate granted absolution from the instance, against which the plaintiff appealed.

Buchanan, A.C.J., dismissed the appeal, with costs.

DU FREEZ V. BRINK.

This was an appeal from the Resident Magistrate's Court of Wellington, in which the plaintiff sued for £185, less £7 paid on account, being the balance due for goods sold and delivered. The judgment of the Magistrate was absolution from the instance, with no order as to costs, and the point of the appeal was as to the question of costs. The defendant (appellant) contended that he was entitled to costs.

Mr. Benjamin was for the appellant, and Mr. J. E. R. de Villiers was for the respondent.

In the course of the hearing of the case, Buchanan, A.C.J., remarking on the Magistrate's decision, said: "That's a most extraordinary judgment. Persons like that should not be allowed to try cases. The reasoning is in one direction, and the judgment is in the opposite direction. I am sorry that there is not a cross appeal, and then I might have settled the whole question."

Buchanan, A.C.J., said that the Magistrate had in this case, granted absolution from the instance, without costs. If the Magistrate believed the plaintiff's evidence, he ought to have given judgment for the plaintiff, with costs. If he did not believe the plaintiff, he should have given judgment for the tenderer. Instead of that, he granted absolution from the instance, but he had not given satisfactory reasons for his refusal to allow the defendant his costs. The defendant ought to have had his costs. There should be some grounds for departing from the rule that the victorious party was allowed costs. The judgment of the Court would be that the appeal would be allowed, with costs; judgment to be entered for the plaintiff in the Court below for the sum of £1 15s. 7d., the amount of the tender, and absolution from the instance in the case of the remaining claims, the plaintiff to pay costs.

REYNOLDS AND CO. V. LUYT.

Mr. Van Zyl (for the appellant) stated that this was an appeal from the Resident Magistrate of Prieska, in which respondent was allowed judgment for an amount of £4 4s., loss sustained through breach of contract. The respondent alleged that he had been engaged by appellant to go and fetch 8,400 lb. of goods at an agreed charge of 1s. per 100 lb. When he arrived at the place where the goods lay, the appellants' agents refused to hand all the goods over. Appellants stated that they never entered into any such contract, and merely told respondent that if he was anxious to get the goods at

all, he must hurry. They were quite willing to pay for the goods he brought back.

Buchanan, A.C.J., said that there was a direct conflict of evidence as to whether or not a contract had been entered into between the parties. The respondent stated Reynolds told him that there was 8,400 lb. weight of goods to be transported, and that they asked him to hurry up and go and fetch them. Appellants denied this, and said that they told respondent that if he wanted to fetch the goods he would have to hurry. The question was one entirely of fact. The Magistrate based his judgment upon the evidence and telegrams put in, and in his lordship's opinion, there was not sufficient grounds for upsetting the Magistrate's decision. The appeal would therefore be dismissed, with costs.

WELLS V. M'BANGA.

This was an appeal brought by the appellant Wells to have the judgment of the Resident Magistrate of Maclear set aside. The case arose out of the ownership of a certain horse, which the plaintiff M'Banga averred had been lost by him in 1902, and which was afterwards found in the possession of the present appellant. Respondent identified the horse by certain marks and by a split ear.

Mr. Close appeared for the appellant, and Mr. Van Zyl for the respondent.

Buchanan, A.C.J., said this was a question of bare facts. The respondent claimed the horse, which he believed was stolen from him. It was stated that a native who was at present undergoing five years' imprisonment, had stolen the horse. In his opinion, the appellant took a risk in buying the horse from a person like the thief. The identity of the horse as being the one stolen from respondent was mainly based on the facts of the age of the horse and the docking of its tail. As regarded the age, the evidence was very conflicting. The Magistrate, however, heard all the witnesses, and had the further advantage of seeing the horse, and he came to the conclusion that the horse was the property of the respondent, and must be restored to him. In his lordship's opinion, the Magistrate had acted according to the evidence adduced, therefore the appeal must be dismissed with costs.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

APPEALS.

FORTUIN V. ENGELBRECHT. { 1005.
Sept. 7th.

This was an appeal from the decision of the Resident Magistrate of Springbokfontein, given on March 30 last. The appellant was the plaintiff in the action in the Court below, and the respondent was the defendant. The claim was for £20 damages for assault, and the defendant admitted the assault. It was alleged that the defendant struck the plaintiff with his fist, kicked him in the side, and caused him injuries. He admitted the injuries, but denied the damages, and judgment was given for the plaintiff for £3 damages, and costs of suit. The plaintiff appealed on the grounds of the insufficiency of the damages awarded.

Mr. Upington appeared for the appellant, and Mr. Gardiner for the respondent.

Hopley, J., said he thought this was rather an up-hill fight for the appellant.

Mr. Upington said that in another case it might be, but in this case it was not so, as certain specific damages were proven.

The evidence of the appellant, Paulus Fortuin, taken in the Court below, was to the effect that he was a post-cart driver, and also a grain farmer. On February 5 last he was taking a load of fish from the coast to Springbokfontein, and in the course of his journey he outspanned on the farm Elansklop. He asked the proprietor—Willem Engelbrecht, the respondent—for a pipe of tobacco, and the latter, without saying a word, struck him under the jaw and knocked him down, and then kicked him about the face and body. For this offence the respondent was fined £2 and costs, or 14 days in the Criminal Court; and as a result of the injuries he received the appellant claimed £20 damages, but the magistrate only awarded him £3. The evidence of medical men who attended the appellant during his illness was to the effect that prior to this onslaught the appellant was very healthy, but since then he had been suffering from the effects of the kicks he received. Amongst the items claimed for in the damages was the value of a foal born dead, and the progeny of a mare which the appellant had to hire to ride to see the doctor.

The respondent's evidence in the Court below was to the effect that the appellant stole his forage and wasted the water, which had to be brought a considerable distance, and although

cautioned about doing so, continued to do so.

The Magistrate in his reasons stated that the assault for which some considerable provocation existed was of a very mild nature. The evidence of the plaintiff and his father could not be relied upon in any particular. Many contradictory statements were made by them, some of which were proved to be lies. The doctor in his evidence clearly stated that no evidence of kicks in the side could be found. The plaintiff's statement that he rode a long distance after the assault went to prove that his injuries were not of a very serious nature. The Magistrate, in making his award, treated the matter without taking into consideration the provocation.

Mr. Upington contended that the Magistrate was not justified in considering an assault where a man was kicked about the head and face and body was a mild assault. There was no evidence on the record to support the view the Magistrate took. Then, again, there was no evidence forthcoming to prove that the appellant gave the respondent any provocation for the assault.

[Hopley, J.: I consider there is sufficient provocation in a man stealing your forage and wasting your water, for which you have to send a wagon and team of mules miles.]

Mr. Upington said there was very little doubt but that the respondent kicked the appellant when he was lying on the ground. If he did not, then he must have possessed the acrobatic skill of a "Savate."

[Hopley, J.: That is not impossible, knowing the ways of these Hottentots.]

Mr. Upington: But these are white men.

[Hopley, J.: Oh, are they! We are not so sure about that. There is a part of this country where there are very few white people, and the natives possess the names of Europeans.]

On reference to the charge sheet, Mr. Upington ascertained that the respondent was described as a European.

Mr. Upington further contended that when European farmers had little differences they did not usually stand on one leg and kick at their opponent's head and face with the other. Continuing, Mr. Upington said that his client had been badly treated, and asked for a favourable consideration of his appeal.

Hopley, J., commented upon the distances from Magistracies in Namaqualand, and to that might be due the fact that the assault had taken place. He (the learned Judge) said that no one would have complained if the Magistrate had found for a little more, but when one considered that the Magistrate had heard the evidence of both sides, it seemed strange that the Supreme Court should, without hearing witnesses, be

asked to set the Magistrate's decision aside. The appeal would be dismissed, with costs.

SMITH V. DE JAGER AND OTHERS.

This was an appeal against the decision of the R.M., Colesberg.

From the record it appeared that eight of the appellant's oxen had been attached by respondents in execution of a writ against appellant's father. Appellant was a minor, and had been a rebel during the late war. The cattle were given him the day after he returned from commando by his father, as it was appellant's birthday. He had paid for a considerable amount of his school fees, and managed his own affairs. He had not allowed his oxen to be considered as belonging to his father, because the military authorities were paying attentions to the cattle of rebels. The R.M., Colesberg, had declared six of the cattle to be non-executable, but in doing so had said that the plaintiffs and his witnesses' (with the exception of two) evidence was not of the best.

Mr. Uppington was for the appellant (plaintiff in Court below), and Mr. Gardiner for the respondent.

Hopley, J., said he was of the opinion that the matter should be remitted back to the Magistrate for further inquiry as to the ownership of the oxen, which he had declared to be liable for execution, and the further costs of such inquiry and the costs of the appeal would have to abide the results of the inquiry. With regard to the costs of the interpleader action, he thought that the Magistrate had not exercised his judicial discretion in ordering each party to pay his own costs. The Magistrate had given the appellant six out of the eight oxen, practically making him successful in his action. There had been no tender made to the plaintiff, and he had succeeded in the major portion of his claim. His lordship thought that the Magistrate ought to have awarded him the costs. He thought that the judgment should be changed on that point. The costs in the Court of Appeal would have to be paid by the respondent.

STARTUP V. BUJEYE.

This was an appeal from the decision of the Resident Magistrate of Maclear, granting a decree against the appellant for £9 10s.

From the record it appeared that the appellant was engaged in winding up the estate of a Mr. Roberts, of Maclear, which had been sequestrated. Prior to the insolvency, the respondent, a native named Bujeye,

pledged some cattle with Mrs. Roberts for a loan of £9 10s. During the period in which the estate was being wound up, Bujeye, hearing that the cattle had been seized, went into the appellant's office, and paid the £9 10s., which he said he owed to Roberts's estate. His name not being found on the list of debtors, the appellant decided not to pay the money over again until Bujeye returned. He came in a few days after, and on being again asked, said he owed the money to Mr. Roberts, and the appellant then paid the money into the estate. An action was brought to recover the amount, and the Magistrate gave a decree for it against which decision Startup appealed.

Mr. Gardiner for appellant. Respondent in default.

Hopley, J., said the attorney was behaving very wrongly when he did not rectify a mistake of this sort.

Mr. Gardiner: But the money has been paid into the estate, and Startup had not got it.

Hopley, J.: He is the trustee's agent, and surely he can pay the money out of the estate to this unfortunate fellow.

Mr. Gardiner said the trustee always had great difficulty in dealing with an estate between man and wife.

[Hopley, J.: And this poor ignorant Kafir has also got into a difficult position.]

Mr. Gardiner: When the name of this Kafir was not on the list of debtors to the estate, Startup took precautions to ascertain that the money was due to the insolvent's estate, and asked him before handing the money over, and Bujeye clearly stated that he owed the money to Mr. Roberts.

Counsel contended that Startup had received the money, and had distributed it in good faith after having made every inquiry, and he was not legally responsible for it. The trustee was the responsible person.

Hopley, J., said he considered that these people had dealt with this unfortunate native in a terribly careless way. It made one indignant to think of it. Mrs. Roberts lent him money at interest close on 100 per cent. per annum, and when the stock which he had given as a pledge were being seized in the insolvent's estate, nobody took the trouble to explain that the cattle did not belong to the estate. Startup, who was the legal adviser, should have done something in that direction. The result of it all was that this unfortunate native, in the hands of these Europeans, was going to be absolutely ruined. The Court might have to give judgment against this native, but such judgment would not reflect very much to the credit of the Europeans. He did not wish to say that Startup did anything that was really wrong. It was rather Roberts that he (his lordship) blamed.

ed, because they must have known whose the cattle were, and did not take the trouble to explain. He could not understand why Startup did not say to the native when the matter came to light that the estate had not been wound up, and that as the native was not a concurrent creditor, he would get his money back, and have saved all this expense which the unfortunate native had been put to.

Counsel having been further heard in argument,

Hopley, J., said this appeal he feared would have to be allowed, but he regretted exceedingly the whole of these proceedings. He regretted them very much, because he felt certain the unfortunate native, who was affected by the order and the reversal of the decision in the Court below, would never properly get into his head that he had not been properly treated to British justice by the British Courts. He seemed to his lordship to have received very questionable treatment at the hands of the Europeans with whom he became involved. His lordship then proceeded to review the evidence, after which he said it became the duty of the Roberts, when they discovered the mistake, to have protected this native. If they had done so, and disclosed the real owner of these cattle, then there would have been no further trouble in this matter, and the native would not have been deprived presumably of all the property he possessed. The Magistrate seemed to have founded his judgment on the facts of the case, as they appeared before him. He examined the documents, and came to the conclusion that the money was due to Mrs. Roberts, and not Roberts's estate, and he came to the conclusion that it was paid on behalf of Mrs. Roberts. Under all the circumstances there did seem to be no claim against Startup personally. Bujeye might have sued the estate for the refund of the money they got hold of, and which was not theirs. He would still be able to get back the money if the estate was not wound up, or there might have to be a contribution account by the creditors to give this money back to the native. Although these proceedings would probably ruin Bujeye, he feared he would have to give absolution from the instance, with costs.

SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

CIVIL APPEALS.

SMITH V. WATNEY. { 1906.
{ Sept. 8th.

Messenger of R.M. Court—Attachment—Sale in execution.

It is the duty of a messenger who has been entrusted with a writ of execution to attach the goods named therein and sell them on the due date, even if they are claimed by a third person. In such case he should take security for indemnity from the judgment creditor.

This was an appeal from the decision of the A.R.M., of Malmesbury, in a case heard before him, in which the present respondent was the plaintiff and the appellant was the defendant. Judgment was given for £12 8s. in favour of the plaintiff, who was the messenger of the Magistrate's Court. The defendant Smith had previously obtained judgment against one H. J. Hoffman, and thereafter took out a writ of execution. The plaintiff seized two mules which were afterwards claimed by one Lombard, who had a lien on them for rent. The plaintiff refused to sell the mules, until the defendant guaranteed to pay the rent due to Lombard. Upon receiving the guarantee the mules were sold for £22 10s., and the defendant (Smith) duly received the proceeds. The plaintiff paid Lombard the £14 rent, but the defendant refused to refund the money. The Magistrate, for the purposes of the case, said he would take Smith's version of what took place at the office between him and the plaintiff, and he held that whatever the messenger did, after he informed the judgment creditor, that he must be assumed to have done so as the agent of the creditor.

Mr Close was for the appellant, Mr. Van Zyl was for the respondent.

Hopley, J., said that in this case there was an action by Smith against Hoffman and Smith recovered damages for the sum of £16, and costs, and a writ of execution was issued from the Court of the Resident Magistrate at Malmesbury, ordering the Messenger of the Court to take Hoffman's goods to satisfy Smith's claim. He went out apparently as he was intended to do, and there attached two mules and a cart. Lombard gave

security that he would produce these at the right date for sale. It appeared that a few days after Lombard put in a claim, and he had some right to these mules, as they were pledged to him as rent for a farm he had leased to Hoffman. He produced a note to that effect, and about four days after the attachment he seemed to have gone into Malmesbury, and made an affidavit that the mules had been handed to him, and that they were his bona fide property. The Messenger of the Court drew the attention of Smith to the fact that the mules were pledged to Lombard, and Smith admitted that he saw the note of pledge. Now, it was at this interview if at all that the Court must fix the subsequent rights of the parties, with which they were concerned in this appeal. The Messenger of the Court said that upon his showing the note and bringing Lombard's claim to the notice of Smith, Smith said that he did not think much of it, and that he asked if the cart would realise sufficient to pay more than his claim, and the Messenger of the Court said he thought it would, whereupon Smith authorised him to settle with Lombard, and told him to let the sale go on on the basis. That was the Messenger's clear and distinct version of what took place at that interview, but Smith, in his evidence, denied that anything of that sort took place. He admitted seeing the pledge note, and stated he expressed his contempt for it, and that he never authorised the Messenger to guarantee or promise to pay Lombard his rent. It seemed to the Court that it would have been well for the Magistrate to have found either one way or the other as to which of these was the more likely version, but he had not been able to make up his mind to the point of being able to pronounce which of these people he believed and he had gone with considerable ability and care into the law of the case with the object of showing that the messenger's duty ceased when a third party claimed the property. The magistrate held that the messenger of the Court acted merely as the agent to Smith. The Court could not hold that view. The messenger had been commanded to do certain things by the writ that was entrusted to him, and it was his duty to do those things unless something stopped him, the mere putting in of a claim by a third party should not have done so. It was his duty to go on and sell on the right day. He could protect himself from loss at the hands of the judgment creditor, whose writ was in his hands. The messenger of the Court was, he supposed, an experienced messenger, and he should have known that there were ways of protecting himself. He did not do that. The proper thing for the magistrate to have done was to give absolution from the instance, and the appeal would be al-

lowed and the judgment altered. The plaintiff would have to pay costs.

[Appellant's Attorneys: Tregold, McIntyre and Bisset. Respondent's Attorney: D. Tennant, junr.]

FUMBA V. DICKERSON. } 1905.
} Sept. 8th.

Carrier—Negligence.

D. hired F.'s wagon to carry certain grain and saw it loaded on the wagon, and also saw that there was a sail cloth wherewith to cover it. The wagon was in charge of F.'s brother. On arrival at the store of D.'s agent, the grain was found to be wet, and the agent refused to accept delivery.

Held on appeal, that as there was no evidence of negligence against F. or his servants, D. was not entitled to recover damages.

D. had lent to F. certain bags in which to carry the grain under the agreement that they should be returned. On F.'s failure to return them, D. sued him for their value as "goods sold and delivered."

Held, that this action having been wrongly brought, D. was not entitled to recover.

Van der Merwe v. Colonial Government (15 C.T.R., 456) distinguished.

This was an appeal from the decision of the Resident Magistrate of Tabankulu in a case in which the plaintiff, Dickerson, the present respondent, sued the defendant Fumba, the present appellant, for the recovery of £33 15s. damages, alleged by the plaintiff to be owing to him on account of the negligence of the defendant and for goods delivered.

From the record it appeared that the plaintiff came to the defendant and engaged with him for his (Fumba's) wagon to carry 20 bags of mealies and 10 bags of Kafir corn to a place in the Flagstaff District. The mealies and corn were valued at £1 per bag. On the journey they got damaged by rain, with the result that when they reached their destination the plaintiff's agent refused to take delivery. The plaintiff alleged that the damage to the corn was caused by the defendant's negligence, and he claimed £1 value of the corn and mealies, £30, and £3 15s. for goods given to the de-

fendant in consideration of the cartage. The magistrate in the Court below gave judgment for the plaintiff for £26 5s. The plea was a denial of liability for the damage, the £3 15s. being admitted.

In the course of the evidence for the plaintiff in the Court below, it was stated that Dickerson offered to allow Fumba for the bags which were in good condition, and that the defendant led him to believe he would bring back the good grain, the arrangement being that he was to be paid for the return cartage. No bags were, however, returned by the defendant. The grain was good when placed on the wagon.

The magistrate, in giving judgment, based his decision on the case of *Van der Merwe v. The Colonial Government* (15 C.T.R. 456), where the defendant was held liable for damage caused by not furnishing a sail-cloth with a wagon. He gave judgment for £26 15s., being 15s. per bag for the grain and £3 15s. in respect of the goods, which was admitted.

Mr. Le Roux appeared for the appellant, and Mr. Benjamin for the respondent.

Mr. Le Roux said that the mistake the magistrate had made in basing his decision on the case of *Van der Merwe v. The Colonial Government* was in looking upon the present appellant as a common carrier. In the case of *Tregidga v. Sitscuright*, reported in Vol. 14 Supreme Court Reports, p. 76, and 7 C.T.R., 67, the Chief Justice held that the Praetor's edict extended to carriers by land; but he (counsel) contended that this was to be taken as applying only to common carriers by land. In the present case the plaintiff came to the defendant and engaged his (Fumba's) wagon; therefore the defendant could not be regarded as a common carrier, and Golini Fumba, the appellant's brother, who drove the wagon, could be regarded only as the respondent's agent, in so far as he looked after the grain, and as the appellant's agent, in so far as he looked after the horses. The case was really one of letting and hiring. Bower, the respondent's servant, helped to load up the wagon, and it was admitted by the defendant that it had a sail-cloth. In the Court below no evidence was called to rebut the allegation of negligence; neither was there any to prove negligence. There was a sail-cloth on the wagon, and there was no proof that they, on appellant's side, had not done the best they could to avoid the damage.

[Hopley, J.: Your point is that the defendant saw the wagon, and he saw the sail-cloth with which it was furnished, and should have seen if they were fit to carry the grain?]

Mr. Le Roux: Yes, and, further, there is no proof of negligence.

[Hopley, J.: There was a sail-cloth on the cart; of course, if the driver

were to take the sail-cloth off and sleep in it in a rain-storm, leaving the grain exposed, that would be different?]

Mr. Le Roux: Exactly, but there is no proof that we did not do our best—that there was any negligence.

Hopley, J., said that in this case some important points arose, and if it had not been that that was the last possible day in which he could give judgment before proceeding on circuit, he would have taken time to consider it, but as he had not very much doubt himself, he felt ready to give judgment on the case as it stood. The plaintiff sued a native in the Territories who owned a wagon, as a great many natives there did, whom he had hired for a special trip from Mount Ayliff to Lukisikisi to carry some grain. This was about January or February last—during the rainy season in these parts. The appellant sent his wagon to the respondent's store, where the latter had an opportunity of examining it, and seeing that it was all right, and where it was to be presumed he loaded it. Now, it had been argued that if any damage occurred to this grain thereafter, the carrier should be held responsible for it. Mr. Justice Maasdoorp had laid down in a similar case that where a man contracted to do carrying work, he must do so to the best of his ability, and that he was liable for negligence if he should exhibit any negligence in the course of the work he undertook. In the present case the journey was undertaken, and it was said that it should have taken four days, when in reality it took 12 days, and on arrival at the end of the journey the respondent's agent refused to take delivery of the grain, as it was wet. That was the clearest way to increase the damage which had been incurred. What the agent should have done was to open the sacks, and have seen how much of the grain had been damaged. The respondents, it was presumed, had seen to the loading of the wagon before it started on its journey, and the covering of it, and as no negligence was proved against the carrier he could not be held responsible. The Magistrate based his judgment on the case of *Van der Merwe v. The Colonial Government*, which was to a large extent similar. It did not seem to the Court that the judgment in that case should affect the present case, for in that negligence on the part of the carrier was proved. In the present case nobody seemed to have asked how the wet occurred, and they ought to have gone more deeply into the question, and ascertained if the damp was due to the negligence of the carrier. That had not been done, and it seemed to His Lordship that that portion of the case in the Court below failed, and there should be a reversal of the judgment, and there would be absolution from the instance. With regard to the other

claim for £3 15s., the action was brought for goods sold and delivered; that should not have been done. They were not sold and delivered; they were given for carrying the goods, and in that the respondent had carried out his contract. Therefore, he must succeed in his appeal. On both counts it seemed that the Magistrate's judgment was wrong, and the appeal would be allowed with costs. He thought that under the circumstances the proper thing was absolution from the instance, because it might be possible for the present respondent to move if there was actual negligence on the part of the carrier.

[Appellant's Attorneys: Zietsman and Bosman. Respondent's Attorneys: Findlay and Tait.]

SUPREME COURT

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

ADMISSIONS. { 1905.
 { Sept. 12th.

Mr. Benjamin moved for the admission of Everitt George Orsmond, as an attorney and notary.

Applications granted, oaths to be taken before the Resident Magistrate of East London.

Mr. Benjamin moved for the admission of Johannes H. Conradie, as an attorney and notary.

Application granted and oaths administered.

PROVISIONAL ROLL.

LAWLEY V. SOUTH AFRICAN PIONEER SYNDICATE.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £180, due by reason of the non-payment of capital after notice; counsel also applied for the property specially hypothecated to be declared executable.

Order granted, subject to affidavit of service of notice being filed.

LOTZ V. BRAF.

Mr. Bailey moved for provisional sentence on a mortgage bond for £150, due

by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

DU PLESSIS V. HEGERS.

Mr. Bailey moved for provisional sentence on a mortgage bond for £90, due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

SNYMAN V. TURNER.

Mr. Roux moved for provisional sentence on a mortgage bond for £300, due by reason of the non-payment of interest, and also for provisional sentence on a Magistrate's Court judgment for £11 8s. 11d.; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

HOFFMANN V. NICHOLS.

Mr. De Waal moved for provisional sentence on a mortgage bond for £175, and for the property specially hypothecated to be declared executable.

Order granted.

VERSTER V. BERGL.

Mr. Payne moved for provisional sentence on a mortgage bond, and for £13 2s 6d., insurance premiums, paid by plaintiff, and costs, counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

PAARL AFRICAN TRUST V. BASSON.

Mr. De Waal moved for provisional sentence on a mortgage bond for interest in the sum of £36 and £1 11s. 6d. insurance premiums.

Order granted.

ARMSTER V. BELING.

Mr. Benjamin moved for provisional sentence on a promissory note for £23 15s. with interest *a tempore morae* and costs.

Order granted.

STURK AND CO. V. SHUR AND ABRAHAMSON.

Mr. Lewis moved for a provisional order of sequestration to be made final.

Final order granted.

WILSON V. HEIBERG.

Mr. Gutsche moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

MALYON V. GOLDING.

Mr. Bailey moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

Mr. Bailey also asked that the order should be made final against Moses Golding, under which the defendant had under an alias first name passed a certain mortgage bond.

Buchanan, A. C. J., refused the application.

GOVEY AND CO. V. WARNER.

Mr. Benjamin moved for a provisional order of sequestration to be made final.

Final order granted.

ESTATE LETTERSTEDT V. WENTZEL.

Mr. Douglas Buchanan moved for a provisional order of sequestration to be made final.

Final order granted.

COULTON V. BULL.

Mr. P. S. T. Jones moved for a decree of civil imprisonment upon a judgment of this Court for £200 as and for damages, and for costs amounting to £96 odd. It was stated that the defendant was a medical practitioner residing at Uitenhage.

Decree granted.

Buchanan, A. C. J., subsequently stated that a telegram had been received to the effect that security had been given. Under the circumstances the decree would be suspended for a fortnight.

CHIAPPINI V. VAN STRAATEN

Mr. Du Toit moved for provisional sentence on an acknowledgment of debt for £50, less £25 paid on account.

Order granted.

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MARTIN V. MEKENI AND ANOTHER.

Mr. Russell moved for provisional sentence for £30 interest and £5 2s. 3d. taxed costs upon a judgment of the Magistrate's Court, and for the property to be declared executable.

Order granted.

ESTATE DE VILLIERS V. VAN ZYL.

Mr. Watermeyer moved for provisional sentence on a mortgage bond for £850, with interest, less £40 paid on account. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

DE KOCK V RILEY.

Mr. Close moved for provisional sentence on a mortgage bond for £5,000, with interest and costs, due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Mr. Benjamin (for defendant) said that he was instructed to confess judgment.

Order granted as prayed.

ILLIQUID ROLL.

RANDALL V. RANDALL. { 1905.
 { Sept. 12th.

Dr. Greer moved, in terms of consent paper, for a decree of judicial separation and judgment in terms of prayers 2 and 3 of the summons.

Judgment accordingly.

DARTER V. STEER.

Mr. Alexander moved for judgment under Rule 329d for £29 1s. 3d., balance of account for goods sold and delivered, etc.

Order granted.

GEARING V. B.S.A. ASPHALTE CO.

Mr. Roux moved for judgment under Rule 329d for £30 10s. 6d., work and labour done, with interest *a tempore morae* and costs.

Buchanan, A. C. J., said that an application had been made to him in chambers to sequester the defendants' estate.

Mr. Molteno said that he was appearing in an application against defendants on the motion roll.

Order granted.

HAMMERSCHLAG V. ESTERHUIZEN.

Mr. De Waal moved for judgment under Rule 329d for £56 16s. 4d., goods sold and delivered.
Order granted.

CAPE TIMES, LTD. V. AMERICAN MEDICINE CO.

Mr. Douglas Buchanan moved for judgment under Rule 329d for £23 17s. 6d., advertising charges, with interest *a tempore morae* and costs.
Order granted.

HARDING V. HOWARD.

Mr. De Waal moved for judgment under Rule 329d for £25 18s. 9d., and £10, being amounts deposited in connection with certain transfers and for delivery of certain title deeds to complete transfer.

Buchanan, A. C. J., said that the defendant was an attorney, and he did not appear. He mentioned this point so that the Law Society might look into it. An order would be granted as prayed.

DU PLESSIS V. STARK.

Mr. Swift moved for judgment under Rule 329d for £34 1s., professional services rendered.
Order granted.

CHARLIE V. ESTATE MATOLA.

Mr. Gutsche moved for judgment under Rule 319, defendant having been barred.

Judgment as prayed, defendant to file account within six weeks.

REHABILITATIONS.

Mr. Roux moved for the discharge of Samuel Lewis from insolvency.
Application granted.

Mr. Alexander moved for the discharge of Alexander Gromer from insolvency. He understood that the Master refused to give the certificate.

Buchanan, A. C. J., said it was necessary to have a written report from the Master. The case would have to stand over.

GENERAL MOTIONS.

WOOD V. OXENDALE AND CO. { 1905.
Sept 12th.

Dr. Greer moved as a matter of urgency for the attachment of certain

property *ad fundandam jurisdictionem*, pending the result of an action to be instituted by applicant for £2,500 damages for breach of contract, and for leave to sue by edictal citation. Respondents, it was stated, were an English company. Applicant alleged that he had been appointed their agent for Cape Colony, and that respondents had broken their contract with him.

Rule nisi granted, authorising the applicant to sue by edictal citation, and to attach one case of goods belonging to respondents, pending an action to be brought by the applicant, rule to be returnable on the 15th November, and to be served personally.

TUTT V. TUTT.

Mr. Lewis moved for a decree of divorce, in default of compliance with an order of the Court for the restitution of conjugal rights.

The application was granted.

***Ex parte* WILSON.**

Mr. P. S. T. Jones moved to have a rule nisi under the Derelict Lands Act made absolute.

The application was granted.

HENDRICKS V. CAPE TOWN TRAMWAY COMPANIES.

Dr. Greer moved for leave to sue *in forma pauperis*.

Mr. Molteno opposed the application. The applicant's affidavit was to the effect that, owing to the negligence of the defendant companies, a cart he was driving was upset. He was taken to hospital, where his leg was amputated. He claimed £2,000 damages. He was not worth £10, and consequently sought to sue *in forma pauperis*.

The affidavit of Donald McDonald stated that the pole against which the applicant's cart collided was a fixture, and that the applicant, when he reported the matter, made no statement with regard to a projection of the rails. He saw the rails three months after the accident, and there was nothing wrong with them. The applicant's wife admitted to deponent that her husband ran against the pole, and that the accident was caused through no fault of the Tramway Company, but through that of her husband.

An affidavit made by Henry van den Westhuizen stated that the accident was not due to the negligence of the defendant company. In the interval between the accident and when the applicant reported the accident, the road had been repaired.

Other affidavits made by spectators stated that the horse bolted, and collided with the post.

A replying affidavit by the applicant denied that the horse bolted.

The affidavit of Charles Millar stated that at the spot where the accident occurred, the rail was about an inch above the level of the road.

Catherine Hendricks denied having told Mr. McDonald that the accident was the fault of her husband.

Mr. Molteno said the Court had made the rule that the probabilities should be in favour of the petitioner before granting an order. On the affidavits before the Court, could it be held that the applicant was likely to succeed in his suit. The result would be that the Tramway Company would be put to heavy expense, whilst the applicant would have nothing to lose.

Dr. Greer said he placed himself in the hands of the Court. If there was no chance of the applicant succeeding in his action, of course, it would be inadvisable to proceed with the action. Mr. McDonald had stated that he saw the place where the accident occurred three months after the accident, and that nothing had been done to it in the meantime; whilst Mr. Van der Westhuizen stated that the road had been repaired and reguttered. If the cart had struck the telegraph pole, the boy would have fallen towards the road, but he was thrown towards the path.

Buchanan, A.C.J., said that under the 125th Rule of Court provision was made for a person who was a pauper, on the certificate of counsel, suing in *forma pauperis*. Several cases had been before the Court as to the effect of a barrister's certificate, and in the case of *Almond v. Jordan*, in the Eastern Districts Court, the practice of the Court was pretty fully stated. Since then a case had been before that Court when the question of the effect of counsel's certificate was also discussed, and it was decided that the right to sue in *forma pauperis* was not dependent solely on counsel's certificate. If the respondent could show that the applicant had no case the Court might well refuse leave. It was not a matter of right, but a privilege granted by the Court. Counsel in the present case declined to withdraw his certificate, and maintained that the opposition to the rule was founded on a conflict of testimony. The Court, under such circumstances, had discretion, and his Lordship thought the rule should be made absolute. His Lordship wished to adhere to the opinion that the mere certificate of counsel was not final, but when the case rested on the mere conflict of evidence, the Court would generally act on counsel's opinion. The rule would be made absolute, and Dr. Greer would be appointed to act as counsel, and Mr. J. Bujrski as attorney. His

Lordship added that the Court looked upon counsel in these cases not as counsel for the party, but as advisers to the Court.

Ex parte THE ESTATE MOSTERT.

Mr. Gardiner moved to pass transfer of certain lands.

Mr. Benjamin opposed the application on behalf of the trustee of the estate.

Dr. Greer opposed on behalf of the respondent, Williams.

Mr. Gardiner said he had not been served by the respondent Williams with copies of the affidavit.

Dr. Greer said his client did not oppose. He had been called into court to explain why he should not pay costs.

The applicant in this motion, Willem Frederick Zipp, executor dative in the estate of the late Adrian Sybrandt Mostert, applied for an order authorising him to deal with and dispose of certain property situate at Observatory-road.

From the petition of the applicant it appeared that the late Adrian S. Mostert surrendered his estate as insolvent on the 22nd August, 1863, and at the time of the surrender he was the registered owner of a certain property situate at Observatory-road. The property was brought up in the schedule of the insolvent, and the transfer was handed over to the trustee of the estate. About 1864 Mostert died, leaving a mutual will, in which his wife and the children of the marriage were appointed the heirs. On the 29th December, 1868, the joint estate was rehabilitated. There still remained registered in the name of Adrian S. Mostert a certain portion of the land surrendered. Owing to the order of rehabilitation not having been made in terms of the 106th section of the Ordinance of 1843, the Registrar declined to pass transfer.

Counsel for the trustees read the affidavit of George Wm. Steytler, in which he stated that he was one of the trustees in the insolvent estate of Adrian Sybrandt Mostert. The applicant was not entitled to the property claimed in his petition, as it was still vested in the insolvent estate, and as trustee of the estate he claimed the same for the benefit of the creditors, the deficiency of whose claims amounted to £2,094 1s. 9d. At the time of the liquidation of the estate some of the property in the estate was sub-divided into lots, and it must have been an omission that these lots were not dealt with, or possibly not sufficient was offered, and they were not sold and subsequently forgotten.

Counsel having been heard in argument.

Buchanan, A.C.J., said he thought this application was covered by the decision of the Court in the case of Parker. In this case a certain property was registered in the name of one Mos-

tert. He became insolvent, and by the insolvency, he became divested of his property. Mostert died shortly afterwards, and his widow afterwards obtained the rehabilitation of the joint estate. This rehabilitation, however, was not one which would reinvest them with their estate. Part of the estate had been sold by the trustees in insolvency, and part had since been discovered not to have been sold. One of the trustees, who was still alive, could not say why it was not sold. The property was vested in the trustees for the benefit of the creditors, who had not been paid in full, and consequently were now entitled to payment out of the unreleased property of the estate. He thought the creditors would never have had the benefit of this property had not the applicant moved in the matter, and as he had brought the existence of this property to the notice of the creditors, it was only fair to say that the property should pay the costs of that and previous applications. The only question the Court had to decide was whether the executor *dativo* should not be made to pay the costs of the second respondent.

Mr. Benjamin said he thought the costs of the second respondent should be paid by the applicant. The second respondent had been brought to the Court for no reason at all, in fact, such a proceeding seemed to be gross negligence on the part of the applicant.

Buchanan, A.C.J., said that these costs were incurred in consequence of the order of Court, and the property would have to pay all costs.

BENNETT V. GILLANDERS.

Mr. P. S. T. Jones moved as a matter of urgency for an interdict to restrain the defendant, Dr. J. Gillanders, from removing furniture from a cottage, occupied by him at Muizenberg. The affidavit of the petitioner stated that the respondent was indebted to him in the sum of £38 10s., being for seven months' rental of Blackpool Cottage, Muizenberg. Although petitioner did repeatedly demand the rent, the respondent had failed to pay it. The respondent had hired another house at Wynberg, where he intended removing his furniture, and if he was allowed to do this the petitioner would be defeated in obtaining payment of his claim, and would lose his lien on the furniture, and that he intended instituting an action to recover the amount of his rent.

The application was granted pending an action to be forthwith instituted.

STEPHAN BROS. AND OTHERS } 1905.
V. THE B.S.A. ASPHALT CO. } Sept. 12th.
Oct. 13th.
Oct. 17th.

This was an application on behalf of Stephan Bros. and others for the compulsory winding-up of the B.S.A. Asphalt Co., carrying on business in Strand-street, Cape Town.

The petition of H. R. Stephan, trading as Stephan Bros., and Jack Carey and Co., and Sidney Charles Gearing, trading as Cunningham and Gearing, set forth that the B.S.A. Asphalt Co. was registered on February 25, 1903, for the object *inter alia* of manufacturing asphalt and paving material, and laying of the same. The nominal capital of the company was £50,000, divided into £1 shares. According to the records of the Deeds Office, 36,517 £1 shares had been issued and allotted, and the full amount of £1 a share had been called up thereon. Calls to the amount of £1,206 5s. remained unpaid on divers of the said shares, but it was not expected that any considerable sum would be recovered from this source. The petitioners were creditors of the company, and had made repeated applications for the amount due to them, but the company had neglected to pay or satisfy the same, although they did not dispute their indebtedness. In August, 1905, the insolvent estate of James Garvie and Co. obtained judgment against the company for the sum of £281. A writ of attachment was issued, but the amount was still unpaid. The business of the company had been carried on since its formation at a loss, and was still being carried on at a loss, and the sooner the company was placed under liquidation, the better it would be for creditors and shareholders. The company was unable to pay its debts, and the assets were insufficient to provide for and satisfy all its debts and liabilities. At a general meeting of shareholders, the position of the company was so unsatisfactory that a committee of investigation, consisting of Messrs. J. Maynard Nash, Harry Gibson, C. H. W. Fleming, and A. B. Godbold, was appointed to go into the affairs of the company, and the result of their investigation brought to light serious irregularities and mismanagement. Having regard to the circumstances, it was just and equitable that that company should be wound up by the Court. It was desirable that provisional liquidators be appointed, and that the committee of investigation be appointed as such liquidators. The petitioners prayed: (1) That the said company may be wound up under the provisions of the Companies Act of 1892, and that for such purpose all necessary and proper directions may be given; and (2) that Messrs. Nash, Gibson, Fleming, and

Godbold be appointed provisional liquidators, or that the Court would grant such other relief as may to their lordships seem meet.

The supporting petition of the Cape Town and District Gas, Light, and Coke Co., stated that the B.S.A. Co. had a contract with them for the surplus tar available at petitioners' works. In terms of this contract, the Asphalt Co. were indebted to petitioners for tar supplied up to the end of August, 1905, in the sum of £276 11s. 10d., to which must be added the value of the quantities supplied during the current month of September. Petitioners had experienced difficulty during the last few months in getting the surplus tar removed, in terms of their contract, having their works kept clear by the Asphalt Co. Petitioners found on inquiry that the Asphalt Co. were in difficulties, that a judgment had been obtained against the company for debt, and that the writ of execution remained unsatisfied. Petitioners were also informed that the affairs of the company had formed the subject matter of investigation, and that a report had been submitted for consideration by its shareholders, from which it was clear that the Asphalt Co. was hopelessly insolvent. Petitioners had learnt that the firm of Stephan Bros. and others were petitioning to have the Asphalt Co. liquidated, and placed under the winding-up-clauses of the Companies Act. Petitioners begged to support such application for compulsory winding up, and as it was evident that the administration of the affairs of the company by Andrew Allen, the managing director thereof, must form the subject matter of investigation by the liquidators when appointed, it was their opinion that some person other than Andrew Allen should be appointed as such liquidator. Petitioners were informed that the said Andrew Allen had intimated his intention of applying to be appointed one of the official liquidators of the Asphalt Company, to which petitioners were opposed. Petitioners were, next to the said Andrew Allen, the principal creditors of the Asphalt Company, and were apprehensive that if the liquidation be not speedily decreed the assets of the company would be gradually attached and sold in execution, to the prejudice of the claims of petitioners and others. Petitioners, therefore, suggested that the four gentlemen who were members of the committee of investigation should be appointed official liquidators.

Mr. Molteno for the first petitioners. Mr. Benjamin for the supporting petitioners. Respondents in default.

Buchanan, A.C.J., asked counsel whether it was necessary to appoint four liquidators.

Mr. Molteno said that the committee had presented a voluminous report.

The committee were appointed by the shareholders and the parties interested, and he thought it was well that they should still be associated. He added that he thought the Court was likely to hear more about the matter, inasmuch as very serious allegations were made.

Buchanan, A.C.J., said that the Court would not go into the report at present. A rule would be granted calling upon all persons to show cause why the company should not be placed under compulsory winding up, and why the persons named in the petition should not be appointed liquidators, rule to be returnable on the 16th October, and to be published once in the "Government Gazette" and once in the "Cape Times."

Postea (September 13).

Mr. Alexander (with him Mr. Watermeyer) moved to set aside the provisional liquidation proceedings.

Mr. Alexander based his application upon a petition by Mr. Andrew Allen, managing director of the company, which was in the following terms:

1. That a petition was presented in the Chamber-book by Stephan Bros. and others praying for the winding-up of petitioner's company, and for the appointment of Messrs. Gibeon, Nash, Fleming, and Godbold as liquidators thereof.

2. That your lordship refused to deal with such a petition save in open court.

3. That on the 12th (yesterday), the petition was presented in court, and your lordship made a provisional order of liquidation, and at the same time appointed the gentlemen above named as liquidators.

4. That no notice whatsoever has been given your petitioner or to the company or to any of the company's officials of such intention to so petition, and that the first intimation that any such proceedings were contemplated was conveyed to him through the Cause List published in the "Cape Times."

5. That your petitioner begs leave to assert that, in his opinion, the said order was obtained by wilful misrepresentation.

6. That the claim lodged by Messrs. Stephan Bros. has repeatedly been offered to them and refused.

7. That the amount originally owing to them was £2,000, plus interest, and that in security thereof 10,000 shares of this company belonging to your petitioner were deposited with Stephan Bros.

8. That on 14th January, 1905, this sum had been paid off with the exception of £258 10s., and that, upon that date and on subsequent dates, a cheque hereunto attached, and dated 14th January, for the said balance, was rendered to Stephan Bros., and that the said cheque was declined, and that, on or

about 7th August, the bank, as per certificate on the said cheque, certified that there were enough funds available.

9. That petitioner begs leave to refer your lordship to the letters of 20th June from Stephan Bros.; 8th August, from Van der Byl and De Villiers; and the letter of 15th August from the secretary of the company to the bank, and other relative letters hereto attached.

10. That the reason that Messrs. Stephan Bros. declined to accept payment was solely and simply in order to prevent your petitioner from voting on the 10,000 shares referred to, and which belonged to him.

11. That the claim lodged by Mr. E. P. Reilly on behalf of the Cape Town and District Gas Light and Coke Company is not due.

12. That an action in connection therewith was raised in the R.M. Court, and the decision of the Magistrate was that under clause 7 of the agreement between the Gas Company and petitioner's company, the sum sued for was not due.

13. Against this judgment the Gas Company have appealed, but at present the Magistrate's judgment stands, and your petitioner would crave leave to refer your lordship to the records therein.

14. On August 7, at a meeting of creditors of petitioner's company, an investigation Committee, consisting of Messrs. Gibson, Nash, Fleming, and Godbold, was appointed to investigate the affairs of the company.

15. That the appointment is set forth in the minute book of the company.

16. That at a meeting of shareholders, held on Monday, the 11th inst., the committee's report, together with a reply thereto by your petitioner, came up for discussion.

17. That at the outset of that meeting Mr. Attorney A. J. MacCallum took exception to the legality of the whole proceedings in connection with the appointment of the committee subsequent to August 7, the date on which a resolution was passed appointing the said Committee of Inquiry, and that his objection was noted.

18. That the grounds of objection were that such a committee is appointed under section 120 of the Companies' Act, 1892, and that consequently a second general meeting should have been held to confirm the resolution of the first meeting in terms of section 110 of the said Act.

19. That no such subsequent general meeting was held, and that your petitioner therefore holds that all proceedings in connection with the appointment of this committee subsequent to August 7 are illegal, and constitute a direct contravention of the Companies' Act, and of the said sections in particular.

20. That although Messrs. Gibson, Nash, Fleming, and Godbold were pre-

sent at the meeting above referred to that none of them gave any notice or made any reference whatsoever to the application brought before the Court yesterday, although they well knew that steps were being taken thereto, and that also with their consent and on their initiative.

21. That the report of the Committee of Investigation was presented to the shareholders at a meeting held on September 7, and that discussion was postponed until a meeting on the 11th inst., in order to permit of my reply being placed before the shareholders.

22. That a copy of said report is attached to the petition lodged by the Gas Company and above referred to.

23. That your petitioner desires to state that the said report is an absolute, wilful, and malicious mis-statement of fact, a deliberate misconstruction of your petitioner's intentions, and a gross travesty of truth.

24. That your petitioner in giving evidence was treated in a most unfair and biased manner, and that the report issued is not in accordance with the evidence given, but rather to the contrary.

25. That your petitioner has repeatedly requested a copy of the evidence, but that the chairman of committee (Mr. Nash) has declined to furnish him with a copy or to permit him to examine the original.

26. That at a meeting held on 7th September, the directors' report, copy of which is hereunto annexed, was passed, and in that report the following extract occurs: "It will be necessary if this company is to continue trading to find additional capital, and the Board advises a reconstruction of the company, reducing its present capital and inviting fresh capital or by the issue of debentures. . . . At the instance of the chairman, at our last meeting a committee was appointed to inquire into the affairs of the company. . . . The directors wish it placed on record that, in their opinion, the committee as constituted is not an impartial committee, moreover their actions during the past few weeks in making public the affairs of the company . . . is not calculated to be in the best interests of the shareholders. . . . The directors regret having to take up this attitude, as they had hoped the committee would be an assistance to them, instead of which it has been the opposite."

27. That your petitioner further takes exception to the legality of the report on the ground that the committee, even though the appointment had been legal (which petitioner, as indicated in section 19, denies) have exceeded their powers in that they have dealt with matters other than the financial aspect and affairs of the company.

28. That even although the company, as your petitioner holds, was thoroughly solvent at the date of the presentation of Stephan Bros.' petition to the Court for liquidation, the mere fact of the publication of provisional liquidation while the company had no chance of replying, renders its position very serious indeed both in regard to creditors and to work in hand.

29. That in this connection petitioner begs leave to produce a telegram from Johannesburg stating that certain works there are about to be stopped.

30. That your petitioner, in common with the other directors and with the shareholders named in the accompanying affidavit, and with certain creditors, verily believe that the appointment of Messrs. Gibson, Nash, Fleming, and Godbold as liquidators is to the greatest disadvantage of the creditors, shareholders, and the business of the company alike.

31. That your petitioner represents by far the largest creditors, viz., the Neuchatel Asphalt Co., Ltd., who are creditors to the extent of about £4,000, and that petitioner is also a personal creditor to the extent of over £600.

32. That your petitioner emphatically denies the assertion in the Gas Company's petition to the effect that he intends to apply to be appointed joint-liquidator.

33. That the company is solvent, and that the report of the committee (if held legal) does not show anything to the contrary.

34. That if your lordship does not see fit to rescind the order of provisional liquidation, then your petitioner humbly suggests that four liquidators is an utterly unnecessary and needless expense.

35. That in connection with the appointment of Mr. Nash, your petitioner desires to point out that Mr. Nash was the auditor of the company, and that to appoint him as a liquidator would be a most unusual proceeding.

36. That your petitioner begs leave to represent to your lordship that in the event of provisional liquidation still being upheld by your lordship, the appointment of Messrs. J. M. P. Muirhead and Mr. Gerald Orpen, of E. R. Syfret and Co., as joint official liquidators, would be in the interests of the company and of all concerned, they being impartial men.

37. That your petitioner desires to refer the Court to the report by Mr. W. A. Palliser, the manager of the company's branch in Johannesburg, which report is in the form of a letter dated 31st August, 1906, and to which is subjoined a copy of his former report dated May 29, 1905, which is lodged herewith, and especially to the statements regarding the managing director contained on pages 2 and 3 of the said letter-report.

May it therefore please your lordship

to make an order to one or other or all of the following effects, viz.:

1. For an order setting aside the whole actions of the Investigation Committee and all matters and actions relative thereto, subsequent to the date of appointment (7th August).

2. For an order that the said committee have acted illegally, and, *ultra vires*, in discussing in their report matters other than the financial affairs of the company.

3. That the order appointing Messrs. Gibson, Nash, Fleming and Godbold to be provisional liquidators, and directing that the company be placed in provisional liquidation, should be set aside in so far as concerns the appointment of the liquidators, and that Messrs. Muirhead and Orpen be appointed liquidators in their place.

4. That the order be held over and not permitted to take effect until such date within one month from the date hereof, as a meeting of shareholders shall have discussed and come to a decision upon the question of the reconstruction or liquidation of the company.

[Buchanan, A. C. J. (to Mr. Alexander): Have you given notice to the other side?]

Mr. Alexander: No, my lord. Yesterday's application by the creditors was *ex parte*, and this also is *ex parte*. We are anticipating the return day of the order granted yesterday.

[Buchanan, A. C. J.: I can hear your application if it is a matter of urgency, but I don't see how I can give any order without notice to the other side.]

Mr. Alexander read the petition of Mr. Allen, and said that in the present state of affairs very serious injury was being done to the company.

[Buchanan, A. C. J.: If you had given notice to the other side, you might have anticipated the return day.]

Mr. Alexander: There was no time. The company is now hung up completely. In the petition of my client two independent persons are suggested as liquidators.

[Buchanan, A. C. J.: There are two men appointed already in whom the Court has every confidence.]

Mr. Alexander said that he had to suggest the names of Mr. J. M. P. Muirhead and Mr. Orpen, of Messrs. E. R. Syfret and Co., both of whom were competent men, who had had nothing to do with the matter previously. The petition set out that the petitioner would be very much prejudiced by the fact that the provisional liquidators who had been appointed had presented a certain report, which took up a certain view in regard to the petitioner.

[Buchanan, A. C. J.: They won't present any report until the rule *nisi* has been confirmed.]

Mr. Alexander: I was referring to the report mentioned yesterday. They

make very serious allegations against the present petitioner, and surely they should not be the men to have in hand the winding up of this estate until those matters have been investigated. They have presented this report, and they want to have the sole management of the company.

[Buchanan, A. C. J.: Those may be very good arguments, but no notice has been given of the application, and the Court cannot proceed to go into the matter now.]

Mr. Alexander: I don't know whether there will be any opportunity of hearing this matter before the return day?

[Buchanan, A. C. J.: The Court will be sitting before next term. Nothing can be done on this application until notice has been given. I do not want to go into the merits of the petition unnecessarily.]

Mr. Alexander: Can your lordship suggest any day when you will be prepared to hear the application?

[Buchanan, A. C. J.: The Court will be sitting as soon as the Criminal Sessions are over.]

Ex parte NASH, GIBSON AND OTHERS.
In re STEPHAN BROS. V. B.S.A. ASPHALT CO.

Subsequently Mr. Molteno appeared, and moved on the petition of Messrs. Nash, Gibson, Godbolt, and Fleming, the provisional liquidators, for the committal of Mr. Andrew Allen, the managing director, and Mr. Charles Gibbs, the secretary of the company, for contempt of Court. The petitioners stated that on Tuesday, when their legal representative went to the office of the company, after the order given by the Court, the secretary refused to recognise liquidators. Their representative was threatened with forcible ejection. Gibbs said that he could do nothing without consulting Mr. Andrew Allen, the managing director. One of the petitioners (Mr. Nash) subsequently went to the office, and found only a lady typist and a small boy there, neither of whom had any knowledge of the whereabouts of Gibbs or any official of the company. Later Gibbs appeared, and when requested to wait for petitioners, he said that he was going to be back, and, as a matter of fact, he disappeared, and had not since been seen, although he resided on the premises. It had been found that one safe had been removed bodily from the office, the main safe had been opened, books and other documents of the company removed, and the drawers and files of the office ransacked. The taking away of these books and papers was done on Tuesday night, or, at all events, since the order of the Court was granted. Petitioners verily believed that Gibbs and Allen were in collusion, and that it had been arranged between them that the office

should not be handed over to the liquidators. Petitioners further said they had ascertained that Allen had sold his landed property about three weeks ago, and they were afraid that he was about to leave the country. They prayed for an order for the arrest of the said Andrew Allen and Charles Gibbs, and their committal for contempt of Court. Mr. Molteno also read an affidavit by Harry George Davies, who said that, until the month of August, he was secretary of the company. Latterly, he had noticed large quantities of steel ceilings being removed from the store of the company, far in excess of any orders placed with the company. He noticed a load being removed as late as four p.m. on Tuesday. Counsel added that he was not aware whether his lordship had read the report of the committee of investigation.

[Buchanan, A. C. J., said he had not.]

Mr. Molteno: It is a most damaging report.

Buchanan, A. C. J.: Then there is no wonder that Allen objects. Still, he is not entitled to remove the property of the company. A rule *nisi* will be granted, operating as an interim interdict, restraining respondents Gibbs and Allen from removing any papers or property of the company from their premises, and the Sheriff is authorised to follow up any goods removed since the order of liquidation was granted, respondents to show cause on the 11th October why they should not be committed for contempt.

Postea (October 17th.)

Mr. Alexander said that the petitioners, whom he represented, no longer asked that the sequestration of the company be stayed, but they asked that the provisional liquidators be removed and others be appointed. With reference to the temporary interdict which had been granted against Allen and Gibbs, on the application of the provisional liquidators, he supposed now that nothing further would be heard about that, as the provisional liquidators had full access to the books and other documents of the company.

Mr. Molteno read the original petition of the Stephan Brothers, upon which the company was placed under provisional sequestration.

Mr. Benjamin read the supporting petition put in by the Cape Town Gas Coke, and Light Co. Counsel was proposing to read the report of the committee of investigation when

Mr. Alexander interposed and contended that the Court should first hear the petitions.

Mr. Molteno said that the report contained very serious allegations in regard to the conduct of the managing director, and it was important that the Court should be put in possession of the facts.

Mr. Molteno said that the other side had now withdrawn from the position they originally took up, and were prepared to admit that the liquidation must go on. Their opposition was to the appointment of the provisional liquidators as the official liquidators of the company, so that, in so far as the liquidation was concerned, the sole point now was as to who should be appointed official liquidators.

Mr. Alexander denied that they had withdrawn from their position, but pointed out that, seeing that liquidation had been forced upon them, it was impossible now to get away from it. The most serious charges were made in the report against the managing director and other members of the company by the very persons whom it was now proposed to appoint as liquidators.

Buchanan, A. C. J., asked Mr. Alexander what value of the shares he represented.

Mr. Alexander said that they had a petition signed by thirty-four shareholders, representing 16,195 shares.

Mr. Molteno: The man whose conduct is called into question represents the bulk of the shares. It was a one-man company.

Mr. Alexander, replying to the Court, said that the total shares of the company numbered 36,517, of which 12,600 were held by Allen, though there was some dispute as to his actual holding.

Mr. Molteno said that his learned friend (Mr. Benjamin) and himself represented practically the whole of the creditors of the company. They had got the unanimous support of the shareholders at the half-yearly meeting. They represented now in the last few days the Neuchatel Co., which was the largest creditor, for £4,000. The company were originally represented by Allen, but they had since withdrawn their power from Allen and appointed Messrs. Tredgold, McIntyre and Bisset as their legal representatives here. Mr. Molteno added that his clients represented nine-tenths of the creditors.

Mr. Alexander: My learned friend (Mr. Molteno) represents four creditors, and we represent seven. We represent £4,150.

Mr. Molteno: That includes the Neuchatel Co.?

Mr. Alexander: Quite so; we have their power of attorney. Counsel, in answer to the Court, said that the total liabilities, he understood, were £6,100, and the petition he was now putting in was signed by seven creditors, representing £5,450 lls. 1d. There were no shareholders supporting the application on the other side.

[Buchanan, A. C. J.: If there is likely to be a close contest, I will order a poll to be taken of the shareholders and creditors.]

Mr. Molteno reminded his lordship that this was not a voluntary winding-up, and that an allegation was made

that most fraudulent proceedings had been carried on.

[Buchanan, A. C. J.: We want to know whom the persons interested wish to have appointed liquidators.]

Mr. Molteno: Practically this is a one-man company, and naturally that one man is anxious that this inquiry should not go through. He originally joined with these four gentlemen, who investigated the company's affairs.

Buchanan, A. C. J., intimated that the reading of the petitions, and the report should be proceeded with.

Mr. Benjamin went on to read the report of the committee of investigation. The report stated:

This committee was appointed by the shareholders in general meeting assembled on Monday, August 7, 1905, for the purpose of investigating the past affairs of the company, including the formation and general administration of the business since that event. The resolution appointing them, also provided that the committee should act in a consultative capacity, should the Board of Directors desire it.

As far as the time at our disposal has allowed, we have gone carefully into the various circumstances submitted to us with reference to the formation of the company. For this purpose we have examined the managing directors and such other directors as were available, past and present; the late secretary (Mr. Davies) and the present acting secretary (Mr. Gibbs), had gone carefully into such books and records as were thought necessary.

We think it only our duty to place on record the obvious reluctance on the part of Mr. Andrew Allen, the managing director of the company, to furnish the committee with information, and the want of candour which marked his answers to many questions. He distinctly stated that he was unable to produce the books or balance-sheets of his business prior to the flotation, and that one of the latter had been stolen from the office, when he must have known, or could easily have ascertained that those books which contained materials for reconstructing all but one of the balance-sheets were in the company's office, and in fact in one instance had been continued as a record of the transactions of the present concern. On more than one point his statements were of a contradictory nature, but we have, fortunately, been able to ascertain the facts from other sources.

It is a matter for regret that the general nature of our report cannot be more satisfactory, but it may clear the ground to state at the outset that the very inception of the concern appears to have been somewhat dubious, whilst the subsequent administration has been distinctly open to question.

In later portions of this report allusions will be made to the various points

in further detail, but we cannot omit to say that our investigation indicates that the general management of the company was very defective, and showed a want of business ability and effective control of the company's operations on the part of the managing director, who was, it must be remembered, the vendor and promoter.

From the very commencement there does not seem to have been any system by which the Board really controlled the affairs of the company, the management of which would seem to have been left almost entirely in the hands of the managing director, Mr. Andrew Allen, who mainly devoted his time to inspecting the works at Woodstock, preparing tenders, and canvassing. The secretary opened and answered correspondence and a great portion of the details of working the concern seems to have devolved on him.

There was apparently no co-ordination between the town office and the works at Woodstock, which latter were in charge of Mr. Allen's brother. The directors seem to have had little or no knowledge of what was really going on, and the difficulties at one time in this direction seem to have been so great that two of the Board (Mr. Amos Bailey and Mr. Alfred Mathew) resigned. We only regret that at the time these gentlemen took that step they did not think it advisable to state publicly, or place on record in some emphatic form, the reasons which actuated their decision. Perhaps, however, the most serious matter in this connection was the fact that, whilst the managing director was at any rate more or less in contact with the Board, the branch managers at Durban and Johannesburg, who were not so placed, held larger powers than were possessed by the managing director, from whom they received their instructions.

Mr. Allen, in the earlier stages of the company's history, was authorised to accept contracts to the extent of £300, without reference to the Board. This limit was subsequently raised to £1,000. On the other hand, however, the branch managers have had, it is stated, no limit placed upon their powers. They seem, on Mr. Allen's own admission, to have sent in tenders for work without reference to the head office, and to have been in a position, as Mr. Allen admitted in his evidence, to commit the company to an unlimited extent—at any rate Mr. Allen said there was nothing to prevent them from binding the company to the extent of half a million sterling.

It is hardly necessary for us to dilate upon the disastrous effects of this policy. They are only too well known to the shareholders; first, in the difficulty which has been experienced in getting returns from the two branches, as already reported by the auditors, and also in the very serious losses at the

branches, which have already been reported. The position may, perhaps, be put shortly, by saying that the policy of the company has, to a large extent, been practically shaped and forced by the actions of the branch managers, instead of these gentlemen acting as subordinates to the head office of the company.

When the draft of the report had been practically completed, we received from Mr. W. A. Palliser, the Johannesburg manager, a copy of a report he sent to the Board on May 29 last, when he took up his duties on the Rand. The report contains much useful information, and confirms the opinions already expressed as to the want of effective control and management of the concern from Cape Town. It also contains recommendations of undoubted value, but the means of carrying that out were wanting, and Mr. Palliser did not write as if he were aware of the company's financial position. His report was brought to Cape Town by Mr. Palliser, and discussed at a Board meeting, which he attended, but the directors could not see their way to entertain his proposals, owing to lack of funds.

During the last few months it is quite evident that friction has resulted not only at the Board table, but between the managing director and the secretary, placing the latter official in a distinctly disadvantageous position, and rendering efficient working of the affairs of the company well-nigh impossible.

The Board of Directors, by resignation and absence, was reduced to a bare quorum, and under such circumstances, it is no wonder that the affairs of the company drifted from bad to worse.

A good deal might be written on the past history of the company, but we think it unnecessary at the present juncture to enter into elaborate details, and have contented ourselves with noticing various matters which have come to our knowledge, and which we propose grouping under suitable heads for convenience of reference.

The committee went on to review the formation of the company and to criticise the prospectus. The assets of the company were referred to at length, as well as its relations with the Neuchatel Co.

Dealing with the works management and contracts, the committee made the following observations:

The works at Woodstock are under the management of Mr. Alexander Allen, a brother of the managing director. He does not appear to have been in any way controlled by the Board, who left such details in the hands of Mr. Andrew Allen, apparently because he had such a large holding in the company. No proper costing books, such as would have enabled the managing director at any time to know if any con-

tract was being carried on at a profit or a loss, were kept, nor was there any system which enabled anyone to find out whether the business was paying.

Stock-taking was done in a most careless manner, and in preparing the stock sheets for the annual balance-sheets the stock was brought up, not at cost price, but at a figure which in some cases anticipated a profit. The stock sheets presented at December 31, 1904, were treated in this manner, and the inflated values correspondingly affected the profit and loss account. These returns were certified by the secretary, Mr. Davies, and it is noteworthy that the managing director has, during this inquiry, claimed that the stock had been undervalued. We are unable, on the evidence before us, to sustain his contention, and prefer the figures adopted by Mr. Davies, though even they are apparently in some cases too high. The contracts for work to be executed made by the managing director were seldom brought before the Board, nor does their authority or advice in such matters appear to have been sought. Mr. Allen prepared the contracts and fixed the rates, so that the details of the business were only known to himself. In his absence Mr. Davies, the secretary, would perhaps quote for small contracts, and, if accepted, put the work in hand.

As an instance of the manner in which Mr. Allen ignored the Board, it may be mentioned that, since the appointment of this committee, Mr. Allen, without consulting his brother directors, tendered to the Cape Town Corporation for a contract amounting to £60,000, or about twice the paid-up capital of the company. He does not appear to have thought it necessary to make any special financial arrangements for providing materials for carrying this work to completion in the event of that tender being accepted, at least none have been disclosed to us, though the point was brought to his notice.

There does not appear to be any considerable work in hand at Cape Town, where for some time past the turnover has been of no great magnitude. At Johannesburg, Mr. Allen states, the contracts with the municipality for fair sums are still running, and he describes them as being profitable, but there has been insufficient time to procure any reliable data. From a letter addressed to us by the manager at Johannesburg, dated August 31, 1905, it seems more than likely that the Durban branch is at present handicapped in many ways and any profit from that source is problematical.

The committee in conclusion said:

On the facts reported, shareholders will, not unreasonably, accept some recommendations for their future protection. They have a valuable asset in the tar contract with the Gas Company, provided its terms can be complied

with, and the Agency of the Neuchatel Company should under ordinary conditions be a source of considerable revenue.

We should have liked to recommend a reconstruction of the concern; closing the branches at Durban and Johannesburg, and writing off the capital list of those points; writing down the value of machinery, patents, and goodwill in the same manner; providing a moderate working capital for the development of the works here, and, lastly, a reorganisation of the management.

In face of the fact that a judgment has already been obtained by one creditor at whose instance certain assets at Woodstock have been attached, and that the total claims on the concern, according to the books at June 30 last, were £5,917 17s. 6d., we feel it is hopeless to attempt to carry on the business, and there seems no course open but liquidation, when the shareholders are not likely to see any return, and we very much doubt whether creditors will secure more than a fraction of their claims. We feel bound, however, to notice the fact that the Neuchatel Company is apparently the largest creditor with a claim of £3,824, and they are represented by Mr. Allen, whose action in renewing the agreement in his own name has already been mentioned. In terms of the articles of association, this company is only interested in the agreement so long as Mr. Allen is managing director of the company.

The committee have been put to certain out-of-pocket expenses for shorthand notes of evidence, typing, etc., amounting to twenty guineas, and they request that payment thereof may be authorised by this meeting, subject to production of vouchers therefor.

Mr. Alexander read a replying affidavit filed by Mr. Allen the day after an order for the provisional liquidation of the company was granted.

Mr. Alexander was about to read the reply made by Mr. Allen to the report of the committee of investigation when

Mr. Moltano objected, as no notice of the reply had been given to him.

Mr. Alexander contended that as the Court had considered the report, that they ought to be allowed to read the reply.

Buchanan, A.C.J., said that it was only fair that if one was made public the other should also have publicity. Mr. Moltano said he had no objection to having anything put in that would assist the Court.

He did not wish the report to have been read beyond that he thought it might have a bearing on the appointment of liquidators, as the report had been read he thought the Court should hear the reply.

Mr. Alexander then proceeded to read the "notes" of Mr. Allen's reply to

the statements in the committee's report. The following extracts will be of interest:

1. The statement in the opening clause is entirely wrong. The exact wording of the resolution which was carried is as follows, viz.: "Mr. Godbold moved that a committee of inquiry be formed consisting of Messrs. Nash, Gibson, and Fleming on behalf of the shareholders, and to bring forward at a future meeting a statement of the affairs of the company." I hold that the committee should have confined themselves to the financial aspects.

2. I have to state that their examination of myself was conducted in a most arbitrary and one-sided manner, and did not convey to my mind the feeling that impartiality existed among the members of the committee in reference to myself. It appeared to me that the committee had already made up their minds before they had started to examine me, and knowing as I did that Mr. Gibson was employed by Stephan Brothers and that Mr. Fleming was also connected with Stephan Brothers, and knowing also that Mr. Miller was Stephan's manager, Stephan himself, of course, being a director of the B.S.A. Asphalt Manufacturing Co., Ltd., and taking into account the repeated disagreements between himself and me, I felt that, taking all these circumstances into consideration, I could hardly expect an impartial report from such a committee. The terms of this report have justified my feeling. Upon the appointment of this committee I made efforts to get men appointed upon whom we could depend for an impartial report, and men who had some interest in the company other than that of being possible liquidators. Unfortunately, this was not so, and when we look and examine closely into the personnel of the committee we find that not one member of this committee holds a single share of the company in his own right.

3. I deny the statement that I was reluctant to give information. On every possible occasion I gave every possible assistance. The committee accuse me of want of candour, but I have only to say that so far as the committee themselves are concerned, a spirit of antagonism was exhibited to me during the whole course of the examination. I was unable to produce on the moment the balance-sheet and books used by me prior to the flotation for the simple reason that the balance-sheets had to be obtained from E. R. Syfret and Co. It is an absolute fact that the balance-sheets were removed from the office prior to the flotation, but by whom I have never discovered. I, however, informed the committee that copies could be obtained if desired from Syfret and Co. If, as the committee alleges, there were any contradictory statements on my part, I most emphatically state that

any such were due to the incompetent manner in which I was examined.

4. I deny absolutely the innuendoes in Paragraph 4. It is to be regretted, of course, that these gentlemen were placed in so dual a position, but as to the inception of the concern I most emphatically protest against any statement to the effect that it was other than absolutely genuine.

5. So far as I am concerned, it was to my interest to work the company for its greatest benefit.

6. It is an extraordinary matter that the board, if they took the view that this committee does, did not suggest or put forward any other better or more effective system for the more satisfactory working of the affairs of the company. One of the greatest difficulties so far as I was concerned was that of getting the secretary to carry out the system and to provide details of the board meetings. The only details of working the concern which were carried on by the secretary were those connected with the secretarial and book-keeping duties. With regard to these you will find from the reports of the auditor for 1903 and 1904 and 1905 that continuous complaints regarding the manner in which the secretary's duties were fulfilled were lodged by him. I am not a bookkeeper nor am I an accountant, and these matters were not for me to interfere with or to examine into other than generally. These, you will admit, were duties which pertained to the secretary and should have been superintended absolutely by the auditor. I wish to state, however, that Mr. Nash never made any complaints to me either during 1903 or 1904. Complaints by Mr. Nash were always reserved by him for his annual report, when, in common with the rest of the shareholders, I saw them for the first time.

7. The works and office were in direct telephonic communication, and the co-ordination existing between the two could hardly have been improved upon. The lack of knowledge, if any, on the part of the directors were certainly due to the secretary not producing the necessary detailed statements. It was on this account that the chairman and myself during the early stages of the company's existence, considered it advisable to make a change. This was proposed at a meeting and was at first agreed to, but we were afterwards overruled, as it appeared that the secretary was beginning to pay more attention to his duties. The letters of resignation from Mr. Bailey and Mr. Mathew themselves distinctly state why they desire to retire. Needless to say those reasons differ from those which the committee desire you to believe. It was not the fault of the managing director if the branch manager at Durban and Johannesburg held larger powers than he did himself. This was a matter for the

directors here, and I can hardly see how on earth it would be to my interest to concur in any such state of affairs.

9. In my opinion the most disastrous part of the company's policy was the hampering of the managing director in regard to the acceptance of contracts. In the branch business up to the present year little or no contracting was done in the way of engineering work. The chief business carried on was in disposing of the products of the company. The board had every control compatible with business affairs over the branches, and it was only after I was able to secure the services of Mr. Palliser to manage our Transvaal business that I would admit of any engineering contracts being entered into.

10. The committee here refer to a report drawn up by Mr. Palliser, in which they state that Mr. Palliser attended a meeting of directors. This statement is true only in so far that Mr. Palliser came to Cape Town with his report. The other facts are that Mr. Miller absolutely declined to consider his report. That I ineffectually attempted to arrange several meetings of directors for the purpose of having Mr. Palliser's report thoroughly discussed, but that, as Mr. Palliser will tell you, after waiting here two weeks, he returned to Johannesburg disgusted with the conduct of Mr. Miller, and the result of his visit, which visit cost the company money. Now, the committee referred to the report as one which contains much useful information, and confirms the opinion already expressed as to the want of effective control and management of the concern from Cape Town.

11. In this paragraph the committee state that friction has resulted at the Board meetings. That friction was between Mr. Miller, the late secretary, and myself, and the cause thereof I have already explained. These gentlemen were not, in my opinion, acting in the best interests of the company, and it was my duty to object. The late secretary had himself to blame for the position in which he found himself. He was absolutely incapable, and for the benefit of the company, I wished his removal.

17. The amount of applications received is absolutely correct, applications having amounted to 21,142 shares. I may point out I was not a member of the Board till after allotment.

18. This is, so far as I am concerned, an absolutely false statement. No entries were ever made on the list of applications without the authority of the parties concerned. As to my own holding, I received 1,000 shares in lieu of £1,000.

20. Every statement in the prospectus is, so far as it concerns me, and so far as I have had anything to do with the matters treated of therein, absolutely correct.

21. The amount of profit, as shown by the committee, averaging £1,242 2s. 4d. per annum for the 4½ years previous to the flotation, was certainly substantial, considering that the business was floated with a very small capital, and considering further that in bringing out this profit a large amount was spent each year in extending the business to other centres. This meant that I personally had to visit the different towns in order to establish agencies, which cost a considerable amount of money. Again, prior to the profit of £1,242 2s. 4d. before referred to being brought out, a large sum was drawn each year for my own personal requirements, and yet, in spite of all this, we have an average annual profit shown of about and amounting to over 20 per cent. on a capital of £6,000. I have no hesitation in saying that the statement made in the prospectus is absolutely genuine.

26. As to the flotation expenses, the arrangement was that I should pay all expenses up to the date of the formation of the company. That I took to mean the date when the Board was formed, and everything ready to go on with the flotation, and I still hold that this view is correct. The accounts were paid by the company, and afterwards the amount was transferred to my account. To this I, of course, objected, but in order to have the matter settled, and on account of my receiving 1,000 shares in lieu of cash, I agreed to forego 500 shares. This was accordingly done, and the matter closed.

26. Regarding the 4,350 vendors' shares distributed by me, I have to point out that these were my sole property, and that I had an absolute right to do whatever I wished with them. The obvious intention of the committee in bringing this matter forward was in order to mislead the shareholders into believing that these shares were given as a kind of sop to the gentlemen named for assisting in the flotation. This is an absolute falsehood. Not one of these gentlemen assisted in the flotation in any way.

27. The assets acquired by the company were clearly stipulated and duly registered.

30. I have not got the books in my possession, as they are still in the hands of the committee, but the value of the machinery and plant was increased immediately before the flotation by the addition, so far as I remember, of a new tar still and other improvements. The machinery was valued, and the value taken for the leasehold is, in my opinion, considerably under-estimated. The patents and goodwill I could not dispose of at a less figure, as, in my opinion, that represented its lowest value. Further, in common with other business men in the Colony, I naturally anticipated that the flotation, taken in conjunction with the anticipated revival in trade in the inland towns subsequent

to the war, that as the business had previously been so successful in the coast towns, it would increase on all sides, and especially so when a larger field was to be opened up. We all know how far these anticipations were realised.

32. Regarding the Neuchatel Asphalt Company's agency, the committee have pointed out that the word "agencies" is omitted in the document registered; this is the first time that I have known such was the case. However, I cannot see wherein there is anything wrong in this connection. I was simply the Neuchatel Company's agent, and therefore it was not my business. The committee have carefully left out of their report the fact that everything derived from the working of this agency has been received by the company.

33. In connection with the renewal of the agreement with the Neuchatel Asphalt Co., Ltd., in November, 1904, there was no attempt made to conceal that fact. I am positive that the secretary was acquainted with it, as I handed the new agreement to him to go carefully through before I signed it.

34. Regarding my instructions to the branches that all future payments for work done by the Neuchatel Asphalt Co. should be paid direct to the Neuchatel Asphalt Co., these were specific instructions given to me by Mr. Hollis on account of his company. It is an absolute misrepresentation of fact to say that my interests as agent of the Neuchatel Asphalt Co., Ltd., were at direct variance with the B.S.A. Co.

35. Regarding the tar contract, the committee has carefully avoided making any mention of the action at law which this company found necessary to institute in order to establish this contract beyond doubt. It is only since then that we have been able to run this contract on anything like satisfactory and profitable lines. Only recently the Cape Town District Gas Co. sought by an action in the Magistrate's Court to vary this contract, an action which they lost, with costs.

36. It is false to state that no costing books were kept, as a contract costing book was produced to the committee, showing all expenditure on each contract. It will be found that on the contracts a good profit was made. The trouble was that there were so few contracts during the latter year or so. When the chairman was in Natal, and had been negotiating with another secretary, the Board decided to retain Mr. Davies's services, as they thought he would improve; subsequent events, and our auditor's report, go to show that the Board, although their intentions were of the best, were wrong. It is untrue that the stocktaking was done in a careless manner. It was most carefully done, and the prices were fixed by the secretary from invoices, etc. In my opinion, the position of this com-

pany is due in no small measure to the action of the City Council, and I may here state that during the hearing of an action in the Supreme Court between Nuttall and Co. and the Gas Co. a letter was read from Nuttall's manager to Nuttall, stating that the manager had arranged with the City Engineer to make trouble with Allen on the Early Morning Market contract, and also with Riley, the Gas Co. manager, to plug all the tar possible into Allen, so that Allen would be compelled to sell tar cheap to Nuttall and Co.

38. Under the heading, "General Remarks and Recommendations," one would expect to find some information and advice, but the total advice indicated therein appears to be that the company should go into liquidation, the reason being given that a certain creditor had obtained judgment. It should be noted that throughout the committee's report no mention is made of the numerous irregularities on the part of Miller and the secretary. It will be noted that the report is directed almost wholly against myself, and bears the mark of Mr. Miller's dictation on almost every paragraph. It is also a fact that this movement has been in operation for several months, and is not only confined to this company, but has also been extended to other companies in which Stephan Bros. and myself are interested. It is very easy for these gentlemen to go into any business and find fault. I do not pretend to be perfect. I can make mistakes as well as anyone else; so can most men who have got any initiative. Had I known that we were just about to enter on a period of depression, the severity of which has never before been experienced, I would not have floated my business. When I floated my business I was absolutely confident that it was a first-class business. The greater part of the liabilities taken over by the company on flotation was incurred during the six months previous in the purchase of the Omaha business and other matters for the benefit of the company, and our profit, had there been no depression, should have wiped off all liabilities and paid a satisfactory dividend. I have the confidence of these shareholders who have been more or less in touch with me, and know the difficulties we have to contend with, and if I have lost the confidence of those who only know me by name, it is caused by a few designing parties who are not working for the best interests of the shareholders, and who are anxious to do me a bad turn to suit their own schemes in connection with another company with which I am closely connected.

Mr. Alexander and Mr. Molteno were heard in argument.

Buchanan, A. C. J.: The B.S.A. Asphalt Company commenced operations

in 1903, and this year the financial state of the company was not satisfactory. A meeting of shareholders was held, and at that meeting a Committee of Investigation was appointed, consisting of Messrs. Nash, Gibson, Godbold, and Fleming, and this committee reported to the shareholders the result of their inquiries. The reflections made in their report against Mr. Allen, who may be called the promotor of the company, were such as required further investigation, and a resolution was passed by the shareholders in favour of appointing an official liquidator of the company, and moreover, certain creditors also join in the petition for the liquidation of the company's estate. The order granted was equivalent to proceedings in the compulsory sequestration of an insolvent's estate. At the time the petition came before the Court, *prima-facie* grounds were shown for granting a provisional order for liquidation, and a return day was fixed upon which persons interested were entitled to show cause why this order should not be made absolute. Immediately after this provisional order was granted Mr. Allen and others applied, *ex parte*, and they wished to have this order set aside. It was pointed out that this could not be done without notice being given as they wished to anticipate the return day of the order. Leave was granted to do so on notice being given to the petitioners, but the case was allowed to stand over, and it now comes before the Court for final decision. Mr. Allen and the others who objected to the liquidation, have now withdrawn their objection on the ground that, after what had taken place, it is not desirable to cancel the provisional order, and they consent to the liquidation going through. There is no objection, therefore, to making the rule absolute ordering the B.S.A. Asphalt Company to be placed under liquidation. A great number of affidavits have been made which would have been relevant to the question whether the company should or should not have been placed under compulsory liquidation. The statements of these affidavits now fall away, and it is not necessary to consider them. The only reason why those affidavits should be considered now, is with reference to deciding who should be appointed official liquidators of the company. In deciding upon this question, undoubtedly the Court should take into consideration the wishes of the persons interested. At the previous application, as I said, four provisional liquidators were nominated pending the result of further proceedings. For myself, I do not see the necessity of so many liquidators being appointed, and if there had been no opposition, probably the Court would have been satisfied in appointing one liquidator only. The

four people who were appointed provisional liquidators were the four members of the Committee of Investigation. Two of these gentlemen do not wish to press their claims for being appointed liquidators, I refer to Messrs. Godbold and Fleming. If there had been no objection to the two remaining ones being appointed, probably the Court would have been satisfied in appointing Messrs. Nash and Gibson, but Mr. Allen states that he wishes to have his position considered in the liquidation, and he is a very large shareholder in the company. I think Mr. Allen's wishes deserve some consideration. I have heard the report of the liquidators read, and there are some charges made, but they are more irregularities and want of attention to proper business requirements than express charges of fraud. I do not wish to say anything more about these charges, as it is said they may form the basis of future proceedings, but I think that, under the circumstances it would be better, as there is some dispute, to have three, instead of two liquidators. I should have preferred only one in this case, as the estate is not a very large one; but as three will be appointed they will be Messrs. Nash, Gibson, and Gerald Orpen. I can see the force of the objection taken to the appointment of an official as liquidator, but Mr. Nash is not an official of the company in the sense of having had anything to do with the management. He is the auditor of the company, and there is nothing whatever in his conduct which would require investigation, and which would be inimical or opposed to his duties as liquidator. On the contrary, he called attention to the irregularities which had taken place. These three gentlemen are well known, and the Court has every confidence that they will perform their duties faithfully. The objection taken to Mr. Gibson is, that he has an interest in one of the creditors, but this is no bar to his being a liquidator. As to Mr. Orpen he is suggested for appointment by Mr. Allen himself and is unconnected with the company in any way. The rule *nisi* will be made absolute ordering the company to be placed under liquidation, and Messrs. Nash, Gibson, and Orpen will be appointed official liquidators, with powers under the 149th section of the Act. There is only one other question, and that is as to the security to be given by the liquidators. The amount at issue is at the outside £5,000 or £6,000, and I think it will be sufficient if the liquidators give joint security for £1,000. The costs of the application will be costs in liquidation. There is another matter before the Court, and that is the rule *nisi* which was granted after the liquidation was ordered. Messrs. Gibbs and Allen, it was alleged, removed after the granting of the order

certain papers and a safe from the offices of the company. Mr. Gibbs has filed an affidavit stating that he acted in ignorance of the order of Court, and explaining the circumstances under which he removed this property. The rule will be discharged, but the respondents did what was improper, and if they had been acting with any malicious or fraudulent intent, the Court would have considered it contempt of Court and would probably have imposed a penalty which would have made them understand that they could not disobey an order of Court with impunity. The respondents must, however, pay the costs of that particular application.

Mr. Alexander asked for leave to be heard on the question of the costs of the rule against Gibbs and Allen.

Buchanan, A. C. J., said that he thought affidavits had been read.

Mr. Alexander said that he had also an affidavit sworn by Mr. Allen, which he now proceeded to read.

Buchanan, A. C. J., held that the respondents must pay the costs of the rule.

Mr. Benjamin: I take it that the Gas Company will obtain their costs from the liquidation?

Buchanan, A. C. J., said that that was so.

Attorneys: For the creditors—Van der Byl and De Villiers. For the Cape Town Gas Company—Van Zyl and Buissiné. For the B.S.A. Asphalt Company—A. J. McCallum.

Ex parte THE KRAAIFONTEIN HOTEL COMPANY.

Mr. Molteno moved, as a matter of urgency, on the petition of G. W. Steytler and other liquidators of the Kraaifontein Hotel Company (in voluntary liquidation) for an order for the compulsory winding up of the company. The petitioners stated that the hotel had been advertised to be sold by public auction on Saturday next, and they feared that if such a course were persisted in there would be some prejudice to the claims of the creditors. Ever since the commencement the business of the company had been carried on at a loss owing to the state of trade and other circumstances beyond the control of the company.

A rule *nisi* was granted placing the company under the Act of 1892, and provisionally appointing the voluntary liquidators as liquidators, rule to be returnable on the 16th of October, and to be published once in the "Government Gazette" and once in the "Cape Times."

Postea (October 16). The rule was made absolute.

Ex parte THE ROYAL HOTEL COMPANY.

Mr. Molteno moved that an order of the Court for the winding up order and the appointment of official liquidators in this case be made absolute. He also applied for the appointment of Messrs. Siberbauer, Wahi, and Fuller as attorneys to the liquidators.

Buchanan, A. C. J. said that if necessary the liquidators could appoint the attorneys, but the Court would not make an order to that effect.

The application was granted.

THE CAPE MARINE SUBURBS V. THE RECREATION SYNDICATE, LTD.

Mr. Roux moved that a rule of Court for a winding up order and the appointment of Mr. Syfret as official liquidator in this case be made absolute.

The application was granted.

SUPREME COURT

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

HEYDENRYCH V. WEAKLEY. { 1905. Sept. 13th.

Mr. Searle, K.C., mentioned the matter of the application of the plaintiff for the appointment of a commission to take the evidence of Mrs. Elizabeth Heywood, of Aliwal North. The matter had previously been before a judge in Chambers, and had been ordered to be mentioned in the open Court. Counsel stated that the other side had now consented to the application.

Buchanan, A.C.J., said that the difficulty was that no pleadings had been filed, but, seeing that the other side had consented, the application would be granted, the Resident Magistrate of Aliwal North to be commissioner.

REHABILITATION.

Ex parte GROMER.

Mr. Alexander stated that, in regard to the application of Alexander Gromer for discharge from insolvency, he had now to present an affidavit from the applicant's attorney in reference to the refusal of the Master to grant the necessary certificate. Counsel said that the

applicant had obtained the consent of three-fifths of the creditors in number, and more than three-fifths in value.

Buchanan, A.C.J., said that in the Insolvent Ordinance the word "number" meant creditors over £30—only those of that amount were entitled to be reckoned by number. In this case there were five creditors, three of whom were entitled to be reckoned by number. Of these three only one had consented to the rehabilitation of the applicant. The Master was right in refusing the certificate, seeing that three-fifths of the creditors by number as well as in value must consent. The application would be refused.

GENERAL MOTIONS.

In re INSOLVENT ESTATE { 1905.
FON. { Sept. 18th.

Mr. Cloose moved for the removal of Rachmiel Karter, alias Kartel, from his office as trustee in the insolvent estate of Solomon Fon, general dealer, Malmesbury, an dthe appointment of Frederick Fortunatus Werdmuller to the office.

An order was granted appointing Mr. Werdmuller provisional trustee, and authorizing the Master to call a meeting of creditors for the election of a permanent trustee in the place of Mr. Karter, who had become incapacitated from his office by reason of his insanity, costs of this application to come out of the estate.

Ex parte HAZELL.

Mr. P. S. T. Jones moved for the release of the applicant from curatorship in the estate of one Everton, who, it now transpired, had been discharged from the Valkenberg Asylum. He had recovered the use of his reason, and had gone to Canada.

Order granted, subject to the filing of accounts and payment of moneys found to be due to the respondent.

DU PRE V. COLONIAL GOVERNMENT.

Mr. Roux moved for certain award of arbitrator to be made rule of Court, with costs.

Mr. Nightingale, for the Government, consented.

Award made rule of Court, with costs.

O'CONNELL V. O'CONNELL.

Mr. Benjamin moved, on behalf of Mrs. O'Connell, for leave to sue her husband by edictal citation for restitution of conjugal rights by reason of his malicious desertion. The parties

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in 1900 sold up their home in London, intending to settle in this colony. They came out to the Cape, and defendant became attached to the staff of Lord Roberts and Lord Kitchener, and went with them to Pretoria. Owing to his intemperate habits, he went on a voyage to Europe in September, 1902, and had since contributed nothing towards petitioner's support. Petitioner at first resided at Claremont, and had since removed to Observatory. In March last petitioner's husband returned to Cape Town, and, after remaining about three weeks, left for Europe. He was drinking very heavily.

Leave to sue by edictal citation was granted, citation to be returnable on the 15th November, to be served personally, if possible, or at the respondent's last known address, West Kensington, London, and to be published once in the "Government Gazette" and once in the "Daily Telegraph."

REICH V. McNALLY AND { 1905.
ALI WAL NORTH MUNICI- { Sept. 18th.
PAL COUNCIL.

Municipal Council — Election —
Act 45 of 1882, Sec. 17—
Office of profit.

N. had been elected as a Councillor of the Municipality of A. At the time he was municipal poundmaster, for the duties of which he was remunerated by fees.

Held, that as this was an office of profit under the Municipality, he was disqualified from being elected by Sec. 17 of Act 45 of 1882.

This was an application upon notice calling upon the first-named respondent to show cause why his election as a member of the Aliwal North Council should not be declared illegal and invalid, and why he should not be declared to be disqualified from continuing as a Councillor.

The petition of the applicant stated that at the election for the said Council in July last there were seven candidates for four vacancies, including petitioner and the first-named respondent. At the poll McNally was elected, and petitioner was fifth in the list. By an agreement dated April 9, 1903, McNally entered into a lease with the said council for certain ground, and although that lease expired in March, 1904, he continued as pound master of the Council, and was at the time of his nomination, and still was the municipal pound master. The position held

by the said McNally was one of profit under the said Council, and he participated in the profits of a contract. The election was, therefore, invalid, and McNally was not capable of being a Councillor of the said municipality. The agreement provided for the payment by the lessee of £12 per annum.

The affidavit of the respondent, McNally, stated that he admitted that he acquired the municipal pound at Aliwal North under an agreement dated the 9th April, 1903. He further admitted that, although the said agreement expired on 31st March, 1904, he continued to farm the said pound on the said terms as stated in the said agreement. No further agreement was entered into by him with the said Council. The said Council had accepted payment of his rent every quarter. In March, 1903, the Municipal Council at Aliwal North, by advertisement in the public Press, called for competition by tender for the farming of the said pound. He submitted a tender of £12 per annum for the same. He denied the allegation that he had held, or now held, an office or position of profit, or that he participated, or was concerned in, the profits of any contract. He submitted that he acquired the right to farm the said pound by public competition, and any profit that he had made out of the said pound had not been made from the said Municipal Council of Aliwal North, but from the general public using the said pound. Deponent added that no objection was raised to his candidature until after the result of the poll had been declared. The supporting affidavit of the Town Clerk of Aliwal North stated that any profit the said McNally may have made out of the farming of the said pound would be made out of the general public, and not from the funds of the Municipal Council of Aliwal North.

Mr. Benjamin for applicant; Mr. Gardiner for respondent.

Mr. Benjamin submitted that it was clear that the poundmaster was entitled to certain fees, and to that extent he held an office of profit under the Council. Under the English law it was stipulated that any person participating in any contract with the municipality was disqualified from being elected to the Council. He (Mr. Benjamin) contended that in the present case the respondent was a contractor to the municipality.

Mr. Gardiner contended that his learned friend's arguments were somewhat inconsistent. The position of the respondent was either that of an office of employment or that of lessor or lessee. This was not a case of employment; it was not a case of holding an office. He did not say that it was absolutely necessary that in holding an office that a salary should be attached to it, but there must be certain elements. There must be some

choice in persons when appointing to an office when the Council would be deciding who was the most fit. Here one of the elements of choice was the getting of a rent or the payment for the office, and counsel contended that the payment by the employee to the employer was not consistent with the Act. He also submitted that in the case of an office or employment there should be the power of dismissal. Here there could be no power of dismissal, as long as respondent fulfilled the conditions of the contract. There was no power of dismissal on account of his personal misbehaviour, such as an employee was liable to. In the case of employment there would be a power of control, but here there was none. The Municipal Council was not responsible for the acts of the poundmaster. He alone was responsible. Counsel submitted that all these things went to show that the office of poundmaster was not an office of profit. It was a case of a lease into which he entered, and if it was a lease it could not at the same time be an office of employment. He submitted that it was not.

Buchanan, A. C. J., said respondent had been returned at the last election of Municipal Councillors for Aliwal North. There was a contest for the position, and the candidate who received the next number of votes was the applicant, who, however, was not elected. He was interested in making this application not only as the defeated candidate, but as a ratepayer. His objection to McNally's election was founded on the 17th section of the Municipal Act. Two years before this election the Council of Aliwal North leased the pound, and the respondent was appointed poundmaster under a contract for twelve months. The contract was not renewed, but the respondent had been allowed to continue as poundmaster up to the present time. The contract showed the various duties he had to perform, how he was to keep his books, etc. The contract did not involve the payment of salary to McNally, but he was to receive payment from fees of office. As to McNally's present occupancy of the office being of a temporary nature, that was an argument rather against than for him. The question was whether or not McNally held an office of profit. His Lordship thought that he did hold such an office. He thought that both the contract and the office held came under the section, and that the respondent had no right to stand for and be elected to the Council. It had been stated that although holding this view the Court should not grant the application, with costs, because of the delay in taking proceedings. There might have been something in that objection if McNally had resigned his position on objection being taken, but he had not yet resigned. Under

those circumstances the Court could not see any reason for departing from the usual rule. The application would be granted as prayed, with costs against the respondent.

[Applicant's Attorneys: Tredgold, McIntyre and Bisset; Respondent's Attorneys: Van der Byl and De Villiers.]

GATES V. INSOLVENT ESTATES OF SMITH AND RUSSEL.

Mr. Alexander moved for leave to have a certain proof of debt amended.

The affidavit of the applicant stated that the respondents owed him £51 for rent, and £86 17s. 6d. for repairs done to the house. Through some oversight he had forgotten to file his claims. He wished the first claim to rank as preferred.

There was no opposition to the application.

Order granted as prayed.

Ex parte **BEZUIDENHOUT.**

Mr. Watermeyer moved for an order authorising the transfer of certain property.

Order granted.

Ex parte **POTGIETER.**

Mr. P. S. T. Jones moved for an order for the registration of a certain transfer of a farm to the petitioner from her husband, to whom she had been appointed curator in March, 1904.

Order granted.

ANSTICE V. ANSTICE.

Mr. Gardiner was for the applicant, and Mr. P. S. T. Jones was for the respondent.

Mr. Jones said the respondent had made an affidavit asking for a postponement in order that he might obtain certain documents in connection with the money claimed by the applicant.

Mr. Gardiner objected, as the respondent had been in Cape Town since Saturday, and had had ample time to obtain the documents.

Ordered to stand over until the next sitting of the Court.

Ex parte **TEUBES.**

Mr. De Waal moved for an order authorising the Registrar of Deeds to register a certain notarial bond.

Order granted.

HOULDER BROS. V. COLONIAL GOVERNMENT.

Mr. Close was for the applicants; Mr. Searle, K.C., was for the respondent. The application was on notice of motion to have certain pleadings of the defendants removed from the record.

Mr. Close said the declaration had been filed about eighteen months ago, and after several amendments and exceptions, the respondents now filed a plea, which went beyond the order of the Court.

Formal leave was granted to the defendants to amend their pleadings as tendered, with costs to date of amendment, and a joint commission issued to take the evidence either party wishes, costs of the application to be costs in the cause, Mr. Oliver appointed as commissioner.

Ex parte **ARNOLD.**

Mr. Benjamin moved to have certain transfer passed in the district of Somerset West.

Order granted.

Ex parte **SETTERY.**

Mr. Benjamin moved for the removal of one Frank Percival Smith from his office as executor dative in the estate of Panai Polo, petitioner's late husband, and the appointment of Daniel McLaren Brown, jun., of Port Elizabeth, as executor dative.

A rule nisi was granted calling upon F. P. Smith to show cause on the 16th October why he should not be removed from the office of executor, rule to be served personally, failing which, one publication in the "E.P. Herald."

Ex parte **GERICKE.**

Dr. Greer moved for leave to attach a certain farm at Barkly East *ad fundandam jurisdictionem*, and to sue by edictal citation. The petitioner was suing for provisional sentence on a certain promissory note.

Leave granted to attach the interest of the respondents in the farm, and to sue by edictal citation, citation to be returnable on the 16th October, and to be served personally.

Ex parte **GRAYLING.**

Mr. J. E. R. de Villiers moved for the appointment of a *curator ad litem* to petitioner's wife, an inmate of the Graham's Town Asylum. Counsel said that the matter had previously been before the Court, when some question was raised as to whether the matter

came within the jurisdiction of the courts of this colony.

Order granted, the Resident Magistrate of Graham's Town to be *curator ad litem*, with leave to report to the Court on affidavit, summons to be served on the curator and on the alleged lunatic, and to be returnable on the 16th October.

LESTER V. LESTER.

Mr. Watermeyer applied for a return day to be fixed in regard to the rule for leave to sue by edictal citation.

His Lordship said that no edictal citation was granted. The rule had been made absolute upon an application for leave to sue *in forma pauperis*.

BRADBURY V. THE NATIONAL DRILL AND MANUFACTURING CO.

Mr. P. S. T. Jones moved for the removal of bar and leave to the applicant to defend the action.

Mr. Benjamin was for the respondents.

It appeared that the respondents had obtained judgment, under Rule 329d, on the 31st August last against the applicant. It was now sought to have that judgment set aside, and leave given to the applicant to defend the action, applicant having been absent from the Colony, and having no knowledge of the previous proceedings until his return.

Leave was granted as prayed, costs of the application under Rule 329d to be paid by applicant, and costs of the present application to be costs in the cause.

HALVORSEN V. ANDERSON.

(See 15 C.T.R., 750.)

This was an application upon notice of motion for the interpretation of a certain order of Court.

Mr. Gardiner was for the applicant; Mr. Close was for respondent.

Mr. Gardiner said that the question was whether the contract on which the applicant sued was cancelled by reason of the judgment of the Court.

Buchanan, A. C. J., said that that was clearly so. The application would be refused, with costs.

SUPREME COURT

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

IN CHAMBERS.

INSOLVENT ESTATE WIL- } 1905.
LIAMSON V. BERGL. } Sept. 26th.

This was an application by the defendant in the action (Bergl), for an extension of the time within which his evidence might be taken on commission in London before Mr. Oliver. Mr. Gardiner is for applicant; Mr. Russell was for respondent.

The affidavit of Mr. Robinson, of the firm of Messrs. Fairbridge, Arderne and Lawton, stated that on the 13th July last this Court granted a commission *de bene esse* to take the evidence of applicant in London before the 1st October. Defendant's attorneys were informed that the examination had not yet been held, and had received a letter from Mr. M. Bergl, defendant's father, who represented A. Bergl in London, and who said that he was engaged on a contract to superintend the erection of works for the Borrowje Preserving Works, in Siberia. It was impossible for him to get permission to leave Siberia before January. The company would not grant him his passports to leave for Europe, and he could not cross the frontier without them. Defendant had (deponent added) received permission from the company for a fortnight's holiday, and he intended to leave Siberia about the beginning of January, and he had instructed his attorneys to apply for an extension of time for his examination, until the 1st February. If such postponement be granted, defendant would be able to give his evidence in London in January.

The answering affidavit of Mr. Dold, respondents' attorney, stated that the Court ordered the evidence to be taken on commission before the 1st October. The Master of the Supreme Court was pressing the plaintiff to file an account in the insolvent estate, but plaintiff was unable to do so until the action was decided. If the present application were granted, the case would probably not be heard until the April term, and the creditors in consequence would be delayed in the settlement of their claims. When defendant entered into the contract with the Russian company, the case was already ripe for hearing.

Mr. Gardiner for applicant. Mr. Russell for respondent.

In answer to His Lordship, Mr. Russell said that the action was to set aside certain proof of the debt filed by defendant. A sum of £3,000 was at stake, and plaintiffs' case was that defendant owed money to the estate.

Buchanan, A. C. J., said that he did not see why the case should not come on for hearing in the February term, even if the present application were granted. Had the case, he asked, been set down for trial?

Mr. Russell replied that it had not yet been set down.

Buchanan, A. C. J., said that there was no reason why the commission should not arrive in time for the February term.

Mr. Russell submitted that, if that were his lordship's view, the costs of the present application, at any rate, should be borne by defendant.

Mr. Gardiner argued that costs should be costs in the cause.

Buchanan, A. C. J., granted an extension of time as prayed, and directed that the case should be set down for trial on the 23rd February. There had now, he said, been two applications in this matter, and in the previous one the order was that costs be costs in the cause. Costs of the present application must be paid by the applicant.

ESTATE SCHOLTZ V. PRINCESS RADZIWIŁŁ.

Mr. Benjamin moved for leave to set down this case for trial on the 9th November. He said that the respondent was being sued by edictal citation, and notice was sent to England of the trial for Thursday, the 7th November. That date was an error, and should have been Tuesday, the 7th November. When the agents in London saw the papers, they noticed the discrepancy, and put the matter down for Thursday, the 9th November, instead of Tuesday, the 8th. This just brought the case within the seven days, according to which a case could not be set down for trial without the special leave of the Court. Notice had been sent for Thursday, the 8th November. That was the correct date, but unfortunately plaintiffs could not set the case down for that day without special leave. It was necessary to make this application now, because the edictal citation would have to be published on Friday.

In answer to His Lordship,

Mr. Benjamin said that the case would probably be undefended. They had no reason to believe that the Princess would enter appearance.

Buchanan, A. C. J., said that applicants should set down the case for the

9th November, and it would probably then be ordered to stand over till the 10th November, when it could be disposed of.

SUPREME COURT

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

IN CHAMBERS.

REX V. HENDRIK JUEL AND { 1905.
TOL JUEL. { Sept. 29th.

Stock theft—Hard labour—Act 7 of 1905, Sec. 4.

Where a prisoner is sentenced to pay a fine under Sec. 4 of Act 7 of 1905, or in the alternative to a further term of imprisonment, the Act does not authorize the imposition of hard labour during such additional term.

Buchanan, A. C. J.: A case has come before me, as Judge of the week, from the Magistrate's Court at Britstown, in which certain natives (Hottentots) were convicted of stock thefts, and were sentenced to imprisonment with hard labour for 12 months, and to pay a fine of £1 each, or in default a further term of one month's imprisonment with hard labour. It has been repeatedly pointed out that the Act No. 7, 1905, does not provide for hard labour in the alternative imprisonment, where a fine has been imposed. The sentence and conviction will be confirmed, but the sentence will be amended by striking out the words "hard labour."

LUPTON V. EDELSTEIN.

Mr. Swift moved, on the petition of Bingley Fairbank Lupton for an order restraining Anastasius Trupos from paying over certain money to the respondent, Charles Edelstein, pending an action to be instituted by the petitioner, and for leave to sue by edictal citation. The petitioner set out that respondent owed

petitioner a sum of £50, with interest, in respect of a promissory note, and that he had caused a summons to be issued. This, however, had not been served, the endorsement stating that the respondent now resided at Bethulie, O.R.C. Petitioner believed that respondent resided beyond the jurisdiction of the Court. He had ascertained that on or about September 30 a sum of £100 would become payable to the respondent by one Anastatius Trupos, of Cape

Town, and he prayed that this sum should be attached, pending an action.

Rule *nisi* granted, attaching the sum of £100 in the hands of Anastatius Trupos, due to the defendant, Edelstein, and leave granted to the petitioner to sue by edictal citation, citation to be served personally, and to be returnable on October 26, leave to be reserved to set aside the rule to any other creditor having rights against the said sum.



"Cape Times" Law Reports.

CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

SUPREME COURT

[Before the Acting Chief Justice, the
Hon. Sir JOHN BUCHANAN.]

BLAAUWKLIP GARDEN CO. { 1905.
V. FAURE, VAN EYK AND { Oct. 4th.
MOORE.

Mr. Douglas Buchanan moved, on behalf of the defendants in the action, for leave to amend the plea.

Mr. M. Bisset (for plaintiffs) applied for leave to amend the declaration and replication.

The amendments were allowed, and ordered to be filed within fourteen days, costs to be costs in the cause.

WORDON V. ESTATE WORDON.

Mr. Benjamin moved for judgment in terms of a consent paper. The action, he said, had been brought to set aside a certain will. Various allegations were made, and those allegations had now been withdrawn, and a consent paper had been signed between the parties. He appeared for the first, second, and further defendants. All the parties had signed the consent paper.

Judgment entered in terms of consent paper.

WAITE AND HARVEY V. YOUNG.

Water Court—Act 40 of 1899—
Appeal—Review.

Act 40 of 1899 makes no provision for an appeal from a decision of a Water Court thereunder constituted. Such decision may, however, be brought under review by a

superior court on any of the usual grounds.

This was an appeal from a decision of the Water Court of Humansdorp. Mr. Benjamin was for the appellants; Mr. McGregor was for the respondent.

Mr. McGregor said that he had had no notice of the appeal, and he understood from the Registrar that none had been given. At the same time, the question arose, why was his learned friend there? This was an appeal from a decision of the Water Court of Humansdorp. Under certain sections there was an appeal, and under other sections there was not.

Mr. Benjamin said that the other side had had notice, inasmuch as his learned friend Mr. Burton had appeared from time to time, and the matter had been allowed to stand over.

[Buchanan, A. C. J.: You were not in the case originally. Mr. McGregor?]

Mr. McGregor: No. I am told there is no notice of appeal.

[Buchanan, A. C. J.: I think there must have been some notice, because here the assessors give their reasons for judgment.]

Mr. McGregor said that he had no objection to the appeal being proceeded with subject to right being reserved to raise subsequently the questions of whether notice had been given, and whether an appeal lay against the decision of the Water Court.

Mr. Benjamin said that this was an appeal under section 15, Act 40 of 1899, from a decision of the Water Board for the district of Humansdorp. The appellants were sued by the present respondent for an order to compel them to observe a certain distribution of water, alleged to have been agreed upon between the predecessors-in-title of the parties. Shortly put, the point was this, that the defendants (the present appellants) had no notice of such an agreement, and that such agreement,

if it existed at all, had not been registered against the title-deeds of the predecessor-in-title of either the appellants or the respondent. The third question that arose was as to what this arrangement was whether it referred to the water that was led out of a particular dam, or whether it referred generally to the water in the river, which either ran through the properties or which was the boundary of the properties? The farm in question was called "Klein River," and situate near Hankey. The plaintiff (now respondent) became owner in 1874; the first defendant (now appellant) became owner in 1885, and the second defendant became owner about two years ago. The farm was, roughly, divided into four equal parts, three-fourths being owned by the present respondent, and the remaining fourth by the appellants. It appeared that about sixty years ago the farm Klein River was owned by one Ferreira, who had four children, and sub-divided the farm between the four children. They took undivided shares in the farm. C. J. S. Ferreira, who was the predecessor in title of the present appellants, owned one-fourth. The three other shares of one-fourth each came into the hands of the husband of one of the children, and Mr. Harvey, apparently no relation of the defendant Harvey. Those shares afterwards came into the hands of one Board, and from his hands they passed into the hands of the present respondent. At the time when old Mr. Ferreira divided the property between his children there was a dam called No. 1 dam, with a sluic leading out. The appellants, owning one-fourth, were the upper proprietors, and the respondents, owning three-fourths, were the lower proprietors. Old Mr. Ferreira, in dividing his farm between his four children, made some arrangement as regarded the water, each of the children to have a fourth share, in the order of four days each in each period of sixteen days. In regard to this point there was a dispute as to whether the arrangement referred merely to the water in No. 1 dam or whether it referred to the water to which the farm Klein River was generally entitled. Young acquired the property about 1874. In 1878 another dam was constructed by one Laatz, who had leased from C. J. S. Ferreira. That dam did not come into the case, having subsequent to its construction been disused and closed up. When Mr. Waite acquired the property he made No. 3 dam, which was higher up the river, and from which his lands could be watered. That was about 20 years ago. The dam was constructed on another property called Klein Fontein. A protest was made by Young, but nothing came of it at the time. When Mr. Harvey came, Waite and he proceeded to irrigate

their land through certain pipes which they laid down, and conveyed water from dam No. 3. Recently action had been taken by the respondent to have it declared, firstly, that the arrangement which had been entered into between the Ferreira children when they had taken possession of the property from their father was an arrangement which referred not to the water in the dam, but to the water in the river, and, secondly, to have it declared that this arrangement made between the Ferreira children was binding upon the present appellants. The plaintiff claimed an order in terms of the arrangement and £50 damages. He said that the defendants had repeatedly drained the river, and had taken water from it out of their turns.

The Water Court, in their reasons for judgment, said that they found in favour of the plaintiff, and assessed the damage that he had sustained at £32 10s.

Mr. Benjamin said that, as regarded the side issue raised in the reasons for judgment as to what was a fair and equitable distribution of the water, no evidence had been lead in the Court below upon that point, and the defendants were not called upon to meet an indefinite case of that kind. He submitted that the only question to be determined by the Court was whether there was an original agreement between the parties which was now binding upon the present owners of the property. He submitted that there had been no registration of any alleged servitude in the interests of the present plaintiff. If there had been no registration, then the question arose, had there been due notice to the present owners of the property of any arrangement that would be binding upon them? He contended that no such due notice had been given. He submitted that the distribution that took place when the division of the farm was made was the distribution of the water in the dam, and not the river was made.

Mr. McGregor argued that if an agreement had been admitted, then the parties must be deemed to have taken the Water Court as being the arbiter, and his learned friend could not come into court under section 15 of the Act. It was significant that in this case the Water Court had gone into the question of what would be a fair and reasonable distribution. His learned friend had intimated that he came into court on section 15; section 15, according to his own showing, did not apply, and he had not yet satisfied his lordship on what ground he was entitled to come to this Court. He submitted that his learned friend could not be heard on appeal that day at all. It was significant that counsel should say that this matter must be dealt with rigorously, and only as a matter of

agreement. It was true that no servitude had been registered against the property, but against that they had the only standing system which had existed from time immemorial, and the further fact that the division, after being informally entered into between the father and the children many years back, was thereafter, owing to difficulties arising between the parties, made a matter of arbitration. The award could not be traced, but one might fairly presume that the arbitrator would give to the party that had three-fourths of the land three-fourths of the water. Mr. McGregor dwelt at some length on the point as to whether this matter should have come before the Court by way of appeal or review.

Mr. Benjamin, in reply, submitted that if the Court should hold that there were no grounds of appeal his clients were entitled under the Charter of Justice to ask the Court to review the decision of the Water Court.

Buchanan, A.C.J.: I am not aware that there has been any decision of this Court upon the construction now sought to be placed upon the Water Court Act, No. 40, 1899, on the points raised in issue in this case. The Parliament of this country sought by that Act, it seems to me, to revert to the former practice which was in existence in this country of having disputes between farmers relative to water rights settled on the spot by a Court of Heemraden, and the place of that Court of Heemraden, which has been abolished, was sought to be filled by the Water Court created by this Act. The powers, duties, and mode of procedure of the Water Court, as indicated by the Act, are very similar to those which were followed by the old Court of Heemraden. Their decisions, unlike the decisions of arbitrators, would under this Act be binding upon the parties, and I see under one section the decisions of the Water Court may, without reference to the Supreme Court for confirmation or otherwise, be registered against the titles of the persons affected by the decision of the Water Court. The Water Court in the present case found, as a fact, that the agreement related to the whole of the water in the river, and not the distribution only of such water as happened to get into the sluic which was led out of the river. The Court below, I think, decided this question on sufficient evidence. The Water Court found that the use of the water in the Klein River was intended, and that the present applicants are entitled to the use of water for 4 days out of every sixteen, and that Young is entitled to have 12 days out of every sixteen in the older portion of the river, and they made an order accordingly. This order does not interfere with any right which the applicants may or may not have

to take their four days' turn of water out of the stream higher up. That matter is still left open. The Water Court support their finding upon the older portion by saying that, after being on the spot and investigating the case, this apportionment seems to be a fair apportionment of the water. Now the 5th section of the Act which empowers the Water Court to investigate any agreement or understanding whether written or unwritten, does not contain any reference to a means of bringing a decision of the Water Court before this Court on appeal, and I think it may well be that the Legislature intended the Water Court to settle the question without further appeal, and I am supported in this view by looking at the next section. I think that the Act, as worded, supports the construction sought to be put upon it by Mr. McGregor, that there is no appeal in a case such as is now before the Court, and I think it is quite possible that it was intended that there should be no such appeal. I hold, therefore, that under this Act the question which was referred to the Water Court in this case is one which there is no right of appeal against. At the same time, of course, this Court has always the right of control over the proceedings of any inferior Court, and to correct any informality or malpractice. As I hold that there is no appeal from the Water Court, the only question that remains is whether in order to save expense the Court should say whether there is anything indicated which would induce the Court to interfere with the decision of the Court below. Looking at all the circumstances of the case, looking at the decision given by the Water Court and the fact that their finding is justified by the evidence, I think that this is a case in which there would be no likelihood of a review succeeding against the decision of the Water Court. This must be treated as an application to the Supreme Court, and the order of this Court will be that the application is dismissed with costs.

In re INSOLVENCY STEVENSON.

Mr. Benjamin moved, as a matter of urgency, on behalf of the Board of Executors, as executors in the estate of the late William Hiddington, for the appointment of Mr. Johannes H. N. Roos, secretary of the Board, as provisional trustee in the insolvency of Henry Stevenson, of the Annandale Hotel, Cape Town, for power to carry on the hotel pending the election of a trustee by the creditors.

An order was granted appointing Mr. Roos as provisional trustee with power to carry on the hotel.

SUPREME COURT'

[Before the Acting Chief Justice (the Hon. Sir JOHN BUCHANAN) and the Hon. Mr. Justice HOPLEY.]

COULTON V. BULL. { 1905.
Oct. 11th.

This was an application on notice of motion for an order of release from civil imprisonment, and for a discharge of the decree of civil imprisonment against the applicant (Bull). The applicant is a doctor, who had recently opened practice at Uitenhage, and the respondent is also a medical man. The respondent had promised not to press his claim until the applicant satisfied another debt, and the applicant pointed out in his affidavit that some of his patients were in a critical state, while he was being detained in prison. The applicant, in his affidavit, set out that his income was not sufficient to enable him to pay anything.

Mr. Upington was for the applicant and Mr. Gardiner was for the respondent.

Buchanan, A. C. J., pointed out that the paucity of information in the affidavits with regard to the applicant's property, and suspended the decree on the applicant paying £3 a month.

MZUBELO AND OTHERS V. { 1905.
NDABA AND ANOTHER. { Oct. 11th.
" 12th.

Deed of grant—Rectification—
Tribal tenure—Trust.

One Manguzela, a native Chief, had purchased two farms with subscriptions raised among the people of his tribe for the purpose of extending his location. At the suggestion of the R.M., the property was transferred to the Chief, his Headmen and Councillors, without mention of any trust. Two of these people now claimed dominium in pro rata undivided shares of the farms purchased.

Held, that the farms had been transferred to them only in trust for their tribe: and that the deed of grant must be so amended as to express that trust.

This was an action for the rectification of a certain deed of grant of two farms in East Griqualand.

The declaration was as follows:

1. The plaintiffs and defendants are members of that section of the Amahlubi tribe under the late Chief Manguzela, and reside at Matatiele, in the district of East Griqualand, in this colony.

2. On or about the 26th day of April, 1894, and during the lifetime of the said Mangubela, one John Shepherd Simpson, duly authorised thereto, purchased from the Colonial Government, under the conditions and regulations contained in the Act 15 of 1887, and in certain deeds of grant, hereinafter referred to for and on behalf of the people of the said section of the Amahlubi tribe, certain two farms situate in the said district and known as "Simpson" and "Polygon," for the sums respectively of £1,010 and £780 sterling.

3. The said sums so far as necessary were raised by public subscription amongst the people of the said section of the said tribe, and the whole of the said purchase prices has been paid for and on behalf of the said people.

4. On or about the 25th day of June, 1895, certain two deeds of grant were executed in pursuance of the said contract of sale, whereby the said two farms were granted, ceded, and transferred to the said Chief Manguzela, Rarnati, Sobago, Jafta, the plaintiffs and defendants with full power and authority thenceforth to possess the same in perpetuity, subject to certain conditions therein set forth to which it is unnecessary to refer more fully. The plaintiffs annex hereto copies of the said deeds of grant which they pray may be considered as if inserted herein.

5. It was at all times material to this case the true intention and meaning of all the parties to the deed of grant that the said farms should be granted, ceded, and transferred to the persons mentioned in the last preceding paragraph in trust for the said section of the said tribe, which is entitled to all the right, title, and interest in and to the said farms, under and by virtue of the said deeds of grant, but by mistake or "justus error" the said deeds of grant were signed, and executed in the form set out in the last preceding paragraph.

6. Subsequently to the signing and execution of the said deeds of grant the Chief Manguzela and the said Rarnati, Sobago, and Jafta died.

7. Thereafter the defendants claimed and still claim to be entitled in full and free ownership to an undefined one-eleventh share each, in each of the said farms, and have wrongfully, unlawfully, and in violation of the true intention and meaning of the parties to the said deeds of grant, purported to sell and have attempted to transfer their said shares.

8. Thereafter on or about the 17th day of November, 1903, this Honourable Court granted an interdict restraining

ing the transfer by the defendants of any portion of the said farms, pending an action to be forthwith brought by the plaintiffs against the defendants for rectification of the title deeds of the said farms.

9. By reason the premises the plaintiffs are entitled to claim that the said deeds of grant be rectified so as to carry out the true meaning and intention of the parties thereto, by the insertion in each of the said deeds of grant between the words, "Willie Nda-ba," and "the aforesaid piece of land" of the words "in trust for that section of the Amahlubi tribe under the late Chief Manguzela," or of such other words as will give effect to the said meaning, and intention of the parties.

The plaintiffs claim: (a) Rectification of the said deeds of grant as set forth in paragraph 9; (b) alternative relief; (c) costs of suit.

For a plea in abatement the defendants set out that the plaintiffs were not entitled to have and maintain the action against them without joining the Colonial Government, who, as grantors, were directly interested. On 29th July, 1895, the parties jointly and severally executed and registered in favour of the Colonial Government a mortgage bond for the sum of £1,432. The defendants admitted they belonged to the Amahlubi tribe, but denied that they were members of the section which was under the late Chief Manguzela. They denied that Simpson was authorised to purchase the farms for the people of the section, and they set out that they were entitled to sell their shares and to obtain from the plaintiffs the original deeds of grant for the purpose of passing transfer to one Kirk.

Mr. Upington (with him Mr. D. Buchanan) for plaintiffs. Mr. Benjamin for defendants.

Mr. Upington said that the Government did not wish to intervene in the action, but the Acting Chief Justice ordered the Government to be formally joined as co-defendants, in order that the mortgage bond, if necessary, might also be rectified. The evidence taken on commission was read.

Mr. Upington said that in this case the plaintiffs sought to have the grants of two pieces of ground rectified so as to carry out what they alleged to be the true intent and meaning of the parties at the time when the purchase was entered into, and they alleged that the form in which the documents were drawn up did not carry out that true intent and meaning, and that this was due to a mistake. As to what the true purpose, intent, and meaning of the two deeds of grant actually was there could be very little doubt, because upon that point, so far as the main features of the case was concerned, in spite of the vast amount of evidence that had been

led, there really was very little at issue between plaintiffs and defendants. It was admitted that Manguzela called his people together, that the people contributed, that at the first meeting, or some time before and after, the sum of £300 was contributed, and that a large number of people who had contributed did not appear on the title deeds. He did not intend to enter into a nice analysis to show the names of the contributors and the amounts they had contributed, because these were admitted. Consequently, he submitted that a large portion of the plaintiffs' case was made out. It was highly improbable that these people contributed for the purpose of making 11 natives, including the two defendants, Breakfast and Ndaba, co-proprietors in their own right of the two farms "Simpson and Polygon, and, in fact, when the direct evidence was looked to it was at once seen that that clearly was not the case. Counsel proceeded to quote from the evidence of Mr. Simpson, who stated that while R.M. of Matatiele he was approached by the Chief Manguzela, who was afraid that the farms were going to fall into the hands of the Europeans, and who was anxious to keep the property for his own tribe. These farms, according to Mr. Simpson, were purchased in order to enlarge the location and to protect the location, and in the course of his evidence he said that from an administrative point of view it was necessary that the farms should be added to the location, and that he considered it his duty, as Magistrate of the district, to interest himself on the natives' behalf. Counsel went on to comment on the fact that of the £500 or £600 contributed, every penny, with the exception of £20 or £30, was subscribed by people other than the two defendants. He also pointed out that these farms had always been looked upon by the Government as part of Manguzela's location.

Mr. Benjamin said that a great mass of evidence had been led, and there was a great conflict in the testimony given by the witnesses. The defendants clearly intended to purchase a share of the farms, and they contributed certain sums towards the purchase of the property. It was true that a contract had been entered into between the defendants and Mr. Kirk, but it was not Mr. Kirk who was now before the Court, but the defendants. It was clear from their evidence that the defendants would not have contributed unless they had thought they were going to have a fixed, definite interest in the farms. Whatever Mr. Simpson's explanation may have been, the defendants thought they were going to have a heritable right. If Mr. Simpson did say at the time that the farm was to be bought "in trust," then one would like to know what were the words used by the interpreter in con-

veying the idea to the defendants. He submitted that, while the defendants would not be entitled to a full eleventh share each of the property, they were at least entitled to a share proportionate to the amount of money they had contributed. If the prayer in the plaintiff's declaration were granted then the defendants would be outcasts. Counsel submitted that, as against defendants, plaintiffs were not entitled to succeed in this action.

Buchanan, A. C. J.: Prior to the year 1894 the native chief or headman Manguzela and his people occupied a location on Crown ground in the Matatiele district. Adjoining this location were certain other Crown lands, which the Government resolved to sell. Before the sale the chief and some members of his tribe had spread their borders on to some of these unoccupied Crown lands, and were living there at the time of the sale. When the sale was first mooted Manguzela had an interview with Mr. Simpson, the Magistrate of Matatiele, with a view to the chief buying the land which was about to be put up for auction adjoining his location for the use of his sub-tribe. On looking into the diagram it is very clear why it was desirable that the farms Polygon and Simpson should be bought for the tribe or should be annexed to the location of the Chief Manguzela, not only as giving them access to the water, but also as affording additional grazing and arable land. The Chief took Mr. Simpson's advice and called a meeting of his people for the purpose of discussing the purchase, and at the meeting in the language of allegory so much in favour with the natives, as one of the witnesses said, "he represented as the Chief of his people that he was about to marry a daughter of the Government, and wanted their assistance in providing the usual dowry"—in other words, that he wanted to buy this land and that he wanted his people to assist him in buying it. The people responded to the request, and a number of them subscribed cattle, which were afterwards sold, and the proceeds paid over to the Magistrate. The two defendants Ndaba and Breakfast, each contributed cattle, which were afterwards sold for £10. The Chief himself contributed some £30 or £40 and other members of the tribe contributed, some more and some less. The money subscribed was about £300. Later on Mr. Simpson, acting for the tribe, bought these two farms. Mr. Simpson was then removed from Matatiele to Mount Fletcher. When the land had been bought he had suggested that the transfer or grant should be made not only in the Chief's name, but that the names of the headmen and counsellors should be inserted in the deed. This suggestion was adopted. The grant was made out in the names of the Chief

and these ten counsellors, but without mention of any trust, but, from the evidence given in this case, and about which there is no conflict, it is clear that the Magistrate had made the purchase, not on behalf of the Chief and these ten people named in the grants only, but on behalf of the members of the tribe under Manguzela. The purchase was made in 1894, and when the land was subsequently granted, a mortgage bond was passed to the Government for the balance of the purchase price. Since then, by contributions of the people, a portion of the capital has been paid off, and during the last ten years sums have been raised from time to time by the people of the tribe for the annual interest and for the expenses of survey and transfer. Breakfast has contributed £10 towards the purchase, and he says that he has contributed £5 a year towards the interest. Ndaba contributed £10 towards the purchase, and he says that he has paid £7 towards the expenses of transfer and survey and £5 towards the interest. Mr. Temple, in his evidence for the defendants, says that the £5 contributed by Ndaba was not one year's contribution, but was for his share of the contribution for several years towards the interest. It appears to have been the custom of the tribe, whenever a call was made either for capital or interest, either for the Chief to call a meeting or to send round, and have the amount collected, and when the required amount was collected from his people no further collections were made. In 1902 the defendants, wishing to leave the place for several reasons, entered into negotiations with one Kirk, who bought from them their interest in this farm for £60. Kirk alleges that at that time he bought a one-eleventh interest in the whole property, and proceedings were taken in this court to compel the plaintiffs to deliver the title deeds to Kirk, or to the agents of the two defendants for the purpose of transferring this eleventh portion. But, as I have said, it is clear from the evidence that the defendants were not intended to be the owners in their own right of one-eleventh of the property; and the learned counsel for the defendants now says that he is prepared to give up the claim for one-eleventh, and to take what may be considered a fair proportion of the land purchased. It appears to be the custom of natives for the Chief to allot to the men who come to his tribe ground to cultivate. One of the defendants said the Chief promised him a "blanket," meaning a piece of land, for himself if he would assist in the purchase. The Chief did afterwards point out to each defendant a place where they could build their huts and make gardens. Whether the defendants will be entitled to dispose of their allotments is a question that we are not

called upon to decide. It may be well that the defendants took the allotments from the Chief under the usual custom of the natives, with regard to lands in locations, and they may be bound to abide by those customs, which, if I am rightly informed, amount to this, that when a chief allots land to a member of the tribe he is entitled to occupy that land only so long as he is a member of the tribe, and that, if he likes to give it up or to leave the tribe, then he has to abandon to the common land what was specifically allotted to him as a member of the tribe. There is no doubt that deeds of grant and title deeds are important documents, and that they would not be lightly interfered with by the Court. The defendants' case depends mainly, if not entirely, upon these documents. But motions to amend title deeds or deeds of grant are not unknown in this colony, and when it is clearly made out that there is an error in the documents the Court has ordered the amendment, so as to represent the actual position in the case. But for Mr. Simpson's interference, the defendants' names would probably never have appeared on the deed of grant at all, and they would have been made in favour of Manguzela. I consider that they were grantees, not in their individual rights, but as trustees for the tribe. I think that the plaintiffs have proved in this case that they are entitled to have the grant amended in terms of the declaration. The prayer of the plaintiff's declaration will therefore be granted, and the deed of grant will be amended by adding the words "in trust for that section of the Hlubi tribe under the Chief Manguzela." As the property has been bonded to the Government, and the Government do not object to this action, and to any amendment in the bond following the amendment of the title, an order will also be given for an alteration of the mortgage bond by inserting the words "in their capacity as trustees for that section of the tribe under the Chief Manguzela," so that it will agree with the deeds of grant. The plaintiffs will have to pay the costs of amending the mortgage bond. As far as the defendants (Ndaba and Breakfast) are concerned, they will have to pay the costs of the action.

Hopley, J., concurred.

Mr. Benjamin said that he desired to draw the attention of their lordships to the large amount of unnecessary matter attached to the declaration. He noticed, for instance, that the whole of the Act of Parliament had been printed twice over.

Buchanan, A.C.J.: That will be a matter for the Taxing Master. His Lordship added that he wished to express his disapprobation of certain of the evidence led before the commissioner, especially with regard to the charges

brought without foundation against witnesses.

[Plaintiff's Attorneys: Van Zyl and Buissinné; Defendant's Attorneys: Findlay and Tait.]

SUPREME COURT

[Before the Acting Chief Justice (the Hon. Sir JOHN BUCHANAN), and the Hon. Mr. Justice HOPLEY.]

ADMISSIONS. { 1905.
Oct. 16th.

Mr. J. E. R. de Villiers moved for the admission of Willem Viljoen as an attorney and notary.

Application granted, oaths to be taken before the R.M. of Steynsburg.

Mr. Van Zyl moved for the admission of Louis Henri van Winsen as an attorney and notary.

Application granted and oaths administered.

Mr. Sutton moved for the admission of Frank Robert Baker as a notary.

Application granted and oaths administered.

Mr. McGregor moved for the admission of Cecil Edward Bradfield as a conveyancer.

Application granted and oaths administered.

Mr. Benjamin moved for the admission of Robert Charles Farquharson as a conveyancer.

Application granted, oaths to be taken before the R.M. of East London.

Mr. Benjamin moved for the admission of Harry Pomeroy Ward as a conveyancer.

Application granted, oaths to be taken before the R.M. of Komgha.

Mr. Upington moved for the admission of Frank Muller Rex as a translator, applicant having passed the examination specified by Mr. Justice Maasdorp at the Circuit Court at Oudtshoorn, where the matter was originally mentioned.

Application granted, oaths to be taken before the R.M. of Oudtshoorn.

PROVISIONAL ROLL.

HOARE AND CO. V. CARROLL. { 1905.
Oct. 16th.

Mr. Douglas Buchanan moved for a provisional order of sequestration to be superseded.

Order discharged.

WATSON, TENNANT AND CO. V. VAN ASS.

Mr. Bailey moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

DE KLERK V. CLWEIDAN.

Mr. Green moved for a provisional order of sequestration to be made final.

Order granted.

MAXWELL AND EARP V. DREYER.

Dr. Rainsford moved for a provisional order of sequestration to be discharged.

Order discharged.

LAITE V. SCARLES.

Mr. Lewis moved for a provisional order of the sequestration to be discharged.

Order discharged.

TOORT V. DALY.

This was an application for provisional sentence on a promissory note for £220, less £75 paid on account, together with interest and costs.

Mr. J. E. R. de Villiers (for defendant, who resides at Rosebank) read an affidavit. The defendants absolutely denied that the said sum or any portion thereof was owing. Defendant said that she had made certain payments, and that there had been transactions in connection with certain racing ponies, which wiped off the balance. The matter was complicated by transactions with a third party, Thomas Fisher, whose estate had recently been compulsorily sequestrated.

The answering affidavits of the plaintiff and Thomas Fisher entered into the relationships and transactions between the parties at length. The affidavits dealt principally with racing matters, and an allegation was made that defendant had offered to pay certain sums in settlement of the debt.

Dr. Groer for plaintiff; Mr. J. E. R. De Villiers for defendant.

Buchanan, A.C.J., said that this was not a case for provisional sentence at all. The application would be refused, and the parties must go into the principal case, costs to be costs in the cause.

SWART V. CROUS.

Mr. Bailey moved for provisional sentence on an unsatisfied judgment of the Periodical Court of Heidelberg. The

debt was £5 11s. 4d., with £1 13s. 10d. costs.

Defendant offered 5s. a month. Provisional sentence granted, and property declared executable.

TREDGOLD, MCINTYRE AND BISSET V. CONRADIE.

Mr. M. Bisset moved for provisional sentence on a mortgage bond for £500, with interest and costs, the bond having become due by reason of the non-payment of interest and for the property specially hypothecated to be declared executable.

Order granted.

ESTATE WRIGLEY V. WRIGHT.

Mr. M. Bisset moved for provisional sentence on two mortgage bonds for £400 and £350 respectively, with interest and costs, and for payment of premium of insurance and stamp duty. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

MARKLEW V. ABRAHAM.

Mr. Payne moved for provisional sentence on a mortgage bond for £1,950, with interest, the bond having become due by reason of the non-payment of capital as provided therein. Counsel also applied for the property specially hypothecated to be declared executable, and for rents receivable from the property to be attached.

Order granted.

BAERSELMAN V. FROEMAN AND OTHERS.

Mr. P. S. T. Jones moved for a provisional order of sequestration to be discharged.

Order discharged.

GERSON AND CO. V. ZION, CHIAI AND CO.

Mr. Bailey moved for the final adjudication of the partnership and private estates of the defendants.

Order granted.

WILSON, SON AND CO. AND ANOTHER V. LEWIN.

Mr. Douglas Buchanan moved for the final adjudication of the defendant's estate.

Order granted.

HOLBOYD V. MCBRIDE.

Mr. M. Bisset moved for provisional sentence on a mortgage bond for £250, with interest and costs, the bond having become due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

MACOWAN V. HERRER.

Mr. Douglas Buchanan moved for judgment on a mortgage bond for £1,000, with interest and costs, and for the property specially hypothecated to be declared executable.

Order granted.

JAGGER AND CO. V. DROOMER.

Mr. Gardiner moved for a provisional order of sequestration to be discharged.

Order discharged.

TAYLOR V. GROENEWALD.

Dr. Greer moved for provisional sentence on a promissory note for £100, and judgment for, under Rule 329d, £19 11s. 2d., balance of account owing for goods sold and delivered, with interest *a tempore morae* and costs.

Order granted as prayed.

BROWN V. PADYACHE.

Mr. Benjamin moved for provisional sentence on a mortgage bond for £73, with interest, the bond having become due by reason of the non-payment of interest and instalments. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

OHLSSON'S BREWERIES V. HALVOSEN.

Mr. Douglas Buchanan moved for provisional sentence on a judgment of the Resident Magistrate's Court, Cape Town, for £128 3s., and £2 10s. 4d. and 9s., being taxed costs and charges.

Order granted, subject to copy of judgment being filed.

TOUCHER V. HOGGARD.

Mr. Van Zyl moved for the final adjudication of the defendant's estate.

Order granted.

VOS V. ANDRIES.

Mr. Rowson moved for provisional sentence on a mortgage bond for £350, less £100 paid, with interest, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

VAN EEDEN V. DU PLESSIS.

Mr. Roux moved for provisional sentence on a mortgage bond, due by reason of the non-payment of interest, and for the property specially hypothecated to be declared executable.

Order granted.

BRINK V. BRAAF.

Mr. Van Zyl moved for provisional sentence on certain three mortgage bonds, due by reason of the non-payment of interest, and for the property specially hypothecated to be declared executable.

Order granted.

ESTATE HIDDINGH V. FERREIRA AND VAN DER MERWE AND ANOTHER.

Mr. De Waal moved for provisional sentence on a mortgage bond for £52, being six months' interest, and for costs.

Order granted against the defendants upon whom service had been made.

ESTATE BAM V. GROBBELAAR.

Mr. De Waal moved for provisional sentence on a mortgage bond for £58, being nine months' interest, and for costs.

Order granted.

PETERSEN V. VAN DEN HEEVER.

Mr. Gutsche moved for provisional sentence on a mortgage bond for £800, with interest, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

LANEY AND DURING V. ROUX.

Mr. Gutsche moved for provisional sentence on a mortgage bond for £45, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

GRAAFF V. ROLLNICK AND MATZ.

Mr. Van Zyl moved for provisional sentence on a mortgage bond for £5,000, with interest, less £28 paid on account, the bond having become due by reason of the non-payment of interest; counsel applied for the property specially hypothecated to be declared executable. Counsel said that he had to apply for the case against Matz to be postponed until the 26th October, and he had to apply for judgment against Rollnick only at present.

Rollnick appeared, and offered £25 a month.

Order granted as prayed.

HARRIS V. DOYLE.

This was an application for provisional sentence on a promissory note for £120.

The defendant's affidavit denied that there was a balance of more than £50 owing, which amount he tendered.

The answering affidavit of the plaintiff stated that no payments had been made on account of the promissory note now sued upon.

Dr. Greer for plaintiff; Mr. Upington for defendant.

Mr. Upington argued that the matter was not one for provisional sentence, but that plaintiff should be ordered to go into the principal case.

Dr. Greer submitted that the plaintiff was clearly entitled to his judgment on the note.

Judgment was given for £50, no order as to costs, plaintiff to go into the principal case with regard to the rest of his claim.

VOS V. TURNER.

Mr. Roux moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

DANZIG V. REX AND ANOTHER.

Mr. Van Zyl moved for provisional sentence on a promissory note for £377 10s., payable at the Standard Bank, Oudtshoorn, and for interest at the rate of 12 per cent.

Order granted.

EARL V. HUMPHREY AND TURKINGTON.

Mr. Van Zyl moved for the final adjudication of the defendants' estates as insolvent.

Order granted.

**WILSON, SON AND CO. V. { 1905.
ROCHESTER BRICK CO. } Oct. 16th.**

This was an application for provisional sentence on certain promissory notes, and for balance of account for goods sold and delivered.

The affidavit of W. Stevens, one of the defendants, admitted certain debts, but said that plaintiffs were indebted to them in the sum of £299, rent due for certain coal deposited on defendants' property, leaving a balance due in their favour of £157 9s. 11d.

Plaintiff's answering affidavit emphatically denied that they were indebted to defendants in £299 or any other sum.

Mr. Burton for plaintiff; Mr. Upington for defendant.

Mr. Upington having been heard in argument,

Buchanan, A.C.J., said that provisional sentence was claimed on two promissory notes. These notes were admitted, though defendants said that they had a counterclaim against plaintiffs for rent, in respect of certain coal stored on their property. This claim was positively denied by the plaintiffs. They had two liquid documents, which were admittedly genuine, and there was a disputed amount, which was alleged to be a set-off against those claims. Plaintiffs were entitled to provisional sentence on the liquid documents, less £20 paid on account. Order accordingly.

**GRAAFF-REINET BOARD OF EXECUTORS
V. MENTJES.**

Dr. Greer moved for provisional sentence on a mortgage bond for £335 with interest and for the property specially hypothecated to be declared executable.

Order granted.

**STEPHEN FRASER AND CO., LTD. V.
IMMELMAN.**

Mr. Douglas Buchanan moved for a provisional order of sequestration to be made final.

Order granted.

**PEDLAR AND CLAPHAM V. LEWIS AND
DINNER.**

Mr. Gutsche moved for provisional sentence on a bill of exchange for £125 5s., with interest.

Order granted.

SCANLON V. DI BIASIO.

Mr. Van Zyl moved for a decree of civil imprisonment upon an unsatisfied judgment of the R.M. Court for £88 and £2 12s. 4d. taxed costs.

Defendant admitted that he owed the money, but said that he was unable to pay anything. He was employed as a stone-cutter at the Paarl.

Mr. van Zyl, in reply to the Court, said that the matter arose out of a libel action brought in the Supreme Court by defendant against one Harrison. Plaintiff succeeded, but he had had to pay the costs, as Harrison could not pay.

Buchanan, A.C.J., said that the action should have been brought in the R.M.'s Court.

Decree of civil imprisonment granted, to be suspended on payment of £2 a month, with leave to plaintiff to move the Court further.

Buchanan, A.C.J., remarked that these heavy costs should not have been incurred by the attorneys.

NORTHERN ASSURANCE CO. V. BAREND AND OTHERS.

Mr. P. S. T. Jones moved for provisional sentence on a mortgage bond for £600, with interest, due by reason of notice having been given and for the property specially hypothecated to be declared executable. Counsel said that only Cornelis and Barend had been served with the summons.

Order granted against the two defendants named.

NATIONAL BANK OF SOUTH AFRICA V. ABRAHAM.

Mr. Benjamin moved for a decree of civil imprisonment on an unsatisfied judgment upon two dishonoured cheques amounting to £3,601 8s. 10d. and an illiquid claim of £15 17s. 8d. and taxed costs.

Defendant said that he was without means or property. He had been a speculator and bookmaker. He had agreed to pay £10 a month to the bank, but at that time "books" were allowed, and they were now excluded.

Cross-examined: He was residing in Kimberley, and was hardly making sufficient to live on. He had a wife and nine children. He was engaged in bookmaking and following up sales. The cheques were accommodation cheques for Mr. Harris, a well-known broker in Cape Town, who assigned his estate about eighteen months ago. He had not proved against the Harris estate because it was not worth while.

By the Court: He was already paying £5 a month on another judgment.

No order was made, leave being given to applicant to move the Court further.

DEMPERS AND VAN RYNEVELD V. SACHS.

Mr. De Waal moved for provisional sentence on mortgage bonds for £150,

£150, £75, £200, £83 18s. 6d., £150, £50, and £350, with interest, and for the property specially hypothecated to be declared executable and for leave to collect the rents of the property.

Order granted and power given to the Sheriff to attach the rents.

ESTATE AHEENS V. CONRADIE.

Dr. Rainsford moved for provisional sentence on a mortgage bond for £150, the bond having become due by reason of the non-payment of rent. Counsel also applied for £3 5s., insurance premium and for the property specially hypothecated to be declared executable.

Order granted.

LOTRIET V. BOONZAIR.

Mr. De Waal moved for provisional sentence on a judgment of the R.M.'s Court at Fauresmith, O.R.C., for £43 odd and taxed costs, defendant having removed to the jurisdiction of this Court.

Order granted.

HEIDE V. DANIELS.

Mr. P. S. T. Jones moved for provisional sentence on a mortgage bond for £2,300, with interest, the bond having become due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

OOSTHUYSEN V. FOTHERINGHAM.

Mr. De Waal moved for provisional sentence on a promissory note for £22, with interest.

Order granted.

LUYT V. SMYTH.

Mr. Swift moved for a provisional order of sequestration to be made final.

Order granted.

LIND V. GESWINT

Mr. M. Bisset said that this was an application for the final sequestration of the defendant's estate as insolvent, but his client was prepared to consent to the matter standing over *sine die*.

Mr. Douglas Buchanan (for defendant) moved for an order authorising the sale of certain property in the estate of their father to enable the petitioners to pay off the debt. The

debt was incurred on behalf of the father, and the petitioners were his curators.

Order granted as prayed.

The application for final sequestration was ordered to stand over sine die.

ILLIQUID ROLL.

GILBERT AND OTHERS V. { 1905
SILBERT. { Oct. 16th.

Dr. Greer moved for judgment under Rule 329d for £32 11s. 7d. for balance of money lent and advanced, with interest *a tempore morae* and costs.

Order granted.

SCHMIDT V. GRAY AND SONS.

Dr. Greer moved for judgment under Rule 329d for £23 13s. 6d., being amount due in respect of moneys collected, with interest *a tempore morae* and costs.

Order granted.

JULIAN STEPHENS, LTD. V. RILEY.

Dr. Rainsford moved for judgment under Rule 329d for £2,301 18s. 2d., due as per statement of account, for money lent, goods sold, commission, and otherwise, with interest *a tempore morae* and costs.

Order granted.

ALARD AND OTHERS V. LE ROUX.

Mr. Benjamin moved under Rule 329d for the return of certain promissory note, or, alternatively, for a good and sufficient indemnity in respect of the liability of third parties.

Order given for the return of the promissory note within 14 days.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

HOWSE, REYNOLDS AND CO. V. DAVIE.

Mr. Benjamin moved for judgment under Rule 329d, in terms of prayer (a) of the declaration, calling upon the defendant to render a true, full, and detailed account, supported by vouchers and for costs of suit.

Order granted, account to be rendered within one month.

ST. LEGER AND WILSON V. BONCKER.

Mr. Upington moved for judgment under Rule 319, in default of plea, upon a declaration which claimed (1) an ac-

count of certain moneys collected by defendant on behalf of plaintiffs; (2) debts of the account; and (3) return of all papers and documents handed by plaintiffs to defendants for the purpose of collecting debts. It appeared from the declaration that defendant had made a statement, in which he claimed that a sum of £8 was due from plaintiffs to himself.

Defendant said that he wished to plead to the declaration. He had rendered to plaintiffs a detailed statement of account.

Ordered to stand over until Thursday next.

Postea (October 19.)

Mr. Bisset said this case had been adjourned from Monday to enable defendant to file an affidavit.

Defendant now appeared, and informed the Court that he had done so.

Mr. Bisset said the defendant had only handed the affidavit to him at 10.30 this morning.

Buchanan, A.C.J.: I see you were supposed to collect these accounts, and you gave their collection to somebody else?

Defendant: But they agreed to it. He added that he had given his attorney authority to file the defence and it had not been done.

The Court allowed defendant two days to file his plea.

BRUNT V. GOLDSTEIN.

Mr. Van Zyl moved for judgment under Rule 319 in default of plea for £44 rent.

Order granted.

STANDARD BANK V. PARRY.

Dr. Rainsford moved for judgment under Rule 319 for £67 1s. 1d., overdraft, and for interest.

Order granted.

AFRICAN BANKING CORPORATION V. LEOMAN.

Mr. Lewis moved for judgment under Rule 319 in default of plea for £61 10s. 6d., overdraft, interest, and costs of suit.

Order granted.

BADENHORST V. BADENHORST.

Mr. Benjamin moved for judgment in terms of consent paper. The action was for a decree of judicial separation. The consent paper provided, *inter alia*, for a decree of judicial separation and

payment by defendant to plaintiff of £1,135.

Judgment in terms of consent paper filed.

ROSE V. SHUTTE AND ROSE.

Mr. Van Zyl moved for judgment in terms of consent paper.

Judgment in terms of consent paper.

CAPE TOWN TOWN COUNCIL V. BROWN.

Mr. Gutsche moved for judgment under Rule 319 for £51 15s., £10 8s. 5d., and £9, rates and taxes.

Order granted.

NATIONAL BANK V. LIQUIDATORS CAPE CANNING CO.

Mr. Sutton moved for judgment under Rule 329 (d) for £78 14s. 11d., money lent and advanced, with interest and costs of suit.

Order granted.

SOUTHERN LIFE ASSOCIATION V. FRYER.

Mr. Swift moved for judgment under Rule 329 (d) for £24 9s. 11d., balance of account due from defendant in respect of certain renewal premiums collected by him, with interest *a tempore morae*, and costs of suit.

Order granted.

HOLST V. SCHMIDT.

Dr. Greer moved for judgment under Rule 329 (d) for £66, rent of certain premises, Mentone, Green Point.

Order granted.

CAPE TOWN TOWN COUNCIL V. MOPHERSON.

Mr. Gutsche moved for judgment under Rule 329 (d) for £180 9s. 5d., municipal rates.

Order granted.

MOWBRAY MUNICIPALITY V. HOGGARD.

Mr. Swift moved for judgment under Rule 329 (d) for £75 12s. 6d., owner's rate.

Order granted.

COLONIAL GOVERNMENT V. EDGECOMBE AND CO. AND DOMINICUS.

Mr. Nightingale moved for judgment under Rule 319 in default of plea for £789 8s. 1d., less £226 10s. now paid

by first two plaintiffs; rent of the right to let certain bookstalls on the C.G.R. and for a further sum of £15 18s. 4d., rent of certain bookstalls.

Order granted.

BELLETT V. STARK.

{ 1905.
Oct. 16th.

Mr. Bailey moved for judgment under Rule 329 (d) for £91 11s. 6d., balance of wages due.

Order granted.

HILL AND CO. V. SCHAPERA.

Mr. Struben moved for judgment under Rule 329 (d) for £64, less £25 paid on account, with interest *a tempore morae*, and costs.

Order granted.

PURCELL, YALLOP AND EVERETT V. ADAMS.

Dr. Greer moved for judgment under Rule 329 (d) for £18 10s. 2d., goods sold and delivered, with interest *a tempore morae*.

Order granted.

PURCELL, YALLOP AND EVERETT V. PRESWICH.

Dr. Greer moved for judgment under Rule 329 (d) for £101 7s. 11d., goods sold and labour performed, with interest *a tempore morae* and costs.

Order granted.

ARMSTER V. BELING.

Mr. Benjamin moved for judgment under Rule 329 (d) for £2 6s., goods sold and delivered, with interest *a tempore morae* and costs of suit.

Order granted.

MYERS BROS. V. MORGAN AND ANOTHER.

Mr. Lewis moved for judgment under Rule 329 (d) for £72 6s. 6d., value of a certain diamond bangle stolen by defendants from plaintiff's premises. Defendants had been convicted of theft and sentenced to a term of imprisonment.

Order granted.

ESTATE GINSBERG V. BATES.

Dr. Greer moved for judgment under Rule 329 (d) for £80 rent, with interest *a tempore morae*, and costs

Order granted.

VAN BLERCK AND CRAWFORD V.
LE ROUX.

Mr. Alexander moved for judgment under Rule 329 (d) for £9 15s., goods sold and delivered, with interest and costs.

Order granted.

GREYLING V. GREYLING.

Mr. J. E. R. de Villiers moved for an order declaring the respondent to be of unsound mind and appointing the plaintiff curator of her estate, costs to be borne by the estate. Defendant was at present confined in the asylum at Graham's Town.

Order granted, declaring respondent of unsound mind and appointing Jacobus Johannes Greyling curator of her property, the question of appointment of a curator of defendant's person to be mentioned on the next provisional day.

Ex parte S.A. MILLING CO.

Mr. Van Zyl moved on the petition of the South African Milling Co. for the appointment of Mr. Gother Mann as provisional trustee in the insolvent estate of Frank Emblin, baker and confectioner, Claremont and Muizenberg.

Order granted as prayed.

Ex parte VORSTER.

1905.
{ Oct. 16th.
Nov. 16th.

Mr. Benjamin mentioned this case as a matter of urgency.

Buchanan, A.C.J., said that he thought there should be some alteration in regard to these urgent matters. The suggestion that commended itself to him was that there should be a divisional court sitting every morning to hear urgent matters.

Mr. Benjamin then moved for a temporary interdict restraining petitioner's husband, Cornelius Dirk Vorster, at present confined in Colesberg Gaol, from alienating any portion of the joint estate, and from entering on the farm Dwarsbalk, pending an action for divorce to be instituted by petitioner.

Rule *nisi* granted, to operate as an interim interdict, and to be returnable on the 2nd November.

Postea (November 16th).

Mr. Benjamin moved for the rule *nisi* to be made absolute interdicting the respondent Dirk Cornelius Vorster from selling or alienating 300 sheep and goats, and ten head of cattle, on the farm Dwarsbalk, in the district of Colesberg, and from entering on the farm. Mr. W. Porter Buchanan was for respondent.

From the petitioner's affidavit, it appeared that the respondent had been arrested on a charge of rape upon the petitioner's daughter, and that he was in gaol awaiting trial. The petitioner intended to institute an action for divorce. She applied for an interdict, because she understood that it was the intention of the respondent to remove the stock, and she also said that respondent had threatened her with violence. Petitioner and respondent were married in community.

Respondent, in an answering affidavit, said that petitioner had no cause to make the present application, and he prayed that the order might be discharged. Respondent entered at some length into the position of the property on the farm, and claimed that a good deal of it was due to his exertions.

A replying affidavit by petitioner was also read.

Mr. Buchanan contended that, under all the circumstances, there was no ground whatever for the application. No proof had been given of any intention on the part of the respondent to alienate any portion of the property. He said in his affidavit that he wished the applicant to remain in control of the farm until he had an opportunity of getting out of gaol and clearing himself from the charge.

Buchanan, A.C.J.: Applicant obtained a rule *nisi* calling upon the respondent to show cause why he should not be restrained from alienating any of the property of the joint estate, and also from entering upon the property Dwarsbalk, where his wife is living. The rule is returnable to-day, and the respondent appears to show cause why the rule should not be made absolute. The ground on which the rule was granted restraining the respondent from entering upon the farm is two-fold, but mainly because he had previously threatened his wife with violence, and she expected violence if he were allowed to return to the farm. That this expectation is not without good ground appears from the fact that the husband is now in gaol on a charge of incest and rape upon the daughter of the wife by her previous marriage. I think, therefore, it would be very good ground for restraining him from returning to the property, especially when it is remembered that the farm is a property the life interest of which has been bequeathed to the estate, and has not been brought into the estate by the husband at all. As to the other part of the application to restrain the respondent from alienating or disposing of any of the movable property in the estate, there is great force, no doubt, in Mr. Buchanan's argument, but in this case, considering the circumstances which are disclosed in the affidavits, the relationship which is existing between the two parties, and the fact

that this property was really acquired out of the wife's estate, not separate estate, but an estate which has come to her, I think there would be no harm in continuing the interdict, as no creditors would be injured. The applicant ought to institute an action forthwith. I don't know when the criminal trial is to take place—

Mr. Benjamin: It has been instituted.

[Buchanan, A.C.J.: When will it take place?

Mr. Benjamin: It will probably come on in the Northern Circuit.

[Buchanan, A.C.J.: That won't be before next March.]

Mr. Buchanan urged that it would be very hard upon respondent to restrain him from parting with any of his own property. It was clear that he had property, as he had been in the employ of the military during the late war. Respondent would want some money for his defence to the criminal charge.

Buchanan, A.C.J.: He does not say that he needs the money. He may apply again. I think, for the present, the rule will be made absolute, pending proceedings to be instituted forthwith, costs to be costs in the cause.

REX V. BROODRYK.

Murder—Bail.

Mr. Gardiner moved for the release upon bail of Broodryk, who is charged with murder.

Mr. Nigtingale (for the Crown) consented, on condition of accused providing personal security in £1,000 and two sureties of £500 each, sureties to be to the satisfaction of the R.M. of Beaufort West. The trial, counsel said, would take place at the next Circuit Court.

Bail granted, subject to the conditions named.

REHABILITATIONS.

Mr. De Waal moved for the discharge from sequestration of F. H. C. Hutchings.

Granted.

Mr. P. S. T. Jones moved for the discharge from insolvency of Jacob G. Buhlmann.

Granted.

Dr. Rainsford moved for the discharge from insolvency of Frederick F. G. Aspelmeier.

Granted.

Mr. J. E. R. de Villiers moved for the release from sequestration of Anna Maria Raubenheimer.

Order of sequestration superseded.

GENERAL MOTIONS.

HIGSON V. HIGSON. { 1905.
Oct. 16th.

Mr. Russell moved for a decree of divorce, in default of compliance with an order of restitution of conjugal rights.

Ordered to stand over until the 14th November for production of an affidavit setting out that the defendant had failed to comply with the order of the Court.

Postea (November 14). Rule made absolute.

Ex parte NORVAL AND OTHERS.

Rules nisi under the Derelict Lands Act were made absolute in the following petitions: Estate John Norval (Mr. J. E. R. de Villiers), Estate Jonas Thomas (Mr. Gardiner), J. M. Steyn (Mr. Bailey), Angas Emily Poole (Mr. Bailey), Greeff and Bouwer (Mr. Lewis).

PLOTTEL V. BURMAN.

Mr. De Waal moved for a rule nisi calling upon respondent to show cause why he should not be dismissed from executorship in the estate of petitioner's brother to be made absolute.

Mr. Gardiner, on behalf of the respondent, opposed the application.

Respondent was ordered to file an account within three months, and to pay costs of the application, with leave reserved to the applicant to again move the Court after the expiration of three months.

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice. the Hon. Sir JOHN BUCHANAN.]

LIQUIDATORS, BUFFALO SUPPLY AND COLD STORAGE CO. { 1905.
V. M. BERGL (LONDON). { Oct. 17th.

Mr. Burton moved, on the petition of Mr. H. M. Fleming, in his capacity as official liquidator of the plaintiff company, for an order authorising the acceptance of a certain proposed compromise set out, in an annexure, sub-

ject to one Alexander Bergl being made a party thereto.

[Buchanan, A.C.J.: There is a case pending in the English courts, and they have come to terms.]

They have not quite come to that yet. We come here as the liquidators to ask the Court to allow us to enter into this compromise.

[Buchanan, A.C.J.: The application should hardly be for judgment by consent.]

It will not be a case of signing judgment. The agreement will be arrived at out of court, and all that will happen, I believe, will be that the case will be withdrawn.

[Buchanan, A.C.J.: I take it that the judgment will be registered in the English courts?]

An order of authorisation is asked for of certain amendments, which we ask the Court to sanction, and which we will put to them. At present, their consent to the compromise does not embrace that.

[Buchanan, A.C.J.: My point is that there ought to be a judgment of the English courts. His Lordship added that it was a good rule when a compromise was arranged in a matter such as this that public notice should be given.]

In regard to the publicity of the matter, your lordship may perhaps see from the petition that there are certain reasons why it should not be made public.

[Buchanan, A.C.J.: We cannot dispense with that in the ordinary course.]

Here is a case in the court which, I take it, will be settled, and the general requirements of the law as to publicity would be complied with if there were a regular judgment by consent.

Buchanan, A.C.J., granted an order authorising the liquidators to consent to judgment in their favour in the action instituted by them in the High Court of Justice, based on the offer made by the defendant, with such other conditions as might be agreed upon between the defendant and the liquidators.

GENERAL MOTIONS.

Ex parte JORDAAN. { 1905.
Oct. 17th.

Mr. Molteno moved, on the petition of the executrix testamentary, for authority to confirm the sale of certain property. Counsel said that the sole point was as to the interpretation of the will of the petitioner's late husband, the Master in his report stating that it was so contradictory that it was difficult to understand what was the intention of the testator.

The matter was ordered to stand over for further information as to the position of the heirs.

Ex parte SETTERY.

Mr. Benjamin moved for the rule nisi calling upon Frank Percival Smith to show cause why he should not be removed from certain executorship to be made absolute.

Rule made absolute.

SHARPE V. SHARPE.

Dr. Greer was for the applicant (Elizabeth Jacobsa Sharpe); Mr. Alexander was for the respondent (Archibald J. Sharpe, a platelayer).

This was an application by the defendant in the divorce suit calling upon her husband to show cause why he should not pay to her the sum of £30, to enable her to defend the proceedings.

Affidavits were read, in which the respondent took up the position that he could not pay any sum to the applicant, as he was without means. Applicant said she denied the allegation of adultery made against her by the plaintiff in the suit. Respondent said that his wife's present action was quite unnecessary and a waste of money. He also stated that he was deeply involved in debt. His wife had been turned out of one house by the landlord on account of her disgraceful behaviour, the landlord (the Rev. Mr. De Villiers) saying that he would rather have a Hottentot in the house. Deponent had had judgments against him on account of his wife's debts, and had been twice arrested. He denied that he drank more than once a week, and even then, he said, not more than an average man's drink. He also said that when his wife received £20 from him, she spent it upon a dance at Gordon's Bay, and continued dissipation.

Leave was given to remove the bar, plea to be filed in seven days, but no order was made as to the payment of alimony. Leave was, however, granted to the applicant to defend the action *in forma pauperis*, Dr. Greer to be counsel, and Messrs. Herold and Gie, attorneys, costs to be costs in the cause.

Ex parte ESTERHUYSEN.

Mr. Watermeyer moved, on the petition of the executrix testamentary, for confirmation of an agreement of sale.

Order granted in terms of Master's report.

Ex parte BOARDMAN.

Attorney—Admission—Service of articles—Breach of continuity.

B., an articled clerk, had served upwards of two years with a firm of attorneys in this Colony. He then joined the Imperial forces and now applied for leave to complete the remainder of his service in the Transvaal.

Held, that the breach of continuity of service must be condoned, but that leave could not be granted to complete service in the Transvaal.

Mr. Benjamin moved for an order as to the completion of the articles of clerkship of one Wm. Boardman, petitioner having had his period of service interrupted by joining His Majesty's forces during the late war. He was now acting as managing clerk to a firm in the Transvaal.

Mr. Uppington, on behalf of the Law Society, opposed the application, in so far as it was asked that service should be allowed in the Transvaal.

Mr. Benjamin pointed out that the applicant had actually served two years and three months with an attorney at Barkly East, when he joined the Imperial forces. He was only nine months short of the service required by the Court.

Buchanan, A.C.J., said that the applicant appeared to have rendered meritorious service to the country, in consequence of which the continuity of his service as an articled clerk had been broken. The Court would condone the breach of continuity of service, and grant an order for the applicant to be allowed to qualify for admission by serving a further nine months, so as to complete the requisite period of three years. As to the second part of the application, for leave to serve the balance of the period in the Transvaal, His Lordship said that he could not see his way at present to grant leave.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

COURTENCY V. COURTENCY. { 1905.
Oct. 17th.

Mr. Benjamin moved for a commission to take the evidence of the plaintiff, Mrs. Courteney, who was residing

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at Johannesburg. She had been deserted by her husband, and, having to earn her living as a boarding-house keeper at Johannesburg, was unable to come to Cape Town.

Application granted, the commission to take the evidence of the plaintiff and any other of her witnesses, Mr. J. van Heerden to act as commissioner.

KOCH V. KOCH.

Dr. Greer was for the plaintiff, and the defendant was in default. The action was brought by the husband against his wife for restitution of conjugal rights, failing which a decree of divorce. Leave was given to sue by edictal citation, and personal service was ordered on the defendant at Johannesburg, but after a diligent search by the Sheriff her whereabouts could not be discovered. Substituted service was ordered, and publication had been effected in "Ons Land" and "The Transvaaler."

Buchanan, A.C.J., pointed out that the publication in "The Transvaaler" ought to have been in Dutch, as the parties to the suit were Dutch.

Dr. Greer said that the publication was in Dutch in "Ons Land," and explained that the publication would be made by the agents in Johannesburg. There was some evidence, however, that the defendant was in Europe.

The plaintiff, Frederick Johannes Koch, a farmer, of Rietfontein, said he was married to the defendant, Catherina Margarita Koch (born Bothas), at Prince Albert, in November, 1892. There was no issue of the marriage alive. He lived happily with his wife until 1902, when the defendant went to Beaufort West to fetch her bicycle, which had been handed over to the military. She never returned to the plaintiff. Six months later she wrote a letter to her sister from Johannesburg stating her intention of never returning, and making certain allegations against her husband. Plaintiff was possessed of some 400 sheep and goats, and his wife had brought nothing into the community of property.

It was ordered that the defendant return to the plaintiff and restore to him conjugal rights on or before 15th January, 1905, failing which to show cause on the 1st February, 1906, why a decree of divorce should not be granted, and the defendant declared to have forfeited benefits arising out of the marriage in community, publications as before.

COLDREY V. COLDREY.

Mr. Gutsche was for the plaintiff and the defendant was in default. The plaintiff sued his wife by edictal cita-

tion for restitution of conjugal rights, failing which a decree of divorce for malicious desertion and personal service was ordered, failing which publication twice in the weekly "Cape Times" and the "Daily Telegraph." It was found impossible to effect personal service. The parties were married in community of property in December, 1895, and of the marriage there was one girl, three years of age. In August, 1903, the defendant deserted the plaintiff and had not been heard of since. Plaintiff claimed a decree of restitution of conjugal rights, failing which a decree of divorce and forfeiture of the benefits under the marriage in community.

The plaintiff, Harry Pritchard Coldrey, stated he married the defendant, Ann Jane Coldrey, born (Campbell) in December, 1895. In January, 1903, witness, acting on medical advice, sent his wife for trip to England for six months, which was extended to nine months. He wrote to her regularly every mail and sent remittances. There was nothing peculiar until July, 1903, when he got a somewhat short note from his wife stating that she had not made arrangements for her return for reasons which she would state later on. Witness, in reply, sent a letter, which was returned unopened. In August he received a letter from the defendant containing the following passages: "You will, no doubt, be surprised when you receive this letter. After months of careful thinking I have come to the conclusion it is best I should not return. . . . It will be useless to try to find me, as I am leaving here this week, and for the future I am dead to everyone."

By Hopley, J.: He had no idea why she was staying away. When she left he took exception to her leaving debts behind, after he had stipulated she should not do so.

[Hopley, J.: There do not seem to be extraordinary differences between these people.]

Mr. Gutsche: For two years he has not heard from her.

[Hopley, J.: She has had time to think about it. You can take a similar order to the last, with the same publication as before. If possible, have it brought to her personal notice.]

WARREN V. WARREN AND TAYLOR.

Mr. Lewis was for the plaintiff and the defendants were in default. The action was brought by the husband against his wife, Jeanetta Warren, for divorce, and against James Arthur Taylor for £500 damages, on the ground of the adultery of the defendants.

William George Warren, the plaintiff, stated he was married to the defendant at Cardiff in May, 1880.

Witness went to Australia and remained there twelve years. In 1887 his wife went to England on a trip to see her parents. In 1895 his wife and he returned to England, and in 1897 they came here. At the beginning of the war witness sent her home to her parents for a trip. The letters between the parties were couched in affectionate terms. In August, 1902, she returned with the child. Witness was then at Kimberley with the military, then he came down to Cape Town and subsequently took up his residence at Bloemfontein. Taylor's name was mentioned to him by his wife, who said that the second defendant had been very kind to her on the voyage home. Witness and his wife went to Springfontein, and from there his wife left for Cape Town to spend a few days with some lady friends, and on her suggestion witness addressed letters to a Post Office box instead of the address where she was staying at Sea Point. In July, 1903, she returned to Bloemfontein and stayed twelve or fourteen days, during which time he noticed that she was very cold—there was something strange about her. She again returned to Sea Point, and in September, 1903, witness came down to Cape Town and endeavoured to find his wife, but he could not find the address given at Sea Point. Referring to the P.O. box address, he found it was the property of people in Kloof-road, but he could not find her there. Subsequently he received two letters, in which the first defendant denied any misconduct, but absolutely refused to see him. He returned to Bloemfontein and received more letters in the same strain. In February, 1905, he came down here, and, finding the defendants living as husband and wife, he visited them at Observatory, and, ultimately, in a scuffle, he was shot by the second defendant. Taylor, at the Criminal Sessions, was ordered to pay £50 or undergo four months' imprisonment for the assault, and the jury recommended him to mercy on the ground that there was evidence that he believed the first defendant was a widow and that she was in a delicate state of health when the plaintiff forced his way into the house.

Hopley, J., granted a decree of divorce, the plaintiff to have custody of the child, and taking into consideration the circumstances of the second defendant, who had been imprisoned for a time for being unable to pay his fine, ordered him to pay £25 damages and the costs of the suit.

EVANS V. EVANS AND MAGEE.

Mr. Gardiner was for the plaintiff and the defendants were in default. The action was brought by Joseph James Evans against his wife for divorce, and against the second defendant for £500

damages by reason of the defendants' adultery.

Joseph James Evans, the plaintiff, said he was married to his wife at Belfast on 15th July, 1895. Eventually he came out here and settled at Diep River under Government employment. The co-defendant got an introduction to the house through a friend, and on Sunday, 16th July, 1905, he (witness) became suspicious of the relations between Magee and his wife.

[Hopley, J.: What made you suspicious?]

Witness: He was making "eyes" at my wife. Proceeding, plaintiff said that on the following Tuesday morning, instead of going to his work, he returned to the house, only to find the defendants in the same room. He proceeded to give evidence of the misconduct.

Evidence was called as to the scene which then happened, the plaintiff evicting the defendants from the house and throwing the first defendant's boxes into the street.

Decree of divorce granted, the defendant to pay £50 as damages and costs of the suit. In awarding damages His Lordship laid stress on the unhappy relations between husband and wife prior to the occurrence.

HEYDENRYCH V. AMYOT.

Mr. Roux moved for an order to attach certain property in order to found jurisdiction in an action to be brought for the recovery of £248 18s. 1d. on an acknowledgment of debt.

Order granted and leave granted to sue by edictal citation, the citation and notice to be served together, personal service returnable on 12th December.

SWEENEY V. SWEENEY.

Mr. Jones moved, on behalf of the applicant (Bridget Sweeney) for alimony and funds to enable her to defend an action brought by the respondent against her for divorce.

Mr. Lewis opposed the motion.

The applicant's affidavit stated that respondent was in receipt of £17 15s. a month wages. The applicant had no means of defending the action, as she had seven children dependent on her.

The respondent's affidavit denied that she had no funds. She had a boarding-house, which paid her well.

The applicant, in a replying affidavit, denied that the boarding-house was paying her.

Hopley, J., inquired what amount it would take the respondent to support himself monthly.

Mr. Jones said the respondent's duties towards his family should also be taken into consideration.

Hopley, J., said that in the present case the applicant had a boarding-house, and in that way had a home. There were very serious charges alleged on both sides. It did not appear that there were any accumulated funds, and the Court did not see its way to make an order to stop the proceedings. There would be no order for contribution to the applicant's costs, but he would have to pay 15s. weekly towards the support of the children until the case was decided. The respondent would have to proceed forthwith with his action.

Mr. Lewis: Will your Lordship assign any date?

Hopley, J.: He will have to file his declaration within a week.

Ex parte SOLOMON AND ANOTHER.

Mr. Russell moved for an order authorising the Master to pay over certain moneys to the trustee for the maintenance of minors.

The application was granted.

Ex parte HOLMES.

Mr. Swift moved to have an arbitrator's award made a rule of Court. He put in consent papers.

The application was granted.

Ex parte BOWERS.

Mr. De Waal moved to have the transfer deed of certain property at Camp's Bay amended. He was described in the deed as Arthur Bowers, when it should have been Arthur Fitzgerald Bowers. The Registrar raised no objection to the motion.

The application was granted.

Ex parte KILLINGSWORTH.

Mr. Gardiner moved, on behalf of applicant, for leave to sue his wife, Kate Killingsworth, by edictal citation for restitution of conjugal rights.

The applicant's affidavit stated that he paid his wife's passage to England, and that she now refused to return to him.

The case was allowed to stand over to enable the applicant to state how long he had been domiciled in this country.

Ex parte THE ESTATE DU PLESSIS.

Mr. De Waal moved, on behalf of the trustees in the above estate, for leave to pass transfer of certain pro-

perty. A consent paper by those interested was put in.

The application was granted, petitioner to pay costs of petition.

KEMLO V. KEMLO.

Mr. Van Zyl moved, on behalf of Alexander Kemlo, to have an arbitrator's award made a rule of Court. The applicant and respondent had traded together, but owing to their being unable to agree, an arbitrator was called in, and the parties decided to abide by his ruling.

The application was granted.

MASTERTON V. OBREE.

Mr. Gardiner moved, on behalf of Masterton, to make a certain award a rule of Court.

Mr. Roux, who appeared for the respondent, consented to the application, but opposed costs being given against him.

Mr. Gardiner explained that Masterton was assignee in Obree's estate, and after he had paid out the various claims, he handed the balance to Obree. The latter contended that more than he received was due to him, and as a result, an arbitrator was called in, who found that Obree had got what he was entitled to.

Mr. Roux contended that Masterton had not rendered an account as he should have done when he had wound up the estate, and as a result, the arbitrator was put to considerable trouble and expense to ascertain it, which amount he contended Masterton should pay.

The application was granted, the applicant being given permission to meet his costs out of the funds at present in his hands.

Ex parte DYMOND.

Mr. W. P. Buchanan moved for leave to register an ante-nuptial contract. The parties were married seven years ago in community of property, but were not aware of the fact until recently, consequently they brought the present application.

The matter was ordered to stand over pending counsel quoting authority for the order.

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

GENERAL MOTIONS.

Ex parte THE ESTATE { 1905.
DU TOIT. { Oct 18th.

Mr. McGregor moved for the confirmation of a certain sale. The case had been before a Judge in Chambers, but counsel was advised to bring it up in court.

Rule *nisi* granted, to be served on heirs under the will of the Boshofs, rule returnable on the 14th December.

Ex parte LOVELL.

Mr. Close moved, on behalf of applicant, for leave to sue her husband William Lovell by edictal citation for restitution of conjugal rights.

The affidavit stated the parties were married in 1903 at Cape Town. In April last the respondent, who was a sergeant in the C.G.A., deserted, and has not since been heard of.

Leave to sue granted, citation to be the notice published in the "Cape Times" and "Government Gazette," and to be returnable on the 15th December.

Ex parte MINORS COETZEE.

Mr. Gutsche moved for leave to pass transfer of certain property. The property had been purchased from a vendor who had never received transfer. Usual rule under Derelict Lands Act granted.

Ex parte POULTON.

Mr. Payne moved for the registration of a certain transfer to an executrix.

ESTATE KARR V. COLOMBICK.

Mr. Douglas Buchanan moved, on behalf of the executors in this estate, for attachment of certain property, and leave to sue the defendant, who was resident outside the jurisdiction of the Court, by edictal citation.

Order granted.

GODFREY V. FRANK.

Mr. P. S. T. Jones moved, on behalf of the applicant, to have the hearing of this case set down for trial by jury.

Dr. Greer appeared for the respondent.

Mr. Jones read the affidavit of Mr. Wrensch, plaintiff's attorney, stating that the matters at issue in the suit were mainly matters of fact.

Dr. Greer said his client had not received the necessary notice as required under section 6, Act 23 of 1891, but he did not intend to raise that point.

[Buchanan, A. C. J.: But the Court may.]

Dr. Greer read an affidavit made by respondent's attorney (Mr. C. Brady), in which he stated that the defendant was obliged to leave this colony for Europe, and would be unable to return until December 31. Defendant was a very material witness, as he was in the motor-car when the accident happened, and he prayed that the hearing of the case be set down for some date after December 31.

The affidavit of the applicant stated that on or about the 18th August he was informed that the defendant was making active preparations to leave the Colony. He thereupon reported the fact to his attorney, and the next day caused a letter to be written to the defendant's attorney, calling upon defendant to give security to answer the action and abide by the judgment to be given therein. On the 21st August applicant's attorney received a letter from defendant's attorney stating that, as far as he was aware, the defendant had no intention of leaving the Colony. On the same date a letter was received from defendant's attorney emphatically denying that the defendant was contemplating departure from this colony. In view of that letter, plaintiff took no further steps in the matter. Plaintiff objected to the application to have the case set down for a date after the 31st December, as the defendant was fully aware that the action would come on for trial this term. He firmly believed that the defendant did not intend to return to the Colony, and had left the Colony to avoid judgment.

Buchanan A. C. J., said it was a pity that the defendant was not arrested and forced to give bail before he left the country.

Dr. Greer said he believed that the defendant intended to return to Cape Town. He was a veterinary surgeon, employed by the German Government, and had large interests in Cape Colony.

Mr. Jones said the defendant had sold his horses and motor-cars before leaving South Africa.

The case was set down for trial for February 6.

Buchanan, A. C. J., said that, in the meantime, he would like the attorney for

the defendant to make an affidavit explaining to the Court how he came to write the letters he did to the plaintiff's attorney, and also to know if he would give security for the defendant's appearance.

Ex parte THE ESTATE DE BEER.

Mr. Payne moved, on behalf of the executor in this estate, for the confirmation of a certain sale.

Order granted.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY and a Jury.]

WESTON V. CAPE TOWN TOWN COUNCIL. { 1905.
Oct 18th.
„ 19th.

This was an action brought by Frank Jonah Weston, merchant, of Rondebosch, against the Corporation of Cape Town, to recover £2,000 damages for personal injuries alleged to have been sustained through the negligence of the defendants or their servants. Plaintiff, in the evening of the 16th March last, fell into an excavation near Claridge's Hotel, at the top of Plein-street, made in connection with works which were being carried out by the Waterworks Department, and met with severe injuries to his left knee.

The plaintiff's declaration was as follows:

1. The plaintiff is a merchant residing in Rondebosch, in the Cape Division, and the defendants are the Corporation of the city of Cape Town.

2. The defendants are responsible for keeping the streets of the city of Cape Town in a proper state of order and repair.

3. On or about the 16th March, 1905, certain excavations were being made by the defendants or their servants or agents at the corner of Plein and Roeland streets, in the said city, facing Claridge's Hotel.

4. It was the duty of the defendants to provide or cause to be provided sufficient and proper hoarding, lights, or other protection in and around the said excavations on the date aforesaid, for the protection and safety of the public using the said street, but the defendants wrongfully, unlawfully, and in breach of their duty failed and neglected to provide any or sufficient protection as aforesaid.

5. On the night of the said 16th of March the plaintiff was walking, as he lawfully might, in the said street, for the purpose of his business, when, owing to the negligence and default of the defendants, as aforesaid, he suddenly

fell into the said excavation, which was 7 ft. in depth.

6. Owing to his said fall, the plaintiff sustained injuries to his leg, the knee-cap being broken in several places in consequence of which he has been obliged to undergo an operation; he also sustained other injuries, and still is suffering severely from the result of the said injuries, which have practically crippled him.

7. The plaintiff has, moreover, been obliged, by reason of his said fall, and its results, to incur considerable expense, and has further been prevented and is still prevented to a great extent from pursuing his business upon which he is entirely dependent for the support of himself and his family, and his said business has become neglected thereby, to his great detriment.

8. The plaintiff estimates the loss and damages which he has suffered in the premises damages to the extent of £2,000.

The plaintiff claims: (a) The said sum of £2,000 as damages aforesaid; (b) alternative relief; (c) costs of suit.

The defendant's plea was:

1. The defendant is not aware of the plaintiff's occupation. The liabilities of the defendant are defined by Act 26 of 1893. Subject to the above, paragraphs 1 and 2 of the declaration are admitted.

2. The said excavation was situated between the lines of rail of the Tramway Company, which has the right to have the lines there, and there were at the said excavation the earth thrown up, sufficient and proper barriers, and lights and other protection for the safety and protection of the public using the said street were provided, and the defendant denies that there was any breach of duty on their part or any failure or negligence to provide any or sufficient protection as aforesaid.

3. In addition to the aforesaid, watchmen were employed by the defendant to open and close the barriers upon the approach and departure of a tram passing the said excavation, and, on the 16th March, when the said barriers were opened for the passing of a tram, the plaintiff, with notice and knowledge of the above facts, and in spite of warning, crossed the metals and fell into the said excavation; the said fall was occasioned by the carelessness and negligence of the plaintiff. Save as aforesaid, the defendant denies paragraphs 4 and 5.

4. The defendant has no knowledge of paragraphs 6 and 7, and does not admit them, and he denies that plaintiff has sustained damage to the extent of £2,000, or to any amount for which defendant is liable. Wherefore defendant prays that plaintiff's claim may be dismissed with costs.

Mr. Burton (with him Mr. Lewis) for plaintiff. Mr. Schreiner, K.C. (with him Dr. Rainsford) for defendants.

Sir Edmund Sinclair Stevenson, medical practitioner, Rondebosch, said that he saw the plaintiff in consultation with Dr. Guillemand about the 17th or 18th March, and found that he has sustained a fracture of the knee-cap, which was serious because of the large spaces between the fragments. He considered that it was wise to perform an operation, and this was done. He did not think the plaintiff would ever have the full use of his leg as he had before the accident; he did not think he would be able to bend his knee as he did before.

Cross-examined by Mr. Schreiner: Even to-day he would be prepared to certify the plaintiff as a first-class "life" from an insurance point of view.

Dr. Bernard J. Guillemand, partner of the previous witness, expressed the opinion that plaintiff would always have a more or less crippled leg. He would be liable to pain in his after-life; his leg would ache from time to time.

He thought the plaintiff's general health would suffer because he would not be able to take as much exercise as he otherwise would have done. He thought the plaintiff would have to use a stick in going about for the rest of the year.

George May, photographer, Plein-street, identified a series of photographs of the locality of the accident taken about a month ago.

The plaintiff, Frank J. Weston, who walked into the box with the aid of a stick, said that at the beginning of March he was carrying on business as a draper in Station-road, Observatory. On the 16th March he had removed his home to Rondebosch, and had taken a shop in Plein-street, Cape Town, formerly the Weiner Bakery premises. On the evening of the 16th March he had taken his shop goods and had them placed on a wagon. Witness came to town by train, and went to the shop, where he arrived about half-past seven. He had sent the wagon on in charge of a coloured "boy," named John Julius. Witness waited for about 15 or 20 minutes and looked down Plein-street, but did not see the wagon. On looking up the street he saw the "boy" standing at the corner of Claridge's Hotel with the wagon. He whistled to him, but could not attract the "boy's" attention. Witness went up the street to cross the road towards the wagon. He saw a large mound or heap of earth round the curve of the tram-lines, which he would have to pass to reach the wagon. The mound was outside the lines on the Stal Plein side between witness and the wagon. As he walked he saw the "boy" commence to drive straight ahead, as though he were about to pass Madeira House. He thought the "boy" was going to turn into Plein-street, and in order to meet him witness turned, but fell into the excavation. Witness first struck his chin, then

his arm struck, and he dropped to the bottom of the hole with his left leg underneath. A coloured man named Gabriel and a white man came to his help and drew him out of the hole. There was nothing to indicate to him that the mound of earth was not solid. There was no protection or barrier of any sort. He saw one light on the corner of the heap, but it did not show on the excavation. He saw no watchman at the spot, and he received no kind of warning. Witness claimed £2,000 damages. His out-of-pocket expenses included a bill of £73 10s. 6d. from his medical attendants, about 11 guineas for massage, about £3 for medicine, and 15 guineas hospital expenses. Prior to the accident his business was showing a profit of about £100 a month. His business principally consisted in travelling, his shop being used more as a depot than a money-making concern. His business could not be conducted by any deputy during his illness. Witness had formerly been manager of Mr. Amos Bailey's drapery branch at Woodstock. During the time he was laid up he could do no business; he claimed for three months' loss of trade. He had done a little business since June last. He had a promise of a lease of the Plein-street shop for three years, but it was not signed. His goods were taken to his home at Rondebosch. He was even yet constantly in pain, on account of the injury. He could not move without the aid of a stick except on the level.

Cross-examined: Witness had had a sample-room at Station-road, Observatory about four months prior to the accident. He received a salary of £16 a month and commission while in Mr. Bailey's employ. He was employed at Mr. Pearce's at Claremont from 1899 to 1901 at a salary of £20 a month, and was dismissed without notice. He then went to the Transvaal and had a position in the mines at £22 a month. He had lately been engaged in travelling Cape Town and suburbs.

Mr. Schreiner: Where was the profit of £100 a month picked up this year in travelling about Cape Town and suburbs?—Witness: From the sale of my goods.

Whom were you selling to?—Private people.

What were your big lines?—There were no big lines; the accounts were, say, from £2 downwards and upwards.

Were you doing business in what I may call a "classy" line?—Yes.

Ladies' goods?—Yes.

Give me the largest account that any one lady in the suburbs had between July and March?—I think the largest I had was £15.

Was it at Wynberg, or where was it?—At Observatory.

Cross-examination continued: His best business was in Mowbray. He was not surprised at the amount of the

doctor's bill, and in fact had expected it to go to £100. Witness had not seen the works that had been going on in Plein-street until the 16th March, having returned from Caledon on the 15th. He was in Plein-street on the morning of the 16th, but he did not notice any barriers about the excavations. When he went up to his shop, he saw there was work going on in the street.

Mr. Schreiner: Did you see the tram?

Witness: Which tram?

Mr. Schreiner: Behind which you hurried to get across the road.

Witness: I never saw a tram.

Mr. Schreiner: The tram for which the barrier was opened to let the car pass.

Witness: I absolutely deny that.

Cross-examination continued: He only saw one lamp near the mound. There was not a barrier carrying other lamps. It was absolutely untrue that he rushed out from the kerb as if he intended to catch the car.

By the Court: Even after he got out of the hole, he never noticed barriers or lamps.

Re-examined: He certainly did not run after any tram.

James Parker, Mayor of Mowbray, spoke to making an inspection the day following the accident of the excavation. The protection was very small, consisting as it did, so far as he could see, of only a rope about 18 inches high. He would consider it dangerous even at that time.

John Gabriel, an eye-witness of the accident, said there was no tram there at the time. There were no planks, but he saw two lights, one on a heap of dirt on Claridge's Hotel side, about a foot and a half from the hole, and the other at the bottom half, a foot from the hole. There were no other lights, except further down the street.

Anastasia Candiote, a Greek fruiterer, carrying on business in Plein-street, said that on the night in question plaintiff called at his shop between 6.30 and 7 for a candle. He did not see the accident, but after it had occurred, plaintiff again came to his shop. Witness went to the hole about ten minutes later, and saw an Indian boy carrying a lamp. He saw a rope being put at the front of the hole by an Indian. There were iron posts in the ground, to which the rope was being fixed. He also noticed two or three lights.

By the Court: The custom of the Indian boy was to take the rope off the posts until a car passed, and then fix it on again.

Cross-examined: Witness saw a tram pass up Plein-street a little while after the accident. He stayed about for some time, but did not see a tram go down the street. He only saw two or three lamps over the whole length of the excavation.

ness was standing by the hole, his duty being to remove a plank when the car came and replace it when the car had gone by. The plank rested on tins filled with earth. Witness had only to remove one plank. He did not see the plaintiff until he was close to him. Witness had removed the plank to let a tram pass from the Roeland-street end. Immediately the tram had passed, plaintiff came along and fell into the hole. Plaintiff, who was walking quickly, entered at the place where witness had removed the barricade. Witness was at the time holding the plank and the lamp, and he shouted "Hi!" to the plaintiff. Witness could not stop him. Plaintiff was close behind the car. There were about ten or eleven lamps round the hole when the accident happened. Witness was carrying a lamp, which was alight.

Cross-examined: Witness did not see a wagon standing near Claridge's Hotel. He did not see anybody start to walk across the street from the butcher's shop side. The plank which witness removed to let the tram pass was about two or three paces from the hole. Witness did not know from which side of the street the plaintiff got to the hole. The hole was well lighted, and the man ought to have seen it.

[Hopley, J.: If plaintiff was close behind the car, he would not see the hole before he fell into it?]

Witness: There were lights on both sides of the excavation.

Further cross-examined: No ropes were placed round the hole on the night in question. Ropes were, however, fixed round the hole on the following day instead of planks.

Hallo, another Hindoo (who also gave his evidence through an interpreter) said that he was employed by the Council to watch the lower part of the works in Plein-street. There were eight or nine lamps about the upper hole. He saw a number of people at the hole, and he shouted to Dwear. He saw a man being removed a little later from the hole. There was a tram coming down the street towards the point where witness was standing.

Mustafa Hendricks, a Malay cabman, said that he usually stood at the Plein-street cab-rank. On the night in question he had the first cab on the rank. He saw a man fall into the hole. Plaintiff was close behind the tram.

[Hopley, J.: You would not see the hole because of the tram?]

Witness: I can't say as to that. In further evidence, witness said that he saw Dwear removing a 9 by 3 ft. piece of deal, so as to let the car pass. Dwear was standing at his post all the time.

Cross-examined: Witness made a statement to the police in St. John-street in his Malay name. His European name was Mustafa Hendricks. He had never said that a car passed from the Palmerston Hotel side. Witness did not see plain-

tiff run across the street. The Indian was waiting to replace the plank when the plaintiff fell into the hole. Witness did not think that the plaintiff was more than a foot behind the tramcar.

Christian Paulson, also a cabman, said that he was by the Stal Plein stand when the accident happened. He had a view of the spot. He saw the plaintiff hurrying to the Greek shop. Plaintiff came out and stood a little while, and then walked towards the corner of Roeland-street. A little later he heard a tram coming from Roeland-street, and he saw a man, who was carrying a light, take a plank away. The car passed, and he saw the plaintiff move from the corner and walk rapidly towards the car. The man fell into the hole. Witness's attention was called to plaintiff because he thought he was going to take a cab.

Cross-examined: Witness thought the man was trying to catch the car. He did not see plaintiff move from the verandah at the street corner. He saw lights about the hole.

Albert Sidney, manager of the Palmerston Hotel, said that he remembered seeing the excavations in Plein-street in March last. The excavations were well lighted and barricaded at night. He was not speaking of any particular night, but from general observations.

Mr. Davis, confectioner, Plein-street, said that in March last he saw the works carried on by the Corporation in the street. The works seemed to be properly lighted and barricaded at night.

Gustave Hanson, draughtsman in the Waterworks Department, gave evidence as to the preparation of the plan put in by the defendants.

Mr. Schreiner closed his case.

Mr. Burton said that counsel were agreed that the question to be determined was one of fact, that the jury, as men of business and common-sense, could well decide. As far as one could see, there was no particular legal point arising. The matter resolved itself into this, whether they were going to believe the version of the occurrence given by the plaintiff and his witnesses, or the version given by defendants' witnesses. Either the plaintiff was entirely responsible by his neglect or carelessness for the accident, or the Council was responsible, through the negligence of its servants. Either the plaintiff was entitled to nothing at all, or he was entitled to damages in a substantial amount. It was clear that the plaintiff did not see the hole before he fell into it. Was it not the duty of the defendants to make such protection that no member of the public could walk into the excavation? Counsel at some length analysed the evidence.

Mr. Schreiner argued that his learned friend had put the case before the jury

on such propositions as he would not have ventured to address to a Judge. His learned friend had put the case in such a way as to imply that the onus lay upon the Council to prove that they were not negligent. The Council, in pursuance of its duty had made holes that were required for the improvement of the city. The burden of proof rested upon the plaintiff to show affirmatively that there was negligence on the part of the Council in discharging this duty. If the view put before the jury by his learned friend were true, then the officials of the Corporation had conspired to defeat the ends of justice, and instead of having been in the witness-box, they should have been in the dock. The Council was standing in this matter on a point of principle. Counsel went on to submit that from the evidence the conduct of the plaintiff was consistent with that of a man who wanted to board the tram. He must have seen, and did see, the numerous lights and the barriers. In his desire to reach the other side of the street, he disregarded the hint conveyed to him by the barriers and lights. Mr. Schreiner proceeded to argue that plaintiff entered upon what he must have known to be a danger area, and he did not exercise due care and precaution, and liability for what happened was not, therefore, upon the Council's shoulders.

Mr. Burton, in reply, repudiated the suggestion that he had asked the jury to believe that the officials of the Corporation had put before them a forged plan and a false scheme of protection. What he (Mr. Burton) did say was that the Corporation officials had given them a scheme of protection which should have been there if everything had been properly done. It did look as if that night the servants of the Corporation began to lock the stable-door after the horse had gone.

Hopley, J., in summing up, directed the jury to dismiss from their minds any considerations they might have in regard to the relative positions of the parties, and to give their attention solely to what occurred when the accident happened. At the same time, it must be borne in mind that these works had been going on for some time, having been commenced in Adderley-street and reached the top of Plein-street. The plaintiff was, on his showing, an energetic man, and it was quite natural to expect, when he saw the wagon carrying his goods turning in what he believed to be a wrong direction, that he would go across the street, and quite conceivably without noticing the obstructions in the street. His lordship reviewed at some length the evidence in regard to the state of things in the neighbourhood of the excavation where the plaintiff met with his accident, and in his concluding remarks

inclined strongly to the theory that a tramcar passed just before the plaintiff tried to cross the street, and that a shadow would be thrown on the hole.

The foreman asked his lordship whether it was necessary that the jury's verdict should be unanimous?

Hopley, J., replied that the verdict must be unanimous, unless the jury had deliberated for an hour, and in that case there must be a majority of six.

The jury having retired, and having subsequently returned into court,

The foreman intimated that they had agreed upon a verdict for the defendants. He added that they wished to express their sympathy with the plaintiff in what was to them a regrettable accident.

[Hopley, J.: I am sure we all feel myself that the verdict is quite cor-sympathy with the plaintiff. I think rect.]

Mr. Schreiner then moved for judgment for the defendants, with costs.

[Plaintiff's Attorneys: Friedlander and Du Toit;; Defendant's Attorneys: Fair bridge, Arderne and Lawton.]

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

PROVISIONAL ROLL.

BOSSÉLIER V. PIPMAN. { 1905.
Oct. 19th.

Mr. D. Buchanan moved for provisional sentence on a mortgage bond for £2,000, with interest from April 1, at 6 per cent.; also for £14 2s. 6d. for insurance, etc., and for the property specially hypothecated to be declared executable.

Order granted.

ALLIE V. DULLA.

Mr. Benjamin moved for the final adjudication of the defendant's estate.

Order granted.

WARREN V. WATSON.

Mr. Payne moved for the final adjudication of the defendant's estate.
Order granted.

PAARL BOARD OF EXECUTORS V. MYBURGH.

Mr. Roux moved for the final adjudication of the defendant estate. Provisional order had been granted on the 26th September, 1905.
Order granted.

WILSON V. GLYNN.

Mr. Benjamin moved for the final adjudication of the defendant's estate. The provisional order was granted on October 2.

The defendant appeared and said judgment had been given for £50, whereas the amount was only £45. He had tendered property valued at £100, but it was not accepted. A friend of his had guaranteed to pay the amount. Some of the other creditors did not wish to have the estate compulsorily sequestrated. The defendant proceeded to explain that he had no knowledge of the debt until it was due, as it was contracted by the person to whom he had given his power of attorney. Defendant had tendered £5 a month, but it was not accepted. If he was allowed a month's time, he believed he would be able to pay the debt, as he was expecting an inheritance.

Mr. Benjamin said the defendant had been asked to allow the plaintiff to draw on the inheritance, but he refused.

The defendant said he had assigned the inheritance, but a friend of his was willing to satisfy the plaintiff's claim.

[Buchanan, A.C.J.: Why has he not done so?]

Witness: He was busy.

[Buchanan, A.C.J.: Can you settle it this morning?]

Witness: I will try to do so.

The case was postponed until 2 p.m.

Subsequently Mr. Benjamin asked to have the application postponed as he believed an arrangement would be come to.

This was allowed.

ZUCKERMAN V. BEENHARDT AND SARIF.

Mr. P. S. T. Jones moved for provisional sentence on three promissory notes endorsed by plaintiff, and paid by him as surety for the defendants.

Order granted.

DALA V. HASSIEN.

Mr. Douglas Buchanan moved for a decree of civil imprisonment against defendant, because of his failure to pay £12 2s., costs incurred in an action in the Court.

Mr. Buchanan explained that this case arose out of an action in the Magistrate's Court. Judgment was entered for the defendant instead of the plaintiff, when the error was discovered the mistake was rectified, and the amount of £12 2s. was incurred in moving the Courts.

The defendant admitted owing the money, but said he was unable to pay the amount due. He was only earning 30s. a month.

In reply to Mr. Buchanan, the defendant admitted that he had a shop at the Paarl, when the debt was contracted, but he had since disposed of it. He had no money.

By the Court: He could pay 10s. a month.

The Court granted a decree, but ordered it to be suspended upon payment of £1 a month.

LAURENCE V. SARGENT AND CO.

Mr. Bailey moved for the final adjudication of the defendant's estate. A consent paper was put in.

Order granted in terms of consent paper.

MORKEL V. DEYDIER.

Mr. Bailey moved for provisional sentence on a mortgage bond for £700, less £100 paid on account, with interest at 6 per cent., and for the property specially hypothecated to be declared executable.

Order granted.

ILLIQUID ROLL.

COLONIAL GOVERNMENT V. { 1905.
LAZENBY. { Oct. 19th.

Mr. Nightingale moved for judgment under Rule 329 (d) for £142 17s. 6d. quitrent and stamp duty due by defendant.

Order granted.

COLONIAL GOVERNMENT V. CONRADE.

Mr. Nightingale moved for judgment under rule 329 (d). He drew the attention of the Court to the fact that short service had been effected. It was believed that service could have been personally effected, but six days after the time for service had expired, it was

found that this was impossible, consequently the advertisement was inserted in the "Government Gazette."

Buchanan, A.C.J., extended the return day to December 12.

CYRIACUS V. CYRIACUS.

Mr. Bisset moved for a decree of judicial separation between the parties in terms of a notarial consent paper put in.

Order granted in terms of consent paper.

HERBERT V. HERBERT.

Mr. Close moved for judicial separation in terms of consent paper put in.

Order granted.

CALMEYER V. DAMERELL

Mr. Bisset said that although this case was entered on the list under the names of Calmeyer v. Damerell, it was really to compel the attorney of the defendant to pay certain costs. Calmeyer originally took certain proceedings against Damerell to recover the price of certain property at Rosebank. In consequence of a conversation with a Mr. Lloyd, a clerk in the office of Mr. Waton, Damerell's solicitor Calmeyer decided to allow the case to fall through, and shortly afterwards Damerell applied to the Court to have judgment signed against Calmeyer for not proceeding with his action. In the meantime Damerell left Cape Town, and Calmeyer wrote to him, asking him why he had moved to have judgment signed; he replied by telegram as follows: "No instructions whatever given. Coulton cannot proceed." Calmeyer's attorney immediately served Coulton with notice that they were going to apply for a rule *nisi*, to show cause why he should not pay the costs.

The Court granted an order calling on Coulton on next motion day to show cause why he should not pay the costs.

IMGADI V. TEMBA.

Mr. Searle, K.C., moved under Rule 190 to have the judgment of the Assistant Resident Magistrate of Idutywa reviewed. He explained that in the Court below the plaintiff claimed defendant, his wife, or the dowry of 8 head of cattle. Plaintiff married defendant's sister 20 years ago, and paid six head of cattle for her. She deserted him and returned to live with defendant. Defendant demanded more dowry for her, and plaintiff paid two more

cattle. She would not return, and plaintiff claimed her or the return of his eight cattle. The Assistant Magistrate on the authority of the Chief Magistrate heard and dismissed the summons.

[Buchanan, A.C.J.: Isn't this an appeal?]

Mr. Searle: No. It is a review based on the ground that there was no jurisdiction for the Magistrate to try the case. Under the Act of 1894 there can be no appeal from the decision of the Chief Magistrate in native cases. It appeared from the evidence given in the Court below that the Magistrate had no jurisdiction in the case as the defendant was a constable engaged at Sterkstroom, and resided there. He had a kraal at Idutywa, which he only visited occasionally. He had resided at Sterkstroom for 20 years, and therefore the Magistrate had no jurisdiction.

Counsel contended that even if the man had a wife in another district, and visited her occasionally, he could not be held to be domiciled there, whilst he could be held to reside there.

Buchanan, A.C.J., said it was a pity that counsel was not appearing on the other side, as rather an important point was raised.

Buchanan, A.C.J., said this matter had been brought by way of review before the Court, as if it was an appeal it could not be heard. Under the present state of affairs disputes between natives in the Transkei had to be settled by the Magistrate, and the only appeal was to the Native Court in the Transkei. This was a review on the grounds that the Native Court had exercised rights to which it was not entitled. The plaintiff sued the defendant in the Court of Idutywa. The defendant at that time was employed as a constable at Sterkstroom, where he lived with one wife, but he had a kraal at Idutywa, where another wife lived. In that kraal he paid hut tax. The Native Court held that the defendant's residence was in the Idutywa district, whilst the Magistrate's Court was against that. There was a conflict between the two Courts as to a question of fact. If that question could have been settled, the Supreme Court would not have had to interfere.

His Lordship quite saw that it was possible for a person to reside in more than one district. He might have a residence in two districts, and between them he could spend his time; but if he was to be summoned in one or the other district, he must be residing in that district for the time being. It was true that, according to the English law, that where a person's wife lived, was considered his home. The chief wife of the defendant was living in Idutywa, but this wife did not stand in the same position in native law as a wife did in the English law. He thought, under the whole of the

circumstances, that the Magistrate at Idutywa had no jurisdiction in trying the case, and the order of the Native Appeal Court directing the Magistrate to try the case would have to be set aside.

Ex parte THE DUTCH REFORMED CHURCH OF HEIDELBERG.

Mr. Close moved, on behalf of the churchwardens of the Dutch Reformed Church, for leave to sell certain property. This was the return day for a rule *nisi* granted by the Court on the 1st August last, calling upon all persons to show cause why an order should not be granted allowing the petitioners to sell certain four lots of land, known as Church-square.

Mr. Benjamin opposed the application.

Mr. Close explained that when the town was laid out, a Mr. Fourie, the owner of a certain farm on which the town was built, agreed to give the farm if he was guaranteed £5,000 for it. This was done, and he proceeded to lay out the village, and on the plan which he laid out, the lots in question were indicated as Church-square. The churchwardens now wished to sell the lots to pay off certain church debts.

Mr. Benjamin contended that the Court had not the power to authorise the disposal of a property which was donated to an ecclesiastical body. The only way to accomplish that would be by Act of Parliament.

Buchanan, A.C.J., held that the reservation of the square for church purposes induced persons to pay higher prices for it than they otherwise would. He was of opinion that the church should not transfer the property in question for the purpose of making it into a town erven for the village. To do so would be contrary to the terms of the agreement. Considering the inducements that were offered to the purchasers when the place was sold, he thought the application should be discharged, and the costs of the opposition paid by applicant.

Ex parte LUCK.

Mr. De Waal moved for an order authorising the Master to pay over a certain inheritance. The Master reported favourably.

Order granted.

Ex parte THE ESTATE PIENAAR.

Mr. Struben moved for the appointment of a commissioner in the insolvent estate of Jacob Johannes Pienaar, to

take the evidence of the insolvent's wife.

Granted. The Magistrate of the district was appointed as commissioner.

Ex parte VERSFELD.

Mr. Benjamin moved for the cancellation of the sale of a certain property to one Arnold Woolf, who had purchased it, but had not taken transfer. [Buchanan, A.C.J.: Is there any precedent for such a motion?]

Mr. Benjamin replied in the affirmative, stating that a rule *nisi* had been granted.

A rule *nisi* calling on respondent to show cause why the sale should not be cancelled was granted. The return day was fixed for November 16.

Postea (November 16th). Rule made absolute.

FOOCH V. COOPER.

Mr. Benjamin moved to have a certain dividend declared executable. Order granted.

Ex parte FOURIE.

Mr. Benjamin moved to stay a certain writ of execution for fourteen days, as the petitioner intended to sequestrate his estate.

Buchanan, A.C.J., said he did not think an order was necessary, as the proceeds would remain in the hands of the Sheriff.

Ex parte WIGGET.

Mr. Benjamin moved for the extension of the return day of citation in this case to January 16.

The application was granted.

Ex parte ERASMUS.

Mr. De Waal moved for leave to register the gross of an ante-nuptial contract drawn up in the Transvaal. The Registrar refused to do so until the original contract was produced. This the petitioner found it impossible to do. Granted.

Ex parte STONESTREET.

Mr. Benjamin moved for leave to sue Bernard and Moses Herbert by edictal citation. They owed the petitioner £700, and when last heard of were seen in Cape Town, but they had disappeared.

The application was granted, the return day being set down for December 12.

Ex parte DIAMOND AND WIFE.

Mr. W. P. Buchanan moved for leave to register an ante-nuptial contract. The parties believed that the Married Woman's Property Act was in force in the Colonies as it was in England.

Buchanan, A.C.J., inquired what property the parties had.

Mr. Buchanan: She has £1,000, but I do not know what he has.

The case was ordered to stand over.

Ex parte RAY.

Mr. Benjamin moved, on behalf of petitioner, to sue his wife for divorce by edictal citation. The parties were married and lived in England. He left her to come to South Africa, and when he arrived offered to send for her. She refused to come, but went to Australia instead.

The application was granted. The return day was fixed for February 14.

Ex parte THE EQUITABLE FIRE ASSURANCE AND TRUST CO.

Mr. Searle, who moved for the relinquishment of certain trusts, said the company had been wound up, but it had still six trust estates, which it wished to relinquish. The petitioners had been authorised to take the necessary steps to wind it up. They wished certain of the estates to be handed over to the Colonial Orphan Chamber.

In the estates of Hannon and Blore, the Court ordered the trust to be relinquished when the accounts were filed with and approved of by the Master. In the trusts of Ross and Hodgskin, Mr. Currey was appointed as trustee in lieu of the petitioner.

SMARTT SYNDICATE V. PHILLIPS AND OTHERS.

Mr. Gardiner moved for the removal of bar and the appointment of a commission de bene esse and costs.

Dr. Greer, who appeared for the respondents, said they did not oppose the application, but they refused to pay the costs.

The case was ordered to stand over.

Ex parte EDROSS.

Mr. Roux moved for leave to pass a bond on certain property in Hanover-street, which was originally a Mahomedan mosque, and was now falling into ruin unless money could be raised on bond to repair it.

Granted.

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

HAMMOND V. DE ZUID AFRIKAANSCH EIGTUIG EN BOUW MAATSCHAPPIJ, BEPERKT. 1906. Oct. 20th.

This was an action brought by Pieter Eduard Hammond, of Worcester, against De Zuid Afrikaansche Rijting en Bouw Maatschappij Beperkt to recover damages in the sum of £500 for personal injuries to his child, Pieter Eduard Hammond, jun., alleged to be due to the negligence of the defendants or their servants.

From the pleadings, it appeared that in May last the plaintiff entered into a written contract of lease with the defendants to hire from them for a year a certain house situate in Behring-street, in the town of Worcester. A little later plaintiff, who had moved into the premises, vacated them, and on the 4th July the Rev. Mr. De Villiers entered into occupation. Plaintiff said he had sub-let the house to the Rev. Mr. De Villiers. Between the house and the adjacent premises was a passage, which gave access to the back part of the premises leased by plaintiff. The allegation in the declaration was that defendants had stacked a number of planks on this passage, and that on Sunday, the 2nd July, plaintiff's child was seriously injured by the planks falling upon him, breaking his left leg and inflicting injuries on his body. By the wrongful, unlawful, and negligent conduct of the defendants, plaintiff had, he said, sustained damages in the sum of £500. Defendants, in their plea, said that when the alleged accident occurred, the plaintiff was not in lawful possession or occupation of the premises, and denied that the premises had been sub-let by plaintiff to the Rev. Mr. De Villiers. Plaintiff had got into arrear with his rent, and had been ordered to quit the premises. Defendants denied that in stacking the planks they acted unlawfully, wrongfully, and negligently, and said that due precautions were taken, and that if the accident did happen, as alleged, it was caused by the negligence and carelessness of the plaintiff in permitting the child to enter and trespass upon the said passage, where the plaintiff and his children had no right to be, and to play upon and about the said planks. The children had been warned about playing in the passage. Defendants denied any liability for the injuries. The plaintiff, in his replication, denied that the accident was

caused by his negligence and carelessness, and said that he was in lawful occupation of the premises, and both he and his children had a right to go on the passage.

Mr. Van Zyl was for the plaintiff; Mr. Alexander was for the defendants.

The plaintiff, Pieter Eduard Hammond, said that about May last he entered into a contract with the defendants for the hire of a dwelling-house for a year, rent to be paid monthly in advance. He took possession of the premises on the 15th May, and paid £9, the first month's rent, in advance. During the first month he saw Mr. Fuch, a director of the defendant company, and told him that the house was not in a habitable state. He asked him whether, if he sub-let the house, they would cancel the contract. He took steps, and spoke to the Rev. Mr. De Villiers and the churchwardens. At the beginning of the second month he did not pay the rent. Mr. Muller (secretary of the company) did not give him notice on the 21st June to quit the house, because he had not paid the rent. On the 27th June Mr. Muller asked him whether he could vacate the premises if the minister would take it. Witness said that the notice was very short. He met the Rev. Mr. De Villiers the following day, and it was arranged that witness should remain in the house until the 3rd June. Mr. De Villiers removed into the house a few days later. The arrangement was that if the Kerkraad hired the house, he would pay the rent for the half-month of June. Witness had not paid the rent for that month. On the 27th June a case filled with iron fell on one of witness's children. The company's house was next door. The company often put boxes, planks, etc., in the passage between the houses. On the 30th June or a couple of days before planks were stacked in the passage. Witness made constant use of this passage to reach his yard. The planks were stacked to a height of more than 6 feet. On Sunday, the 2nd July, his child's leg was broken. There was a north wind blowing, and rain was falling. There was nothing to keep the planks from rolling down. Witness was not at home at the time of the accident. The child could now walk, but his leg was crooked, and he seemed to be lame. In bad weather he complained of pain from the injury. Witness denied that he had been cautioned about his children playing near the planks. On the day after the accident he went and asked Mr. Muller, the secretary of the company, whether they would pay him compensation for the injury to the child. Mr. Muller said that he would speak to the directors.

Cross-examined: Witness had never offered the rent for the half month. He would have been able to pay the

rent if it had been demanded. Just before then he had given notice of his intention to surrender. He was aware that he could not sub-let the house without the consent of the defendants. He had never applied for their consent to the sub-letting of the house. He was not aware that any warning was given to his children.

[Buchanan, A.C.J. (to Mr. Alexander): He was in lawful possession of the property under his lease.]

Further cross-examined: Witness made a complaint to the company when the case fell upon his child. On the 2nd July witness and his wife were away from home, having left the children in charge of two older girls.

Elizabeth Petronella Hammond (wife of the plaintiff) gave evidence as to certain interviews with Mr. Muller, representing the company. As to the injuries to the child, she said that the child was confined to bed for eight weeks. The boy complained just when they were about to have rain that he experienced pain from the injury.

By the Court: She did not know the amount of the doctor's bill.

Rachel Hammond (daughter of the plaintiff) spoke to the finding of her little brother under the planks on the day in question.

Johannes Hammond (son of the plaintiff) said that on the day in question he was "playing horse" with his two little brothers. While he was tying one brother the other ran down the passage, and the planks blew down upon him. They did not play upon the planks. Witness did not see the planks fall, his attention being drawn to the accident by hearing cries from his brother.

Jacobus Johannes Erasmus, of Worcester, Pieter Jacobus de Wet, and Arnholdt Zeeman gave evidence as to having viewed the stack of timber after the accident. They were of the opinion that it was not safe.

Reitz Carol Wolff, a medical practitioner, said that he examined the boy after the accident, and found three fractures of the bones of the left leg. The injury was a serious one, and the leg had to be placed in plaster of Paris on three occasions. The child had suffered considerably, and the leg was still crooked in shape. He would not advise the child to play football.

Cross-examined: The boy would be unfit for military service, but could follow other walks in life.

The plaintiff (recalled) said that he assessed the damages at £500, because all the time the child was suffering he and his wife had extra trouble with the child. The pain the boy suffered was unnecessary, and he would never be fit to do heavy work. A special boot would be necessary, and the boy would not be able to secure a girl with a large "dot."

Mr. Van Zyl closed his case for the plaintiff.

Percival Noel Muller (secretary to the defendant company) said that the wood was stacked in the passage because the company was stock-taking.

[Buchanan, A.C.J.: Who gave you permission to stack the wood there?]

Witness: No one; we had the right to do it.

[Buchanan, A.C.J.: No, you had not; you had let the place.]

Witness (continuing) said that Hammond had told him that he could not pay the rent, and if the company was willing to cancel his lease, he would move out, and let the house be used as a manse. The directors assented. In the course of further evidence, witness said that on the Friday before the accident he had had to warn the children about playing upon the planks. After the accident, witness saw the plaintiff, who remarked that he did not know why the Lord had punished him, because he had paid for his sins long ago. Witness did not think the stack of planks could have been blown down, because the passage was well protected from the wind by the trees.

Mr. Van Zyl was about to cross-examine witness as to the legal right of the plaintiff's children to be in the passage, when

Buchanan, A.C.J. interposed, and observed that he did not think there was any necessity to labour that part of the case. The plaintiff was lawfully occupying the house.

Cross-examined: Witness had the boards stacked very carefully, and they could only have been overturned by the children. He denied that the planks were so shaky that they could easily have been blown down.

Philip Botha H. Fuchs, one of the directors of the company, spoke to having seen plaintiff's children playing on the boards in the passage on Friday, the 30th June.

Carl B. Denah, an assistant in the defendant company's employ, said that he helped to stack the floor boards. On the Friday and Saturday, while the stacking was being carried out, he had to speak to the plaintiff's children about playing on the boards. He did not think the planks could have been blown down by the wind.

Johannes Goridges, another assistant, Gerhardus Goridges, also in the employ of the company, and Jan Reitz, assistant carpenter, gave evidence to the effect that the planks were properly stacked, and that it had been necessary to warn plaintiff's children in regard to playing about the boards.

Peter Francois Hugo, farmer, said that on the afternoon in question he was passing along Behring-street, when he saw two children on the top of the planks, and another clinging to the planks, trying to clamber up. Just

after he had passed he heard a child's cries. He did not go back.

Cross-examined: Witness could not say whether the children he saw were the plaintiff's. The passage was open to the street, and any children could have gone there. He did not warn the children about the danger. He did not trouble about the danger of the youngsters being killed.

Mr. Van Zyl having been heard in argument on the facts,

Buchanan, A.C.J., said he found that the plaintiff was in lawful occupation of the premises when the accident occurred. From the evidence it appeared that the timber was properly stacked, and that there was no negligence on the part of the defendants. He had come to the conclusion that the wood was sufficiently stacked if it had not been interfered with, and that it was brought down by the acts of the children when playing there. Under these circumstances, it could not be said, as the plaintiff alleged, that the accident was entirely due to the negligence of the defendants in stacking the wood in the passage. There was no contributory negligence pleaded, but it was pleaded that there was negligence on the part of the defendants. He (the learned Judge) could not find that negligence had been proved on the part of the defendants, but he did find that they had disproved any negligence, and they had also proved that the accident was entirely due to the conduct of the plaintiff's own children in playing on this wood. There was no doubt that one must feel a great deal of sympathy with the plaintiff in the trouble and expense to which he had been put and with the little boy who had been hurt, but the Court was not there to decide the matter from that point of view, but to decide whether the defendants were legally answerable for what had taken place. Judgment would, therefore, be given for the defendants, with costs.

[Plaintiff's Attorney: D. Tennant, jun.; Defendant's Attorneys: Walker and Jacobsohn.]

In re INSOLVENT ESTATE MCPHERSON.

Mr. Wright moved, as a matter of urgency, upon the petition of Wm. Arthur Currey and other creditors, for the appointment of provisional trustees in the estate of George Campbell McPherson, trading as McPherson and Co., at Cape Town, and in the private estate of McPherson. The petitioners stated that they represented claims to the amount of £26,800, and the liabilities of the estate were estimated, approximately, at £30,000. Insolvent had carried on a large business, and it would be to the interest of the creditors to carry it on for the benefit of the estate

without interruption during the insolvency. Amongst the stock-in-trade were certain perishables, which must be disposed of or attended to at once, and it was necessary that provisional trustees should be appointed to take charge of the business, pending the election of permanent trustees, the names of Messrs. W. A. Currey and A. N. Foot being suggested.

Order granted as prayed, appointing Messrs. Currey and Foot as provisional trustees.

Ex parte GOWAN.

Divisional Council—Voters' list
—Act 40 of 1889.

Where applicant's name had, per incuriam, been omitted from the list of voters for a Divisional Council. The Court granted an order authorizing its insertion.

Mr. Upington said that he had an unusual application to bring before the Court as a matter of urgency, so as to enable the petitioner to be nominated on Tuesday next as a candidate for election to the Divisional Council of Oudtshoorn. Counsel read an affidavit by the petitioner, who said that he was the registered proprietor of immovable property in the division of Oudtshoorn, Ward No. 2, of the value of over £6,000. He had, for the last fifteen years, been a registered voter for the division of Oudtshoorn for Divisional Council purposes. When the present list was framed, he found that his name had been registered as a voter on the rough draft. Thereafter, the secretary of the Divisional Council, in having a fair copy made of the said list, inadvertently omitted petitioner's name therefrom. Petitioner possessed the necessary qualification to enable him to be elected as a member of the said Divisional Council. He had been requested by several persons to allow himself to be nominated as a candidate for the Divisional Council, to which he had consented. On inspecting the voters' list, he found that his name had been omitted therefrom. Nominations for the ensuing election must be filed not later than the 24th October. There were no reasons why petitioner's name should not be placed on the voters' list, and he therefore asked for an order authorising his name to be placed on the list or such other relief as to the Court may seem meet. Counsel also read an affidavit by Mr. Arthur C. Sheard, secretary of the Divisional Council of Oudtshoorn, stating that the facts and allegations contained in the petition were true and correct. He added that he was not aware of any

reason why the petitioner's name should not be placed on the list. Counsel referred to the Divisional Council Act, No. 40, 1889, and said that its provisions did not seem to touch a case of this kind, where an omission was due entirely to a clerical error.

Buchanan, A.C.J., said that, if the Court which sat to hear objections to the voters' list passed Mr. Gavan's name, then he saw no objection to the list being corrected, as prayed. The important point was whether Mr. Gavan's name was included in the list submitted for public inspection, and the point must be made clear whether his name was passed by the Court. A rule *nisi* would be granted calling upon the Court appointed to hear objections to the list to show cause, on Tuesday next, why applicant's name should not be inserted on the final list, applicant to pay costs, leave being granted to telegraph the notices, in order to enable the applicant, if no objection is raised, to be nominated for the election on Tuesday next.

Postea (October 24th).

Buchanan, A.C.J., said that a telegram had been received from the chairman stating that "there is no objection to the application being granted." His Lordship added that he had desired counsel to tell him whether the list which was published bore petitioner's name?

Mr. Upington: I have made inquiries, but I have no information.

Buchanan, A.C.J.: I wanted it to be made perfectly clear that the omission was due merely to a clerk's error in copying from the draft.

Rule made absolute, authorising petitioner's name to be inserted upon the roll of voters.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

WAGNER V. WAGNER. { 1905.
Oct. 20th.

This was an action brought by Charles Wagner for an order for restitution of conjugal rights, failing which a decree of divorce, against his wife, Clara Wagner, because of her unlawful desertion. Mr. Roux was for plaintiff; defendant did not appear.

The defendant was personally served with the notice in Johannesburg.

The plaintiff's declaration stated he was a stonemason, residing at Wynberg. He was married to the defendant on April 22, 1895. On October 5, 1904, de-

fendant deserted plaintiff, and refused to return.

Mr. Birch proved the marriage in April, 1895.

Charles Wagner, the plaintiff, stated he was married to defendant in April, 1895. There was no issue of the marriage. A man named Fredericks lived with witness and his wife, and the defendant misconducted herself with him, but witness forgave her. This was the second occasion on which the defendant left witness. In October, 1904, the defendant left the house, taking with her her clothes and about £50 in money. She left a letter stating she had left through no fault of her own. He had heard that the defendant was residing in Vredenberg. The defendant wrote telling witness that she would not return to him, as she was happier where she was. The letter further alleged that there was no happiness in her home, and consequently that she preferred to earn her own living. The defendant came to Cape Town about three weeks ago and created a row at the house he was living at. He had not seen her since. Witness would take her back if she would return.

An order for the restitution of conjugal rights by December 31, failing which to show cause on January 12 why a decree of divorce should not be granted, was made.

Ex parte BROWN, LAWRENCE AND CO.

Mr. Baily moved as a matter of urgency for the appointment of provisional trustees in the estate of Frederick Wickham, trading as Sargent and Co. He suggested Messrs. G. W. Steytler and Muirhead.

The application was granted.

BAILY V. DRUMMOND. { 1905.
Oct. 20th.
" 23rd.

Contract—Acceptance by letter.

B. had agreed, verbally, to sell a house to D., and D., by letter posted at 5.10 p.m. on the same day, accepted B.'s offer. At 5.47 p.m. and before receiving D.'s letter, B., by telegram, revoked his offer.

Held, that B. was bound by his contract.

This was an action in which Percy Baily, of Claremont, claimed from Hildyard Home Drummond £30, amount due for three months' rent and damages at the rate of £10 per month, for such time as the defendant should continue to occupy the premises after July 31 last.

The plaintiff's declaration stated:

1. The plaintiff is James Marcus Smith, under a duly executed power of attorney as agent for Percy Baily, late of Claremont, and at present travelling in Europe. The defendant is Hildyard Home Drummond, at present residing at Villa Marbella, Claremont, in the division of the Cape.

2. By an agreement bearing date April 3, 1905, plaintiff agreed to let, and the defendant to hire, a certain partly furnished house, known as Villa Marbella, Claremont, the property of the plaintiff, at the monthly rental of £10 sterling, payable on the first day of each month, the tenancy commencing as and from 1st April, 1905.

3. Plaintiff gave defendant possession of the said premises, and defendant paid plaintiff the apportioned rent for the month of April.

4. All things have happened, all times elapsed, and all conditions have been fulfilled to entitle plaintiff to payment by defendant of the sum of £30 sterling—being rent due at the rate of £10 per month for the months of May, June, and July, 1905, but though frequently requested so to do, defendant has refused or neglected, and still refuses or neglects, to pay the said sum of £30, or any part thereof.

5. Plaintiff further says that defendant has broken the agreement by failing to pay £10 on the first of each month, as therein provided, that the said agreement is thereby ended, and plaintiff is entitled to recover back the possession of the said premises. Plaintiff says that so long as defendant continues to occupy the same, he is suffering loss and damage to the extent of £10 sterling per month, being the rent of the said premises. Wherefore plaintiff claims:

(a) Judgment against the defendant in the sum of £30 sterling; (b) an order for the ejectment of defendant from the said premises by reason of his breach of agreement; (c) damages at the rate of £10 per month for such time as defendant shall continue to occupy the said premises after July 31, 1905; (d) alternative relief; (e) costs of suit.

For the plea to the declaration the defendant says as follows:

1. Paragraphs 1, 2, and 3 are admitted, save that the agreement was entered into and possession of the premises given by Percy Baily, and not by his agent, James Marcus Smith.

2. Defendant denies paragraphs 4 and 5, and says that on or about the 2nd day of May, 1905, he contracted with the said Percy Baily to purchase the property known as the Villa Marbella in the circumstances hereinafter set forth in the claim in reconviction, and to which the defendant craves leave to refer, and thereupon the agreement of lease was cancelled by mutual consent. Wherefore the defendant prays that

the plaintiff's claim may be dismissed, with costs.

And for a claim in reconvention the defendant (now plaintiff) says as follows:

1. Defendant (now plaintiff) craves leave to repeat the allegations stated in the above plea.

2. On or about the 2nd day of May, 1905, the plaintiff (now defendant) agreed to sell and the defendant (now plaintiff) to purchase a certain property known as the Villa Marbella, situate in the 3rd Avenue, Claremont, in the district of the Cape of Good Hope, for the sum of £1,350.

3. It was a term and condition of the said contract that the defendant (now plaintiff) should immediately take possession as owner, but that the purchase price of £1,350 (as agreed) be paid and transfer executed on the 1st August, 1905.

4. On or about the 6th day of June, 1905, the terms of purchase were confirmed to defendant (now plaintiff) by plaintiff's (now defendant's) agent, one James Marcus Smith.

5. On or about the 16th day of July, 1905, the defendant (now plaintiff) completed negotiations for a re-sale of the aforesaid property to one Charles Edward Mackintosh, of the city of Cape Town, for the sum of £1,500, to be paid and transfer taken on the 1st August, 1905.

6. Defendant (now plaintiff) duly notified plaintiff (now defendant) or his agents of his preparedness to take aforesaid transfer, but same was refused to defendant (now plaintiff) by plaintiff (now defendant) or his agents.

7. The aforesaid Charles Edward Mackintosh claims from defendant (now plaintiff) £50 as damages.

Wherefore the defendant (now plaintiff) claims: (a) £200 damages; (b) alternative relief; (c) costs of suit.

For a replication to defendant's plea, plaintiff says that, save for admissions, he denies all and singular the allegations of fact and conclusions of law in the said plea contained, joins issue thereon, and again prays for judgment as before, with costs.

And for a plea to the claim in reconvention, plaintiff (now defendant) says:

1. He denies all the statements in paragraphs 1, 2, 3, and 4 of the said claim. He says that on May 2, 1905, he did offer to sell to the defendant (now plaintiff) the said Villa Marbella for the sum of £1,350 sterling, but that the said offer was withdrawn on the same day before being accepted by the defendant (now plaintiff), and that no contract of sale ever existed.

2. Plaintiff (now defendant) says that he has no knowledge of the allegations made in paragraphs 5, 6, and 7 of the said claim, and puts defendant (now plaintiff) to the proof thereof.

Wherefore plaintiff (now defendant) prays that the defendant's (now plaintiff's) claim in reconvention may be dismissed, with costs.

Dr. Greer for plaintiff; defendant in person.

Percy Bailly, the plaintiff, stated he owned the property in dispute, situate at Claremont. The house was furnished, and as witness contemplated a trip to England he let it as it was to defendant. An agreement was drawn up between them. Witness gave defendant possession in April. The rent was paid for the period of that month defendant was in occupation. No rent had since been paid. The defendant had written to witness, asking him to sell the property. On May 2 witness received a communication from the defendant, asking him to call on him at Whitehall. Defendant was sitting in a Mr. Peregrino's office. As soon as witness entered the room defendant said: "Well, Bailly, what is the lowest you'll take for the house?" Witness replied that he would take £1,350—£850 in cash and £500 on bond. The defendant sat down and wrote out a broker's note, which witness copied. The note was to the effect that the property was to be taken possession of on August 1, 1905. Witness did not know Drummond before this. Witness and Drummond went and had a drink, and witness went to see his agent, and as a result wired Drummond to the effect that the offer to sell the property was withdrawn. He confirmed this by letter. Witness received a letter from the defendant the next day, accepting the place at £1,350. That letter was dated May 2, but was not received until 3.30 p.m. on May 3. Witness did not receive a letter from defendant dated May 3. Witness left for England on May 5, and returned to Cape Town for the purpose of this case.

Cross-examined by defendant: Witness built the house himself.

Everything you put in it was of the best?—Yes.

You built the house for your own use?—Yes.

Before you commenced building you were a Cape policeman?—Some years back I was.

In further cross-examination the witness said the duplicate copy of the lease was not stamped. After witness left Peregrino's office he went and saw Smith, and sent the telegram. Witness denied that he had told Peregrino that he had sold the property to defendant. Witness had great confidence in Smith. The mistake witness made in giving defendant the option was that he would lose three months' rent. Before going to England witness passed a bond on the house. Witness left debts in Cape Town, which he directed Smith to pay.

The witness objected to these questions, as they were irrelevant. "He's trying to get me into a net," remarked the witness.

"They generally do," replied His Lordship, "when one is in the witness-box."

James Martin Smith, broker and accountant, of St. George's-street, stated he held defendant's power of attorney whilst plaintiff was in England. Witness recollected plaintiff letting his house to defendant. Shortly after the plaintiff told witness of the offer to sell. Witness told him his action was foolish. As a result the telegram was sent, and a letter followed it. On May 5 plaintiff left for England, and witness endeavoured to collect the rents from defendant, but was unable to do so. Witness received a letter on May 6, stating that defendant refused to pay the rent, but that if witness would guarantee to refund it when transfer was effected he would pay the three months' rent. Witness agreed to this course.

To the Court: Witness could have sold the property if the price offered had been sufficient.

Witness (continuing) said he had not received any rent from defendant.

Cross-examined: Witness offered the property to defendant in April for £1,400. Witness drew up the lease. Witness allowed defendant to draft another one. Witness was under the impression that defendant would not pay the rent. Witness would have got his commission whether the property was sold privately or not. When Mr. Bailly went to England witness went to a money lender, and mortgaged four months' rent for a loan.

What was the amount?—That has nothing to do with the case.

[Hopley, J.: If Mr. Bailly was complaining of his conduct, this would be very relevant; but as far as you are concerned, it is not.]

Witness denied that he was short of money at the time.

Dr. Greer drew the attention of the Court to the fact that the questions were irrelevant.

The defendant was about to further cross-examine the witness with regard to rents he collected, when

Hopley, J., said he would have to stop all the irrelevant questions.

Witness stated that for £5,000 cash he would not sell the property to defendant.

A letter signed by Robert Greening was put in.

[Hopley, J.: Who is Robert Greening? There was an attorney of that name suspended from practice in this Court. Is that the same gentleman?]

Dr. Greer: Yes, my lord.

Witness denied having received a letter from Drummond repudiating Greening's services.

Witness said Greening was in Drummond's office on one occasion when wit-

ness visited him, and Drummond turned to him and said, "Greening, you have got me into a hole several times, so you can get me into another now."

Defendant: That would be an extraordinary thing for a man to say.

[Hopley, J.: It is possible he may have misunderstood you.]

Michael Cavanagh, superintendent of the Telegraph Order Branch, produced the telegrams which passed between plaintiff and defendant.

John Reid, clerk in the Magistrate's Office, Wynberg, produced the records of actions which had been tried there. One of them was for civil imprisonment against the defendant, who on July 6 admitted renting a furnished house, that he had paid no rent, and that the house was rented for his mother-in-law.

Dr. Greer closed his case.

F. Z. S. Peregrino stated the defendant occupied his office in April. He saw plaintiff there on one occasion, and he told witness that Drummond was buying a house from him. From the conversation he had heard between Drummond and Bailly, he had the impression that the former had bought the house. Witness was asked to join in a liquid refreshment to celebrate the purchase.

In cross-examination, witness admitted that defendant did not pay for the use of the office or the stationery. They were negotiating for a partnership, but it fell through.

Elizabeth Home Drummond, wife of the defendant, stated the latter told her that he had purchased the house they were living in. She was very much annoyed, and defendant showed her a letter to the plaintiff, which he posted at Lansdowne-road. Defendant told her he intended selling the house again.

Cross-examined: Witness knew nothing about her husband's financial position.

You know that he has been sued for debt?—Yes.

You know that decrees for civil imprisonment have been applied for against him?—There has been a person down at the house to ask if we had any effects, if that is what you mean?

Have you not seen the newspapers?—I never open a newspaper from one year's end to the other.

Dr. Greer: That is rather unfortunate.

Charles Edward Mackintosh, a speculator and company representative, stated he accepted the defendant's offer to sell the house and furniture for £1,500, and claimed £50 for breach of contract.

Cross-examined: Drummond had nothing but certain articles of furniture which were excluded under his agreement. During May, June, and July, when negotiations were going on, Drummond said not a word about any dispute about his purchase of the house.

The defendant, Hilyard Home Drummond, gave evidence. He stated he was a pupil to Mr. Coulton—

[Hopley, J.: Are you articulated?]

Witness: No.

[Hopley, J.: We do not know what a pupil is in our profession. Are you still carrying on in hopes of being a law agent?]

I have rather higher aspirations than that. I am endeavouring to understand the business of an attorney, through being in Mr. Coulton's office.

[Hopley, J.: Then you are employed as a learner?]

Yes.

Witness (continuing) said his friend MacIntosh wanted to buy a house. Witness saw the house advertised in the "Times," and approached Bailey about it. MacIntosh was willing to give £1,200 for it, so witness thought that if transfer was not to be effected until August, he could take up possession and live rent free for three months. Witness believed MacIntosh would pay £1,350 for the place.

[Hopley, J.: Who would pay the transfer fees?]

MacIntosh.

But I mean the transfer fees from Bailey to you?—I didn't think of that.

[Hopley, J.: And you would probably have found yourself being prosecuted for trying to defraud the Revenue.]

Witness corroborated the evidence given by the plaintiff with regard to the agreement to purchase the house. Continuing, he said that he wrote the letter accepting the offer of the house about an hour and a half before he received the telegram from plaintiff. He met plaintiff next morning, and told him that he intended to keep him to his agreement. The witness denied that he authorised Greening to write to Smith agreeing, on his behalf, to pay the three months' rent.

[Hopley, J.: Then you think that Smith and Greening were conspiring to get this £30 from you?]

Witness: I believe Mr. Greening's share of that transaction was a pair of boots.

[Hopley, J.: You say that Smith gave him a pair of boots?]

Witness: Yes; for his assistance in enabling Mr. Smith to raise £30 when he was hard up, he got these boots. I had had some experience of Mr. Greening, and it is not likely that being left with any degree of sense, that I should get him to do anything for me.

Witness added that Smith told him if he would give up possession, he would give him a clear quitance to July 31.

The witness gave the Court a short resume of his legal experiences.

In cross-examination, witness said he had not always been known as Home Drummond. Witness did not pay the

rent of Mr. Bidewell Edwards's house for certain reasons. Witness was still living in the house rent free. "I was working out my damages by staying there," added the witness. Witness had not the means to purchase the house.

Had you £4 or £5 at that time?—I had.

And yet we see that you were decreed for that amount?—Yes; but that was later on.

Witness denied that he was proprietor of "South African Truth." He also denied that Greening was a personal friend of his. He often took him into his house, because he was sorry for him.

Dr. Greer and the defendant were heard in argument on the facts.

Cur. Adv. Vult.

Postea (October 23rd).

Hopley, J.: In April last a lease for 12 months was entered into between the plaintiff and defendant of certain premises known as Villa Marbella, at Claremont, belonging to the plaintiff, at a rental of £10 a month, and it is clear that during the same month certain overtures were made by the defendant to purchase the place, the sum of £1,400 being then mentioned as the purchase price. The defendant is, and then was, a man of no means, and it was impossible for him to conclude a contract of sale at that price with any prospect of carrying out his share of the transaction, unless he could gain time for payment and could see a possibility of a resale. The latter he seems to have had, even at that time, as a Mr. McIntosh had visited him at the property in the early days of his tenancy, and had expressed his wish to buy it. The plaintiff was at that time about to visit England, and seems to have been anxious to effect a sale of the property, and he, on May 2, met the defendant in the office of Mr. Peregrino, where, after some discussion, he made an offer of the place to the defendant, which the latter asked him to put in writing, he himself preparing a rough draft of the offer. The plaintiff thereupon wrote out a formal offer of the place at £1,350, of which £500 might remain on first mortgage at 6 per cent., the balance to be paid on August 1, when transfer was to be given. These terms, the defendant says that he then and there verbally accepted, and I am inclined to believe that he did, as it is common cause that the plaintiff and defendant went to a neighbouring publichouse to have a drink, inviting Mr. Peregrino to join them in "wetting" the transaction. Mr. Peregrino refused to join them, but his impression was—and he overheard most of the conversation—that a final sale had been effected.

The plaintiff says that the drink was merely to "wet" the offer he had made, but I think it more likely that

it was, as the defendant deposes, to celebrate the conclusion of the bargain. However, the case, as far as the conclusion of the contract is concerned, does not rest on verbal evidence alone, for the defendant returned to the office and wrote a formal acceptance of the offer, which he enclosed in one of Peregrino's envelopes, and intended to have delivered by his messenger. This is borne out by the evidence of Peregrino, and is distinctly sworn to by the defendant, and I believe that the acceptance was written as above stated. It was not, however, sent by messenger, nor immediately posted in Cape Town, as the defendant's wife happened to be in town, and called for him, and he went with her to have a cup of tea at a restaurant opposite the Railway Station, whence they went, just in time to catch the 4.40 train to the suburbs. This would land them at Claremont Station at 5 p.m., and I believe their evidence that they walked home and dropped the letter into a pillar-box in Lansdowne-road at about 5.10 o'clock. Even then, if there had been no verbal conclusion of the contract at about 4 o'clock in Cape Town, as I think there was, this posting of the letter would conclude it at 5.10 p.m. The plaintiff seems, after he parted from the defendant, to have met or gone to his agent, a Mr. Smith, and told him what had happened. Smith told him that he had been foolish, as he would lose three months' rent, and also that he himself had a better offer for the property. As far as these two knew, the only writing affecting the matter at that time was the offer to sell, and they made up their minds that it would be wise to back out of such a contract without delay. They thereupon despatched a telegram to Claremont informing the defendant that the offer was withdrawn. This telegram was handed in at the Post Office in Cape Town at 5.47 p.m., and was not received by the defendant at his residence until shortly before 7 o'clock. Next day the plaintiff received the defendant's letter, but apparently under the conviction that it was written and posted after receipt of his telegram, he has treated the matter as if there had been no concluded contract, while the defendant has equally consistently maintained that there was one. The parties met in Cape Town on May 3, and each maintained his position. The plaintiff shortly thereafter proceeded to England, leaving his affairs in the hands of Smith under a general power of attorney; and the defendant proceeded with his plan of reselling the property to McIntosh. From time to time Smith made attempts to get rent for the property from defendant, who, however, always refused to pay, on the ground that he had purchased it. Eventually, in July, defendant effected

the resale of the property to McIntosh for £1,500, transfer to be given on August 1; but when that date arrived the plaintiff's agents refused to give transfer to him, and he was accordingly unable to fulfil his contract with McIntosh, who immediately claimed damages from him for breach of contract. I am therefore clearly of opinion that there was a concluded contract of sale on the 2nd of May from the plaintiff to the defendant of the Villa Marbella for £1,350, and that transfer was to be given, and the contract was to be performed on both sides on the 1st of August, that the plaintiff signified his intention of not carrying out that contract on the 3rd of May, that the defendant held the plaintiff to his contract, and that the plaintiff finally committed the breach of the contract by refusing to transfer the property on the 1st of August. In such circumstances, it has been laid down in a number of cases, of which *Philpotts v. Evans* and *Frost v. Knight* may be mentioned, that the correct method of measuring the damage for such a breach is by estimating them with reference to the date at which the contract should have been carried out. That date in the present case was August 1, when, if the plaintiff had carried out the contract, the defendant would have made a profit of £150 on the resale to McIntosh, but the Government dues on the transfer, to himself, and the various fees and charges of effecting that transfer, and the further transfer to McIntosh, would probably have come to something like £40, so that the clear profit would have been, say, £110. This amount must, however, be reduced in a final settlement between the parties by the sum of £30 for the use and occupation of the premises by the defendant during the months of August, September, and October. The order of the Court is that the defendant do give up possession of the said premises to the plaintiff on the 31st inst., that the plaintiff do pay to the defendant the sum of £80, and that the plaintiff do pay the costs of suit.

[Plaintiff's Attorney: Stanley-Jones;
Defendant in person.]

caused by his negligence and carelessness, and said that he was in lawful occupation of the premises, and both he and his children had a right to go on the passage.

Mr. Van Zyl was for the plaintiff; Mr. Alexander was for the defendants.

The plaintiff, Pieter Eduard Hammond, said that about May last he entered into a contract with the defendants for the hire of a dwelling-house for a year, rent to be paid monthly in advance. He took possession of the premises on the 15th May, and paid £9, the first month's rent, in advance. During the first month he saw Mr. Fuch, a director of the defendant company, and told him that the house was not in a habitable state. He asked him whether, if he sub-let the house, they would cancel the contract. He took steps, and spoke to the Rev. Mr. De Villiers and the churchwardens. At the beginning of the second month he did not pay the rent. Mr. Muller (secretary of the company) did not give him notice on the 21st June to quit the house, because he had not paid the rent. On the 27th June Mr. Muller asked him whether he could vacate the premises if the minister would take it. Witness said that the notice was very short. He met the Rev. Mr. De Villiers the following day, and it was arranged that witness should remain in the house until the 3rd June. Mr. De Villiers removed into the house a few days later. The arrangement was that if the Kerkraad hired the house, he would pay the rent for the half-month of June. Witness had not paid the rent for that month. On the 27th June a case filled with iron fell on one of witness's children. The company's house was next door. The company often put boxes, planks, etc., in the passage between the houses. On the 30th June or a couple of days before planks were stacked in the passage. Witness made constant use of this passage to reach his yard. The planks were stacked to a height of more than 6 feet. On Sunday, the 2nd July, his child's leg was broken. There was a north wind blowing, and rain was falling. There was nothing to keep the planks from rolling down. Witness was not at home at the time of the accident. The child could now walk, but his leg was crooked, and he seemed to be lame. In bad weather he complained of pain from the injury. Witness denied that he had been cautioned about his children playing near the planks. On the day after the accident he went and asked Mr. Muller, the secretary of the company, whether they would pay him compensation for the injury to the child. Mr. Muller said that he would speak to the directors.

Cross-examined: Witness had never offered the rent for the half month. He would have been able to pay the

rent if it had been demanded. Just before then he had given notice of his intention to surrender. He was aware that he could not sub-let the house without the consent of the defendants. He had never applied for their consent to the sub-letting of the house. He was not aware that any warning was given to his children.

[Buchanan, A.C.J. (to Mr. Alexander): He was in lawful possession of the property under his lease.]

Further cross-examined: Witness made a complaint to the company when the case fell upon his child. On the 2nd July witness and his wife were away from home, having left the children in charge of two older girls.

Elizabeth Petronella Hammond (wife of the plaintiff) gave evidence as to certain interviews with Mr. Muller, representing the company. As to the injuries to the child, she said that the child was confined to bed for eight weeks. The boy complained just when they were about to have rain that he experienced pain from the injury.

By the Court: She did not know the amount of the doctor's bill.

Rachel Hammond (daughter of the plaintiff) spoke to the finding of her little brother under the planks on the day in question.

Johannes Hammond (son of the plaintiff) said that on the day in question he was "playing horse" with his two little brothers. While he was tying one brother the other ran down the passage, and the planks blew down upon him. They did not play upon the planks. Witness did not see the planks fall, his attention being drawn to the accident by hearing cries from his brother.

Jacobus Johannes Erasmus, of Worcester. Pieter Jacobus de Wet, and Arnholdt Zeeman gave evidence as to having viewed the stack of timber after the accident. They were of the opinion that it was not safe.

Reitz Carol Wolff, a medical practitioner, said that he examined the boy after the accident, and found three fractures of the bones of the left leg. The injury was a serious one, and the leg had to be placed in plaster of Paris on three occasions. The child had suffered considerably, and the leg was still crooked in shape. He would not advise the child to play football.

Cross-examined: The boy would be unfit for military service, but could follow other walks in life.

The plaintiff (recalled) said that he assessed the damages at £500, because all the time the child was suffering he and his wife had extra trouble with the child. The pain the boy suffered was unnecessary, and he would never be fit to do heavy work. A special boot would be necessary, and the boy would not be able to secure a girl with a large "dot."

Mr. Van Zyl closed his case for the plaintiff.

Percival Noel Muller (secretary to the defendant company) said that the wood was stacked in the passage because the company was stock-taking.

[Buchanan, A.C.J.: Who gave you permission to stack the wood there?]

Witness: No one; we had the right to do it.

[Buchanan, A.C.J.: No, you had not; you had let the place.]

Witness (continuing) said that Hammond had told him that he could not pay the rent, and if the company was willing to cancel his lease, he would move out, and let the house be used as a manse. The directors assented. In the course of further evidence, witness said that on the Friday before the accident he had had to warn the children about playing upon the planks. After the accident, witness saw the plaintiff, who remarked that he did not know why the Lord had punished him, because he had paid for his sins long ago. Witness did not think the stack of planks could have been blown down, because the passage was well protected from the wind by the trees.

Mr. Van Zyl was about to cross-examine witness as to the legal right of the plaintiff's children to be in the passage, when

Buchanan, A.C.J. interposed, and observed that he did not think there was any necessity to labour that part of the case. The plaintiff was lawfully occupying the house.

Cross-examined: Witness had the boards stacked very carefully, and they could only have been overturned by the children. He denied that the planks were so shaky that they could easily have been blown down.

Philip Botha H. Fuchs, one of the directors of the company, spoke to having seen plaintiff's children playing on the boards in the passage on Friday, the 30th June.

Carl B. Denah, an assistant in the defendant company's employ, said that he helped to stack the floor boards. On the Friday and Saturday, while the stacking was being carried out, he had to speak to the plaintiff's children about playing on the boards. He did not think the planks could have been blown down by the wind.

Johannes Goridge, another assistant, Gerhardus Goridge, also in the employ of the company, and Jan Reitz, assistant carpenter, gave evidence to the effect that the planks were properly stacked, and that it had been necessary to warn plaintiff's children in regard to playing about the boards.

Peter Francois Hugo, farmer, said that on the afternoon in question he was passing along Behring-street, when he saw two children on the top of the planks, and another clinging to the planks, trying to clamber up. Just

after he had passed he heard a child's cries. He did not go back.

Cross-examined: Witness could not say whether the children he saw were the plaintiff's. The passage was open to the street, and any children could have gone there. He did not warn the children about the danger. He did not trouble about the danger of the youngsters being killed.

Mr. Van Zyl having been heard in argument on the facts,

Buchanan, A.C.J., said he found that the plaintiff was in lawful occupation of the premises when the accident occurred. From the evidence it appeared that the timber was properly stacked, and that there was no negligence on the part of the defendants. He had come to the conclusion that the wood was sufficiently stacked if it had not been interfered with, and that it was brought down by the acts of the children when playing there. Under these circumstances, it could not be said, as the plaintiff alleged, that the accident was entirely due to the negligence of the defendants in stacking the wood in the passage. There was no contributory negligence pleaded, but it was pleaded that there was negligence on the part of the defendants. He (the learned Judge) could not find that negligence had been proved on the part of the defendants, but he did find that they had disproved any negligence, and they had also proved that the accident was entirely due to the conduct of the plaintiff's own children in playing on this wood. There was no doubt that one must feel a great deal of sympathy with the plaintiff in the trouble and expense to which he had been put and with the little boy who had been hurt, but the Court was not there to decide the matter from that point of view, but to decide whether the defendants were legally answerable for what had taken place. Judgment would, therefore, be given for the defendants, with costs.

[Plaintiff's Attorney: D. Tennant, jun.; Defendant's Attorneys: Walker and Jacobsohn.]

In re INSOLVENT ESTATE MCPHERSON.

Mr. Wright moved, as a matter of urgency, upon the petition of Wm. Arthur Currey and other creditors, for the appointment of provisional trustees in the estate of George Campbell McPherson, trading as McPherson and Co., at Cape Town, and in the private estate of McPherson. The petitioners stated that they represented claims to the amount of £25,800, and the liabilities of the estate were estimated, approximately, at £30,000. Insolvent had carried on a large business, and it would be to the interest of the creditors to carry it on for the benefit of the estate

without interruption during the insolvency. Amongst the stock-in-trade were certain perishables, which must be disposed of or attended to at once, and it was necessary that provisional trustees should be appointed to take charge of the business, pending the election of permanent trustees, the names of Messrs. W. A. Currey and A. N. Foot being suggested.

Order granted as prayed, appointing Messrs. Currey and Foot as provisional trustees.

Ex parte GOWAN.

Divisional Council—Voters' list
—Act 40 of 1889.

Where applicant's name had, per incuriam, been omitted from the list of voters for a Divisional Council. The Court granted an order authorizing its insertion.

Mr. Upington said that he had an unusual application to bring before the Court as a matter of urgency, so as to enable the petitioner to be nominated on Tuesday next as a candidate for election to the Divisional Council of Oudtshoorn. Counsel read an affidavit by the petitioner, who said that he was the registered proprietor of immovable property in the division of Oudtshoorn, Ward No. 2, of the value of over £6,000. He had, for the last fifteen years, been a registered voter for the division of Oudtshoorn for Divisional Council purposes. When the present list was framed, he found that his name had been registered as a voter on the rough draft. Thereafter, the secretary of the Divisional Council, in having a fair copy made of the said list, inadvertently omitted petitioner's name therefrom. Petitioner possessed the necessary qualification to enable him to be elected as a member of the said Divisional Council. He had been requested by several persons to allow himself to be nominated as a candidate for the Divisional Council, to which he had consented. On inspecting the voters' list, he found that his name had been omitted therefrom. Nominations for the ensuing election must be filed not later than the 24th October. There were no reasons why petitioner's name should not be placed on the voters' list, and he therefore asked for an order authorising his name to be placed on the list or such other relief as to the Court may seem meet. Counsel also read an affidavit by Mr. Arthur C. Sheard, secretary of the Divisional Council of Oudtshoorn, stating that the facts and allegations contained in the petition were true and correct. He added that he was not aware of any

reason why the petitioner's name should not be placed on the list. Counsel referred to the Divisional Council Act, No. 40, 1889, and said that its provisions did not seem to touch a case of this kind, where an omission was due entirely to a clerical error.

Buchanan, A.C.J., said that, if the Court which sat to hear objections to the voters' list passed Mr. Gavan's name, then he saw no objection to the list being corrected, as prayed. The important point was whether Mr. Gavan's name was included in the list submitted for public inspection, and the point must be made clear whether his name was passed by the Court. A rule *nisi* would be granted calling upon the Court appointed to hear objections to the list to show cause, on Tuesday next, why applicant's name should not be inserted on the final list, applicant to pay costs, leave being granted to telegraph the notices, in order to enable the applicant, if no objection is raised, to be nominated for the election on Tuesday next.

Postea (October 24th).

Buchanan, A.C.J., said that a telegram had been received from the chairman stating that "there is no objection to the application being granted." His Lordship added that he had desired counsel to tell him whether the list which was published bore petitioner's name?

Mr. Upington: I have made inquiries, but I have no information.

Buchanan, A.C.J.: I wanted it to be made perfectly clear that the omission was due merely to a clerk's error in copying from the draft.

Rule made absolute, authorising petitioner's name to be inserted upon the roll of voters.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

WAGNER V. WAGNER. { 1905.
{ Oct. 20th.

This was an action brought by Charles Wagner for an order for restitution of conjugal rights, failing which a decree of divorce, against his wife, Clara Wagner, because of her unlawful desertion. Mr. Roux was for plaintiff; defendant did not appear.

The defendant was personally served with the notice in Johannesburg.

The plaintiff's declaration stated he was a stonemason, residing at Wynberg. He was married to the defendant on April 22, 1895. On October 5, 1904, de-

defendant deserted plaintiff, and refused to return.

Mr. Birch proved the marriage in April, 1895.

Charles Wagner, the plaintiff, stated he was married to defendant in April, 1895. There was no issue of the marriage. A man named Fredericks lived with witness and his wife, and the defendant misconducted herself with him, but witness forgave her. This was the second occasion on which the defendant left witness. In October, 1904, the defendant left the house, taking with her her clothes and about £50 in money. She left a letter stating she had left through no fault of her own. He had heard that the defendant was residing in Vredenberg. The defendant wrote telling witness that she would not return to him, as she was happier where she was. The letter further alleged that there was no happiness in her home, and consequently that she preferred to earn her own living. The defendant came to Cape Town about three weeks ago and created a row at the house he was living at. He had not seen her since. Witness would take her back if she would return.

An order for the restitution of conjugal rights by December 31, failing which to show cause on January 12 why a decree of divorce should not be granted, was made.

Ex parte BROWN, LAWRENCE AND CO.

Mr. Baily moved as a matter of urgency for the appointment of provisional trustees in the estate of Frederick Wickham, trading as Sargent and Co. He suggested Messrs. G. W. Steytler and Muirhead.

The application was granted.

BAILY V. DRUMMOND. { 1905.
Oct. 20th.
" 23rd.

Contract—Acceptance by letter.

B. had agreed, verbally, to sell a house to D., and D., by letter posted at 5.10 p.m. on the same day, accepted B.'s offer. At 5.47 p.m. and before receiving D.'s letter, B., by telegram, revoked his offer.

Held, that B. was bound by his contract.

This was an action in which Percy Baily, of Claremont, claimed from Hildyard Home Drummond £30, amount due for three months' rent and damages at the rate of £10 per month, for such time as the defendant should continue to occupy the premises after July 31 last.

The plaintiff's declaration stated:

1. The plaintiff is James Marcus Smith, under a duly executed power of attorney as agent for Percy Baily, late of Claremont, and at present travelling in Europe. The defendant is Hildyard Home Drummond, at present residing at Villa Marbella, Claremont, in the division of the Capo.

2. By an agreement bearing date April 3, 1905, plaintiff agreed to let, and the defendant to hire, a certain partly furnished house, known as Villa Marbella, Claremont, the property of the plaintiff, at the monthly rental of £10 sterling, payable on the first day of each month, the tenancy commencing as and from 1st April, 1905.

3. Plaintiff gave defendant possession of the said premises, and defendant paid plaintiff the apportioned rent for the month of April.

4. All things have happened, all times elapsed, and all conditions have been fulfilled to entitle plaintiff to payment by defendant of the sum of £30 sterling—being rent due at the rate of £10 per month for the months of May, June, and July, 1905, but though frequently requested so to do, defendant has refused or neglected, and still refuses or neglects, to pay the said sum of £30, or any part thereof.

5. Plaintiff further says that defendant has broken the agreement by failing to pay £10 on the first of each month, as therein provided, that the said agreement is thereby ended, and plaintiff is entitled to recover back the possession of the said premises. Plaintiff says that so long as defendant continues to occupy the same, he is suffering loss and damage to the extent of £10 sterling per month, being the rent of the said premises. Wherefore plaintiff claims: (a) Judgment against the defendant in the sum of £30 sterling; (b) an order for the ejectment of defendant from the said premises by reason of his breach of agreement; (c) damages at the rate of £10 per month for such time as defendant shall continue to occupy the said premises after July 31, 1905; (d) alternative relief; (e) costs of suit.

For the plea to the declaration the defendant says as follows:

1. Paragraphs 1, 2, and 3 are admitted, save that the agreement was entered into and possession of the premises given by Percy Baily, and not by his agent, James Marcus Smith.

2. Defendant denies paragraphs 4 and 5, and says that on or about the 2nd day of May, 1905, he contracted with the said Percy Baily to purchase the property known as the Villa Marbella in the circumstances hereinafter set forth in the claim in reconvention, and to which the defendant craves leave to refer, and thereupon the agreement of lease was cancelled by mutual consent. Wherefore the defendant prays that

5. In or about the said 1897 the said Bassardien did by himself, his servants, or agents proceed wrongfully and unlawfully to encroach over the said boundary upon the land of the plaintiff, and to trespass thereon, and to remove therefrom a large portion of ground, the property of the plaintiff, whereby the plaintiff has suffered damage.

6. By reason of the premises, the plaintiff has suffered damage in the sum of £500.

Wherefore the plaintiff claims: (a) £500 damages, (b) alternative relief, (c) costs of suit.

The defendant's plea stated:

1. The defendant admits the allegations in paragraphs 1, 2, and 3 of the declaration, in all save that he says he received letters of administration on 26th July, 1900.

2. He admits that in or about the year 1897, Salim Bassardien did by himself, his agents or servants, excavate a portion of ground upon his (Bassardien's) land, but he denies that he thereby deprived plaintiff's land of any lateral support to which he was legally entitled, and the plaintiff has suffered any damage for which he (defendant) is legally responsible. He says that if there is any subsidence or danger of subsidence in or upon plaintiff's land, or any other damage done thereto, it was in no way due to Bassardien or any person for whom he is liable, but is due to the acts, defaults, and neglects of plaintiff or some other person for whose acts, defaults, and neglects he (defendant) is not liable, and more especially by the acts in the claim in reconvention set out.

3. Defendant denies the allegations in paragraphs 5 and 6, especially that the said Bassardien did by himself, his agents, or his servants, trespass on plaintiff's land, or remove large portions of ground therefrom, or otherwise do damage to plaintiff, in respect whereof the said plaintiff is entitled to claim the sum of £500 or any other sum.

Wherefore he prays that plaintiff's claim be dismissed, with costs.

And for a claim in reconvention, the defendant (now plaintiff) says:

5. He says that at divers times plaintiff (now defendant) has cut away portion of his own land, and has thus deprived the remainder of his own land of its natural support; he has erected heavy cement work on or towards the edge of the land from which the cutting has been made, and he has, through himself, or the occupiers, or tenants of his land, suffered large quantities of water to flow towards and to such edge.

6. By reason of the acts set out in the preceding paragraph, large quantities of earth, soil, and rock have fallen upon the defendant's (now plaintiff's) premises, and have caused damage which he estimates in the sum of £200, and large quantities will continue to fall

unless plaintiff (now defendant) be ordered to take sufficient steps to abate the nuisance.

Wherefore the plaintiff in reconvention prays: (a) Judgment for the sum of £200 as and by way of damages; (b) An order calling upon defendant in reconvention to build a retaining wall of sufficient height and strength to abate the nuisance aforesaid; (c) such further and other relief as may seem meet, together with (b) costs of suit.

For a replication the plaintiff says:

1. He admits that the defendant received letters of administration on 26th July, 1900.

2. Save as above, he denies all and several the allegations in the plea, and joins issue thereon, and prays for judgment, with costs, as before.

For a plea in reconvention, the plaintiff (now defendant) says:

1. He craves leave to refer to the matters pleaded in his replication.

2. He denies that he has at any time cut away portions of his own land so as to deprive the remainder of his land of its natural support, or that he erected heavy cement work on or towards the edge of any land from which a cutting has been made by him, or that he has, through himself or the occupiers or tenants of his land, suffered large quantities of water to flow towards or to such edge.

3. He denies that by reason of any act set out in paragraph 5 of the claim in reconvention, or for which the plaintiff (now defendant) is liable, any quantities of earth, soil, or rock have fallen upon the defendant's (now plaintiff's) premises, or have caused any damage. He denies, further, that there is any nuisance on his land which he is liable to be called upon to abate.

4. He says that if large quantities of earth, soil, or rock have fallen upon the defendant's premises, or if quantities of water above the amount of the natural flow have flowed towards or to the said edge, or have caused damage, which he does not admit, the same is due to the wrongful acts of the defendant (now plaintiff), as set forth in paragraphs 4 and 5 of the declaration.

Wherefore he prays that the claim in reconvention be dismissed with costs.

Rejoinder and replication in reconvention:

1. For a rejoinder to the replication in convention the defendant repeats all the allegations in his plea, and again prays that the claim in convention be dismissed with costs.

2. And for a replication he (now plaintiff) says that, save in so far as any of the allegations in the claim in reconvention are admitted by the plea thereto, he joins issue thereon, and again prays for judgment with costs.

Mr. Russell for plaintiff; Mr. Benjamin (with him Mr. Bailey) for defendant.

James C. Bisset, Government land surveyor, testified to having drawn a plan of the grounds in question. The depth of the excavation was 22 feet, and it was about 11 feet broad. The boundary ran about nine inches from defendant's house.

Doffa Abrahams, the plaintiff, said he knew defendant, whose ground was just below witness's. Defendant had made certain excavations, when building his houses. If witness had his proper ground, he could get increased rental for his property.

In cross-examination, witness said that when he found Bassardien excavating the ground he went to him and told him to stop. Bassardien promised to put up a wall, but failed to do so. If the successors consented to build it now he would be quite satisfied.

Mr. Benjamin said he thought after the defendant's admission that there was not much necessity to lead further evidence. The cause of action for which the plaintiff sued was for damages for encroachment, and the plaintiff, by his own evidence, admitted that there was accord and satisfaction.

Hopley, J., considered it would be advisable to lead further evidence. He was not prepared to deal with the case at that stage.

In further cross-examination, the plaintiff said it was eight years since the excavation had been made.

Mr. Russell closed his case.

Robert Esdon, C.E., stated he knew the defendant's property. He was called in in 1897 to draw a plan for a house the defendant was about to erect. Witness believed he saw the title deeds, which showed two strips of land, one acquired in 1890 and the other seven years after. Witness taped off the frontage to Pepper and Bryant streets. It was necessary to prepare the site, and excavations would be necessary. It was necessary to make provision for a stormwater drain on the site. It became necessary for the builder to build over-hand from the inside wall. It was also necessary to excavate for an air space. That was all excavated within the defendant's property. Witness allowed 18 inches for the stormwater drain. The cliff was now "weathering," and two or three loads was lying against the wall, which caused the wall to dampen considerably.

In cross-examination: Witness said he must have considered the site for the building a good one, or he would not have drawn the plan.

Willem Versfeld, land surveyor, Cape Town, stated that he surveyed the defendant's property, and discovered two pegs, one being at the corner of Pepper-street and Bryant-street, and the other further down Bryant-street. He was satisfied that the former was a boundary peg. According to his survey, defendant was well within his boundary.

Cross-examined: The difference between himself and Mr. Bisset's survey was eight inches.

Armena Bassardien, widow of Salim Bassardien, said her husband did not cut away the face of the old quarry at all. The ground had been falling down from the cliff on to the house.

Counsel were heard in argument on the facts.

Hopley, J., said this case, like all cases brought against the estate of a deceased man, was somewhat unsatisfactory, because the man who did the acts complained of could not be present. In all such cases the Court was very exacting in having proof of the plaintiff's claim. The present action was for damages done by Bassardien in his lifetime. Taking it that in this colony one property had to give lateral support to another, there was nothing wrong in a person working up to the boundary of his own land; but if he injured his neighbour's property by removing anything, he should secure the safety of the place from which he moved it. In the present case, it was clear that when the parties bought the property, there was an old quarry. The exact locality of the quarry could not now be very well located, as it had been converted into building lots and streets, so that, when a set of witnesses told the Court that such a building was outside the boundary of the quarry, he held that their evidence had to be carefully scrutinized. There had been a conflict of evidence in the case. If people bought property on the edge of a quarry, they could not complain if in the natural crumbling away of the face of the quarry, their property was injured. The plaintiff held that the quarry was outside Bassardien's property. The engineers differed on that point. That the cliff did extend beyond the boundary was evident from the diagrams put in. From the evidence given, the Court was not satisfied that the accumulation of refuse was wholly due to the act or default of Bassardien. It was very difficult for the Court to say that Bassardien had done all this. If the plaintiff now came to the Court and said this damage had been done to his property, what was his duty when he saw it being done, instead of waiting until he could recover heavy damages? That point had been settled by the Supreme Court in 1895. The duty of the plaintiff when he saw Bassardien digging at the foot of the property was to apply to the Court for an interdict, unless Bassardien agreed to make it safe. He did not do so, but said that Bassardien promised a protecting wall. If he made that agreement, he should have moved to make Bassardien erect the wall. If there was this contract, it was very difficult to prove it, and he had not

proceeded on it, and he (his lordship) thought the contract was so stale that no Court would give him relief on it. He felt that on these points the plaintiff's case was weak. It was difficult to believe that he would have allowed the case to go so far if he had thought he could get relief. All these things made it difficult for the Court to believe that he was entitled to judgment. There would be absolute from the instance, with costs.

[Plaintiff's Attorney: A. W. Steer;
Defendant's Attorney: R. M. Cleod.]

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the
Hon. Sir JOHN BUCHANAN.]

VISSER V. VAN DER HEEVER. { 1905.
Oct. 24th.
" 25th.
" 27th.

Beacons — Adverse possession —
Long continued occupation —
Onus probandi.

This was an action brought by Christian Abraham Mauritz Visser, of Kriegerspoort, division of Hanover, against Gert Petrus van der Heever, of Beeste Kuil, also in the division of Hanover, for a declaration of rights, inter alia, and damages.

The plaintiff's declaration was as follows:

1. The plaintiff is a farmer residing at Kriegerspoort, in the division of Hanover, and the defendant is a farmer residing at Beestkuil, in the same division.

2. The parties are the registered owners respectively of the said farms, which adjoin each other.

3. The plaintiff annexes hereto a plan (marked "A"), showing the relative positions of the said farms, and he says that the true boundary line between them is represented by the line A, B, C, on the said plan.

4. For some eight or ten years back the defendant, by himself and his servants, has wrongfully and unlawfully trespassed with his cattle, and otherwise upon that portion of the plaintiff's said farm, which is represented on the said plan by the letters A, B, C, D,

and is coloured in white, and the defendant has enclosed the same by means of a fence erected along the line A, D, C, and he still continues to trespass and encroach upon the said ground.

5. The defendant asserts that the boundary line between the two farms is the said line A, D, C, and he claims the whole of the area A, B, C, D, as his own property.

6. By reason of the wrongful and unlawful acts of trespass aforesaid, the plaintiff has been, and still is, deprived of a fertile and well-watered portion of his said farm, and has suffered damages to the extent of £384.

The plaintiff claims: (a) A declaration of rights as to the boundary line between his and the defendant's said farms; (b) that the true boundary line is the said line A, B, C, on the plan annexed; (c) an order compelling the defendant to remove the said fence back to the true boundary, as above defined; (d) a perpetual interdict restraining the defendant from trespassing upon the said portion of the farm Kriegerspoort marked A, B, C, D, on the plan; (e) the sum of £384 as damages aforesaid; (f) alternative relief; (g) costs of suit.

The defendant's plea was as follows:

1. The defendant admits paragraphs 1, 2, and 5 of the declaration, save that he now resides in Hanover.

2. The defendant admits the relative positions of the farms as shown on the plan A, but he denies that the line a, b, c is the true boundary, and says that the line a, d, c is the true boundary.

3. The defendant says that since 1865, when he and his brother bought the said farm Beestekuil, he and his co-owners have uninterruptedly, and, as of right, used and occupied and grazed their cattle on the said farm up to the line a, d, c, and since 1873, when the defendant became the sole owner of the said farm, the defendant has likewise uninterruptedly and of right used and occupied the said farm up to the said line, and in or about the years 1890 and 1891 the defendant fenced in his said farm along the line a, d, c, and the then owner of plaintiff's land, plaintiff's predecessor in title paid his share of the cost of the said fence, and the plaintiff bought his said farm with knowledge of the foregoing. Save as aforesaid the defendant denies the allegations in paragraphs 4 and 6 of the declaration.

Wherefore defendant prays that plaintiff's claim may be dismissed, with costs.

For a claim in reconvention defendant says: (1) He begs to refer to the pleadings in convention, wherefore he prays: (a) For an order declaring the line a, d, c to be the boundary between the parties; (b) alternative relief and costs of suit.

The plaintiff's replication was:

1. As to paragraph 3 of the plea, the plaintiff admits that the defendant erect-

ed a fence along the line a, d, c, but says that the said fence was erected without the consent of the plaintiff's predecessor in title, who was then the owner of the plaintiff's land. The said fence was erected with the consent of one B. J. du Plessis, who was at the time in occupation of the said land, and who gave his consent and contributed his share of the cost in consequence of certain incorrect representations, as to the boundary line between the said farms made to him by the defendant, but the said Du Plessis had no right nor authority to give such consent nor to pay such share of the cost, and the plaintiff is in any case not bound by his actions herein.

2. Save as above set forth, and save as to admissions, the plaintiff joins issue with the defendant upon his plea, and specially denies that the defendant or his co-owners have uninterruptedly and as of right used or occupied the said ground as alleged either since 1865 or since 1873.

For a plea to claim in reconvention, plaintiff said:

1. The plaintiff craves leave to refer to the pleadings in convention.

Wherefore he prays that the defendant's claim may be dismissed, with costs.

The rejoinder was general.

Mr. Schreiner, K.C. (with him Mr. Burton) for plaintiff. Mr. McGregor (with him Mr. Sutton) for defendant.

Christian Abraham Mauritz Visser (the plaintiff) said that he attended the sale at which the farm Kriegerspoort was sold, in the estate of J. D. van der Heever, about ten years ago, witness's wife being a daughter of C. J. van der Heever. Witness was then living at Middelwater. He knew that there was a fence on the farm Kriegerspoort. The question was put, he thought by Dalton, as to how the farm was to be sold. The auctioneer (Mr. De Villiers) said that he was going to sell the farm according to diagram. Witness did not bid. The highest bid reached was £6,000, offered by Dalton. The farm was subsequently sold to Mrs. Du Plessis (witness's mother-in-law). His wife afterwards bought the farm in 1895 from her mother for £3,700, and in 1900 witness became the owner, the purchase price being £3,900. Witness went to the farm, and remained in possession until the war had broken out. Mr. Cillie then occupied the farm for two years and nine months, and witness returned, and was now in occupation. Witness described the steps which he took to secure the removal of the fence. As to the land in dispute, he considered that it was of great value, seeing that it comprised the river veld and gave access to the water.

By the Court: He valued the land in question at about £1,600.

[Buchanan, A.C.J. (to witness): Would it not be a fair thing to divide the land between you and defendant?]

I thought we should do so. That was why we got a surveyor. Everything was in the hands of my agents.

[Buchanan, A.C.J.: Of course, the question I have to decide is as to the legal rights, but I think that that would be a very fair basis of compromise between the parties.]

Mr. Murray, land surveyor, Colesberg, said that it was inconsistent with the data of the diagram of Beeste Kuil that the disputed ground should be in Beeste Kuil. It was not completely consistent with the diagram of Kriegerspoort that the ground should be in that farm, but it was less inconsistent that the land should belong to that farm than that it should belong to Beeste Kuil.

By the Court: The data which he had obtained from actual survey did not agree with the diagrams.

Mr. Schreiner put in correspondence which had taken place since the trial was commenced, with a view to a compromise. The plaintiff's attorneys had written to the defendant's attorneys suggesting that as this litigation would be a possible source of friction between neighbours and relatives in the future, the land in dispute should be equally divided between plaintiff and defendant, so that the parties could have access to the perennial water, each party to pay his own costs and the expenses of Mr. Surveyor Murray to be equally shared. The reply of the defendant's attorneys was that he (defendant) felt that he had been forced into court by the plaintiff, and that at this stage he could not entertain the proposed compromise. A further letter was addressed by plaintiff's attorneys to the other side, allowing them until ten o'clock this morning to consider the offer. No further communication had, however, been received from defendant's attorneys.

Hannah Catharina Visser (wife of the plaintiff), Pieter Jacobus Visser (cousin of the plaintiff and defendant), Abram Jacobus Cillie, farmer, formerly of Kriegerspoort, and William Muller, clerk in the Deeds Office, were also called on behalf of the plaintiff.

The defendant, Gert Petrus van der Heever, said that he was a retired farmer, and now lived in Hanover. Beeste Kuil was bequeathed in his father's will to witness and his brother, but it was afterwards sold to them by his father. Kriegerspoort was at that time owned by his father.

Mr. McGregor was about to put in a certain "koop brief" or agreement of sale of Beeste Kuil to witness and his brother, when

Mr. Schreiner objected that the document was inadmissible. The document was signed, the witness had stated, by

his father and mother; it was produced from the private custody of the other side; it had not been registered; and counsel urged that the Court had no opportunity of testing it.

Buchanan, A.C.J., noted the objection, but ruled that the document was admissible.

Defendant, in further evidence, said that he became owner of the whole of Beeste Kuil in 1873. They had occupied the farm up to the limits of Booï's Kraal.

Postea (October 27th).

Mr. Schreiner addressed the Court in argument on the facts.

Without calling upon Mr. McGregor, Buchanan, A. C. J.: Mr. Schreiner has argued this case and raised all the points most carefully and fully, and I have listened very attentively to his argument; but he has not convinced me that he has succeeded in this action. The farm Kriegerspoort is held by the plaintiff; the farm Beeste Kuil belongs to the defendant. The dividing line between these two farms is in dispute. The boundary beacon on the west side and the one on the east side are admitted, but the line running between these two beacons takes an angle, and it is the angle beacon which is in dispute. A corner beacon at Wolveberg is marked "A," and the other corner beacon, at Hoogmoedsfontein, is marked "C." The plaintiff claims that the line should run "A.B.C.," and the defendant says that the line is "A.D.C." These two points are about half-way between the two places, and involve a dispute of some 386 morgen. The defendant is in possession of the disputed land. The present occupation is against the plaintiff, and the plaintiff must come into court and establish his right to alter the present occupation. Moreover, the line which is claimed by the defendant is fenced off, and has been fenced off for some time. As the plaintiff is not in possession of the land, it is desirable that we should go back to the original grant of these farms, to see how far the plaintiff's claim is sustained by the original grants, by any of the diagrams which have passed between the owners since that time, or by the conduct of the parties ever since. The two farms were probably occupied before any grants were given to them. Kriegerspoort, the plaintiff's farm, was granted in 1841, and Beeste Kuil was granted first in 1842, and afterwards in 1846. From the diagram, it will be seen that these farms must have been surveyed some time before the grant. In the survey by Van Aho, in 1830, of Beeste Kuil, the farm Kriegerspoort is shown to be adjoining, and when we look at that of the farm Kriegerspoort we see that the farm Beeste Kuil is marked as adjoining Kriegerspoort. Eventually, the whole of these farms must have been occupied before the

grants were got. The surveyor of Beeste Kuil and Kriegerspoort is the same surveyor, and the two original diagrams made by him were evidently intended to fit in one with another, so as to leave no vacant space between Kriegerspoort and Beeste Kuil. His Lordship went on to refer to the course taken by the stream through the property, as marked on the diagrams, and proceeded: From the evidence of the surveyor who has now surveyed the land, I must say that there is no indication whatever of any change of the course of the stream, as now found in actual survey. It must be running more or less in the actual position in which it was when these farms were granted originally. Mr. Murray, the surveyor, said that the stream could not be seen for the whole distance, and the diagrams, as they stand, are certainly in favour to some extent, but not altogether, of the plaintiff's claim. But when we look at the position of the parties, the occupation seems to me to have been altogether against the plaintiff's claim and in favour of the defendant's claim. The grants, as I said, were given in 1841 and 1842 and 1846, if I am correct in my dates. The farm Beeste Kuil was bought by old Mr. Van der Heever, and in 1860 he bought the farm Kriegerspoort. While Mr. Van der Heever was owner of both these farms, he entered into an agreement with two of his sons, the present defendant and Christoffel, to sell them the farm Beeste Kuil in half-shares. It is common among gentlemen like Mr. Van der Heever to dispose of their property to their sons as a kind of half-bequest, half-sale, as was done in this case, and a "koop brief" was entered into between old Mr. Van der Heever and his wife and the two sons. From the old diagram of 1865 I think it is clear that the corner beacon which is now in dispute is shown by the "koop brief" to be the beacon now claimed by the defendant, marked D. Here, then, in 1865, we have the owners of both properties describing the beacons, and therefore the line which divides the two farms, and that description is altogether in favour of the defendant's claim. The transfer was made to the defendant and his brother of Beeste Kuil in 1866. Three years after, in 1869, a further division of the property seems to have been desired by old Mr. Van der Heever, and he directed Surveyor Breda to cut off a portion of the farm Kriegerspoort. The object for which this part was cut off is not clearly stated in the evidence. On the one side it is stated that the object was to hand over this to Beeste Kuil and give the remainder to the other brother, Johannes, and on the other hand it is stated that the object was to reserve a residence for the old gentleman and give the remainder of Kriegerspoort to Johannes,

the step-brother of the defendant, and Christoffel. Johannes, however, would not fall in with this agreement, and nothing was done beyond the survey. When we look at the survey, we find that it lays down a line in accordance with the line now claimed by the defendant. On this diagram, framed by Breda at the time, which Mr. Schreiner suggests was made for the purpose of obtaining an amended title to Beeste Kuil, he (Mr. Breda) says: "Surveyed by me according to the existing beacons held by the proprietors of this and neighbouring farms, etc." This was in 1869. This diagram, therefore, is against the plaintiff's claim. After the proposed arrangement fell through, Christoffel Van der Heever sold back to his father his half-share of Beeste Kuil, which was transferred to the father absolutely for £600, the original price being £225. He must have sold it in 1872, I presume, according to the diagram put in. The father immediately transferred this half of Beeste Kuil to the defendant, who has since 1873 been the owner of the registered title of the whole farm of Beeste Kuil. Christoffel had at that time received transfer of the farm Kriegerspoort, and in the receipt which has been put in, signed by old Mr. Van der Heever, he acknowledges receipt of the purchase price of this farm, the whole of Kriegerspoort. Now, it is suggested that this receipt in the words, "the whole of Kriegerspoort," includes the whole of the ground now in dispute; but I think it is quite as reasonable to say that it means the ground which had been cut off from Kriegerspoort, and is now given to it. At the time Christoffel was owner of half of Beeste Kuil, I think it is clearly proved that he claimed or exercised *dominium* over the ground now in dispute, as part owner of Beeste Kuil, and I think he also took steps to whitewash the beacon now claimed by defendant. Mr. Schreiner suggested that the original intention of the surveyor was to give access to both farms to the western branch of the stream marked No. 1. Now, if that had been the intention of the surveyor, nothing would have been easier than to have made the river the boundary line between the two parties, but he has not done that. Up, therefore, to the time of Christoffel's ownership of part of the farm Beeste Kuil, I think there is no doubt that Oot's Kraal beacon was the true beacon and boundary of this farm. I am not prepared to say, on this evidence, that there is no support for the contention that at no time afterwards did he dispute that beacon. It is no doubt unfortunate for plaintiff that Christoffel is dead, and several witnesses who might have thrown light on the subject have not been before the Court. The defendant has been in occupation since 1865 onwards. We have produced for the plaintiff, witnesses

who say that they saw a beacon at a place where no beacon has been seen by anybody else, and we have against that the fact that a beacon has always existed at the other corner. After Christoffel's death his widow took possession of his share of Kriegerspoort, and she immediately transferred it to her minor son, as she was about to enter into a second marriage with one Du Plessis. She was married out of community to Du Plessis, and consequently by the marriage Du Plessis took no interest in the farm itself, or in the life interest in the farm which his wife had reserved to herself, and, therefore, it is quite fair to contend that Du Plessis was not in the position of a person who can bind the owners of the farm; but his conduct is important, as showing what the persons who were interested at that time considered to be the true beacon line. While the property was still in the hands of the son, the line now claimed by the defendant was fenced some 12 or 13 years ago, and Du Plessis actually paid half the cost of fencing that land. The line now claimed by the defendant had been fenced when the plaintiff bought in 1900, and it has continued so fenced ever since. After briefly sketching the principal points in favour of the contentions of the respective parties, His Lordship added: I do not decide this case altogether on the question of prescription, although I think on the question of prescription a strong case has been made out. I may say that the evidence of long user and occupation is so strong as to show that there is no reason why the past occupation should be interfered with. I, therefore, on the whole case, hold that the defendant has succeeded in this matter, and judgment will be given in his favour, with costs, and on his claim in reconvention I declare the boundary line, A D C, shown on Surveyor Murray's plan marked "a," and dated May, 1905, to be the true boundary line between the farms.

On Mr. McGregor's application, defendant was granted his expenses as a necessary witness.

[Plaintiff's Attorneys: Syfret, Godlonton and Low; Defendant's Attorneys: Herold and Gie.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

HAYES V. RHODDIE.

{ 1905.
Oct. 24th.

[This case not having been concluded at the time of going to press, the report is necessarily held over.—S.H.R.]

JUTA AND CO. V. DRUMMOND.

Mr. Jones moved, as a matter of urgency, on behalf of Messrs. J. C. Juta and Co., for leave to attach the proceeds of a certain judgment of the Supreme Court given in favour of Hillyard Home Drummond.

The applicant's affidavit stated that the defendant owed him £40 16s. 6d., and that the defendant had been granted £80 damages against one Percy Bailey during the week, and the present application was to attach the amount owing from the damages awarded.

Hopley, J., said one of the exhibits of the case was an assignment of any judgment received to his attorney for value received. It was a very peculiar assignment.

Mr. Jones: It is peculiar, when he cannot pay his just debts.

A rule nisi calling on Bailey and his law agent and Drummond to show cause why the amount should not be attached was granted, the return day being fixed for November 2.

Postea (November 2nd).

Mr. P. & T. Jones for applicants; the respondent Drummond appeared in person.

Dr. Greer (for Bailey) said that he appeared merely to submit to any judgment that the Court might give.

Mr. P. Jones read an affidavit by the petitioners, in which they said that they had obtained judgment for £46 against respondent in the R.M.'s Court at Wynberg.

Respondent read an answering affidavit, in which he set forth his position at considerable length. He declared that petitioners had promised to renew a certain promissory note.

Mr. Jones read a replying affidavit by the petitioners.

Respondent said that there were only two courses open to him to carry forward the actions which he had against Bailey and Wood. He had either not to meet these accounts, or he had to sue *in forma pauperis*. Respondent proceeded to argue the question of whether he could have assigned his rights in regard to certain actions to his attorney, and cited certain English cases. He said that he had had actions against others in the Supreme Court, but in the meantime his creditors had sued him in the Magistrate's Court. Hence his present financial difficulties.

Without calling upon Mr. Jones.

Buchanan, A.C.J., said that the rule would be made absolute, and the property declared executable to the judgment obtained in the Magistrate's Court by applicants against respondents. Costs were allowed to Bailey and Jones.

BOSWARVA V. PALMER. { 1905.
Oct. 24th.
" 25th.

Commission—Conditional promise to pay.

This was an action brought by Charles John Boswarva, who resides at Observatory-road, against Charles Thomas Palmer to recover £100, amount due on a written undertaking.

The plaintiff's declaration stated that in April, 1903, the defendant agreed to pay to plaintiff £100, if he (plaintiff) could arrange for the sale of certain premises to defendant, occupied by one MacLeod, for £4,000, and arrange for a bond to be passed on the property for £3,500. The defendant then became liable to plaintiff for £100, and, not having it then, gave a written undertaking to pay it within six months, which he had not done.

The defendant's plea alleged that plaintiff was acting as agent for MacLeod, and effected the sale of the property to defendant, for which service he received £100 from MacLeod. He denied that he agreed to give plaintiff £100. He admitted that he promised plaintiff £100 if he could effect a bond for £3,500, but he denied that plaintiff had done so.

The replication denied that plaintiff was engaged by MacLeod, but admitted that he received £100 from MacLeod.

Mr. Searle (with him Dr. Greer) was for plaintiff; Mr. W. P. Buchanan (with him Mr. Jones) was for defendant.

The plaintiff stated he was a builder and contractor and speculator. In April, 1903, the defendant approached him, and asked him to purchase MacLeod's property for him for £4,000. He told him that he had only £700 cash, and that it would be necessary to arrange for a bond of £3,500, and told witness that if he could raise it he would pay him £100. Witness succeeded in getting MacLeod to sell the property for £4,000, and also arranged the bond for £3,500. MacLeod promised witness £100, provided he could get the sale fixed up within a fortnight. He did so, and got the £100. As the defendant did not arrange about the bond in time, the arrangements fell through, and defendant at witness's suggestion took a partner into the property. Witness arranged a bond later on for £2,400. Witness then asked for his £100, and defendant informed him that he was hard pushed for money, and told witness he would pay him later on. Witness went on a trip for six months, and returned for six weeks, during which time he again asked for the money. Witness again went away for six months, and on his return heard that defendant had got an inheritance. He again applied for the money, but, receiving no reply, put the matter in the hands of his solicitor. Van Reenan

(defendant's partner) told witness that he had nothing to do with the promissory note.

Cross-examined: MacLeod did not give the £100 as brokerage; he gave it as a present. Witness denied that he showed defendant his property, and suggested his buying it. Witness told defendant that MacLeod had promised him £100. All was put down in black and white. "They" were to get 2½ per cent. for raising the money and stamps, etc.—the usual thing.

Mr. Buchanan: And what were you to get your 2½ per cent. for?

Witness: For introducing them to the firm.

Mr. Buchanan: So you were to get £100 for taking him to see your conveyancer, and saying here is a man who wants so and so?

Proceeding, witness said that he had had nothing to do with raising the mortgage. He had not known that Mr. Hofmeyr valued the whole property at £3,700, and that only a portion of the land had been sold to Palmer for £4,000. The bond was "fixed up" before Palmer signed the deeds.

[Hopley, J.: Are you disputing that they agreed to lend the money?]

Yes, they were never satisfied with the security.

[Hopley, J.: And that part of the work for which he claimed £100 was never done]

That is my contention.

Witness (continuing) said he would be greatly surprised to hear that when witness was trying to get the loan of £3,500, Silberbauer, Wahl and Fuller were trying to get a bond of £2,450. Witness knew nothing of Silberbauer, Wahl and Fuller's endeavours to get the bond. Witness denied that he told Palmer he could get money when others could not.

Mr. Buchanan: You were confident you could get it?—I was confident when Mr. Partridge told me he had it.

You are a business man, and you know that people could not get the full value of a place as a mortgage?—Money was very plentiful then.

[Hopley, J.: Do you mean to say that people would advance 35-37ths of the money?]

I know many instances, my lord.

Mr. Buchanan: How is it you took so long to bring this action?—I was away for twelve months.

How long has Partridge gone?—I cannot say.

[Hopley, J.: Is this Partridge the man about whom one sometimes reads in the newspapers of his disappearance?]

Witness: Yes, my lord.

Mr. Buchanan: Isn't it because Partridge has disappeared that you bring this action?

Witness: If Partridge was here, there would be no action.

Mr. Buchanan: That's what we say.

The witness added that after his return to Cape Town he heard that defendant had inherited £4,000, consequently he thought it time defendant paid up. Continuing, he said it was the intention that the £500 was to be paid on June 30, and as it was not forthcoming by July 14, the arrangements fell through.

Wasn't it on account of the absence of one of the partners in the property that the arrangements were delayed?—No. It was because the money was not forthcoming.

After that, didn't you suggest to him that he should take in Van Reenan?—No. I advised him to take in a partner. Continuing, witness said he did not know if Silberbauer, Wahl and Fuller charged anything for preparing the loan.

Hector McLean MacLeod, shipwright, stated he was owner, in common with one Mr. Keswick, of the property which was the cause of the present dispute. The plaintiff had never acted in the matter for witness; he had gone to witness and informed him that he had a purchaser for the place at £4,000. Witness wanted £4,300, but consented to accept £4,000. Witness promised plaintiff £100 if he succeeded in selling the property. Witness mentioned the matter in a general way to Palmer.

In cross-examination, witness stated he purchased the property for £4,800 about twelve months before he sold to defendant. He kept a couple of blocks of land. Palmer asked witness for time to pay, and witness gave his assent.

Edgar Jones, attorney, of Messrs. Fairbridge, Arderne and Lawton, stated he conducted certain correspondence with Silberbauer, Wahl and Fuller on behalf of Mr. MacLeod.

Mr. Searle closed his case.

For the defence,

Andrew Chatterton Fuller, of the firm of Silberbauer, Wahl and Fuller, stated that in April, 1903, Mr. Partridge was in their employ, and had charge of this case. Witness knew nothing of the present case, but put in the correspondence. If the papers for a loan were drawn up, and Palmer failed to avail himself of it, he would be charged with it. There was no charge recorded in the firm's accounts against him.

[Hopley, J.: What has become of Partridge?]

Witness: I do not know, my lord. He suddenly disappeared. We have heard that he was seen in London.

[Hopley, J.: Was there anything irregular about his books, papers, or money matters to account for it?]

Witness: Certainly nothing to cause his disappearance.

The witness (continuing) said Palmer was only charged the fees for arranging the loan.

In cross-examination, witness said the whole of the arrangements for this loan would have been put through without the firm being consulted. He wrote letters on behalf of the firm. The correspondence appeared to indicate that Partridge had made arrangements for the loan.

Witness, in re-examination, said he would not grant 35-37ths of the valuation of a property on first mortgage.

Johannes E. Neethling, of the firm of J. J. Hofmeyr and Sons, sworn appraiser, valued the property at £3,700. Boswarva called on witness, and accompanied him to Messrs. Fairbridge, Ardenne, and Lawton's office, where witness informed him that he was acting for Van Reenen. Witness had considerable experience of advancing money. It would have been impossible to get a £3,500 bond on the £3,700 valuation. After a conversation between Boswarva and Palmer, witness was instructed to send a cheque for £60, as commission for the loan.

In cross-examination, witness said he did not personally make the appraisal. At that time the money market was much easier than it was in August. People were lending their money very recklessly.

In reply to his lordship, the witness said the valuations at that time were greatly inflated.

In further cross-examination, witness admitted that his firm were looked upon as very cautious valuers. In September, witness's firm conducted a sale of stock for defendant. The net amount realised was £481 17s. At the time of the transfer, witness advanced the money, which the defendant subsequently repaid.

Charles Thomas Palmer, the defendant, stated he was now a farmer in Bechuanaland. In April, 1903, he was a cartage contractor at Observatory-road, and hired stables from a man named Hartley. Witness had to vacate these stables. Witness was approached by plaintiff, who showed him some of his own places. The property was purchased from McLeod on May 27. Witness signed an agreement to pay him £100 if he raised the money. Witness knew nothing about plaintiff getting £100 from McLeod at that time.

Plaintiff asked witness what amount he could pay down and he replied £500, without crippling his business. Witness went and saw McLeod on June 30, and McLeod asked to allow the matter to stand over pending the signing of the transfer by Keswick. Witness met the plaintiff on the Parade shortly after, and he told witness that the attorneys would not accept the money, as witness had been late in paying the £500. Witness and Van Reenen saw Boswarva later on, and told him that as he had failed to raise the loan the note was valueless.

In cross-examination, witness said he was not very anxious to get McLeod's place when he met Boswarva. Boswarva took witness to see Partridge on May 27. Boswarva told witness that he was not a broker.

A. G. van Reenen, butcher, Observatory, said he was part owner of the premises. In witness's presence Palmer told Boswarva that the matter of the commission had fallen through, as Boswarva had failed to raise the money.

Mr. Searle, having been heard in argument on the facts, his lordship, without calling on Mr. Buchanan, said he was not satisfied that the claim had been proved. It was quite clear that the plaintiff had done considerable work in bringing about this sale, but for those services he had been paid handsomely by Mr. McLeod. It appeared from the evidence that they had been to Partridge before the promissory note was signed, and he appeared to have given a loose promise to arrange a bond, and that he would be prepared to advance £3,500, trust moneys. In consequence of what was then said and the arrangement with Partridge, the note was signed. It was therefore an agreement to pay £100 to plaintiff in connection with having rendered services for raising the bond. Now, the question which arose was, what did that document mean, and had any work been done by plaintiff in connection with it? It seemed to the Court that the document ought to mean: "If you succeed in raising £3,500, I will pay you £100." That would have been the ordinary commission, and a little more. It had been said that through the defendant's neglect of his obligations that it had not gone through. The Court did not agree with that. Before the Court could agree with the case made by the plaintiff, it would want him present to explain some of his letters. Instead of suing Palmer at once for the amount due, the plaintiff advised him to get in a partner, and then tried to include him in the liability on the note. Possibly, if Partridge had been present, and been cross-examined, he might have been able to throw considerable light on the case, but in the absence of such evidence, his lordship thought the proper judgment in the case was absolution from the instance, with costs, so that if at some future time plaintiff had any further evidence to bring forward he could still bring an action.

Mr. Buchanan inquired what was to be done with regard to the provisional sentence.

Hopley, J., said the defendant would get his money back, and would have to pay all costs.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

LEWIN AND ADAMSTEIN V. } 1905.
ESTERHUYSE. } O. t. 25th.
" 26th.
" 27th.

This was an action brought by Messrs. Lewin and Adamstein to recover possession of portion of the farm Middleplaats, Laingsburg, from Willem S. Esterhuyse, and damages fixed at £100 for injury to the pasturage.

The plaintiffs' declaration stated that they had purchased the farm in question. Defendant had possession of a certain portion of the farm, which he refused to give up.

The defendant's plea stated that he obtained a ten years' lease of the portion of ground in question after the death of his uncle from his aunt, who was executrix in the estate, and had a usufruct interest in the farm, and that the plaintiffs were aware of the existence of this lease when they purchased the farm.

The plaintiffs denied that they knew of the existence of the lease, and added that, even if the aunt had given the lease, she could not grant it to operate after her death.

Mr. J. E. R. de Villiers for plaintiffs, and Mr. Close (with him Mr. Roux) for defendant.

Mr. De Villiers submitted that the burden of proof was upon defendant. Hopley, J., agreed.

The defendant stated that he lived on the farm Middleplaats, in Laingsburg. It formerly belonged to his uncle, W. J. Lourens, who died about ten years ago, and left a will, in which his wife was appointed executrix. She remained in possession of the farm. About ten years ago witness wanted a place to farm, and he stopped at this farm Middleplaats with his aunt. He arranged with her to get a part of the farm to cultivate, with the right to graze 50 head of cattle. For two years he was to get it for nothing and then he was to pay £7 per annum. His aunt's son knew of the agreement, and measured out the ground. Part of the ground was overgrown with mimosa bush, and he had improved the place very much, the value of the improvements being estimated at about £500. For two years he worked at the farm, and then there was a written agreement, which was handed to a Mr. Walters and lost. Under the contract, the original conditions were put in writing, and witness got the ground for ten years at £10 a year. He heard the auctioneer announce the existence of the lease in the presence of both plaintiffs when they purchased the farm.

He denied that he showed anybody the lost contract about four years ago. It was not correct to say that "Gouws" told him the contract was worthless. Witness denied that he asked "Gouws" to get the old lady to give him a new contract the day before the sale. The old contract was lost by a Mr. Walters. Witness could not state definitely when he gave it to him, but he took it to him to have some point explained. The declaration was signed on the morning of the sale. "Gouws" accompanied witness. If "Willem Baard" said that this was the first time he had seen the lease it would not be correct. Mr. De Wet would not be correct if he denied that in the conditions of sale mention was made of witness's lease.

Hendrik Thos. Greeff, farmer, stated his farm was near the defendant's. Witness was for some time partner with Mr. Walter. Witness was in the office when the search was made for the old lease. Willem "Zwart Baard" and Gouws Esterhuyse, called at the office for it. Witness was consulted about the stamps. Witness was at the auction when the conditions of sale were read, and the fact of the lease was mentioned.

Evidence was given by a local farmer, who attended the sale to purchase the farm, but owing to the many conditions he did not do so.

Johannes David van der Muller, a farmer, stated that in June, 1904, he hired from the plaintiffs the farm Middleplaats. The agreement was in writing, and was duplicated. Before the lease was signed there was some difficulty experienced about the two pieces of ground which were leased.

Further evidence of a corroborative nature having been heard, Mr. Close closed his case.

Solomon Lewin, one of the plaintiffs, stated he resided at Laingsburg. Witness and his partner went to the sale of the farm. They did not go specially to buy the place. Witness bid £3,200 or £3,400 for the whole farm. Piet Esterhuyse might have been there, but witness did not see him. Witness stood about 30 yards away from the auctioneer.

[Hopley, J.: I suppose your business is to buy if you see a thing going cheap?]

I did not go there with the intention of buying. I know the reserve price, and I just bid up to £3,000 for it.

Mr. De Villiers: What was the highest bid?

£4,500 by a Mr. Woolfaardt.

[Hopley, J.: And what was the reserve?]

£6,000.

[Hopley, J.: If you had no intention of buying, why did you go there?]

Because I knew the people, and it was a nice drive.

The witness stated he could swear positively that he knew nothing about

the ten years' lease. Witness entered into a lease the following day for the farm. Nothing was said about the ten years' lease at that time. Witness inquired if Piet Esterhuyse and Wilmott, the holders of portion of the farm, were willing to give up their share. Witness asked what Willem Esterhuyse was doing there, and the sons replied that he was doing nothing there, and could be kicked out at any time. The contract was signed, and witness let the farm to Van der Muller. When witness signed the contract to the latter, he did not know that anything was said about Willem Baard's holding. Witness did not read the contract, which was drafted by his agent. Witness intended having a dorp at Piet Esterhuyse's farm. Witness could not exactly remember when he first heard of the ten years' lease, but he thought it was about three weeks after he took the farm over. Willem went up to witness, and said, "I hope you won't charge me too much for the farm." Witness told him to call and see him, but he never did so. In September, witness bought the farm for £4,000. Nothing was said about the ten years' lease. The sale and transfer were unconditional. Transfer was effected on January 14. After witness bought the farm, he told defendant he had bought the farm, and asked him what was up that he did not go in to settle matters up. He said he had a contract, and at witness's request promised to show it to him, but he had not done so. Witness sold the farm to Mr. Solomon. They had not passed transfer, because Solomon refused to go in for the farm, because Willem was in possession. They were to get £5,500 for the farm.

[Hopley J.: You were to get £1,500 profit?]

Witness: I did a number of alterations to the farm.

Witness (continuing) said Solomon withdrew from the sale.

[Honley, J.: I suppose you told Willem Baard that you would hold him liable if the contract was held good.]

Witness: Yes, my lord.

[Hopley, J.: I suppose you or your agent wrote to them and would hold them liable?]

I told his brother that I could not understand what was wrong with Willem.

Witness denied that he told Van Muller that he could not let him have Willem's portion of the farm. Witness wanted it for the purpose of levelling it off. If witness had had the farm they would have made money out of it. Defendant's brother, who was a sublessee, had been using the farm.

In cross-examination defendant said he had not thought of the dorp when he went to the sale. Witness did not believe Willem's contract was signed before the day witness leased the farm.

The place Willem now had was worth £50 a year to witness.

Supposing I came to hire the farm from you, what would you charge me? —I don't know.

He had not yet begun to level the ground of Willem Zwaart Baard. Witness asked several times for the contract, but he could not get it. Witness was plaintiff in the case of Lewin and Grooff, in which he claimed, in addition to the farm, another section on which a man named Marais was permitted to live. He never warned Marais to leave, and the Court held that he had not purchased the section.

Re-examined by Mr. De Villiers: If he ever told Willem Baard if he lost this case he would sue him, it must have come out by "mistake"; he never remembered saying it.

Jacob Adamstein, partner of the last witness, corroborated Lewin on everything that transpired when he was present.

Cross-examined by Mr. Close: Witness had no intention of going up to £6,000, the reserve price on the farm. First of all, the auctioneer put up portion of the farm, and subsequently he offered the whole farm for sale. The conditions of sale were read, but witness did not hear the terms, and yet a bid was made for the farm. When they got the lease of the farm nothing was said of the old lease. He knew that Willem Zwaart Baard was on the farm, but he never told Baard to leave. He would not say that a respectable man like Van der Meulen would perjure himself, but he was trying to get it out of witness.

William Jacob Esterhuyse stated that under the will of his father the farm Middleplaats was bequeathed to him subject to a life interest to his mother. He disapproved of the lease given by his mother. That lease was only to last during her lifetime. While the auctioneer was reading out the conditions of sale, a dog fight took place, and it was difficult to hear.

Daniel Jacobus de Wet stated he was formerly an auctioneer at Laingsburg, and he put up the farm in question in April last year. He could not repeat the conditions of sale, which he might have destroyed when he left the office. He did not remember having mentioned that the farm was being sold subject to an existing lease to Esterhuyse. Witness took it to be a clean sale of the whole farm.

Cross-examined by Mr. Close: He did not suggest that Esterhuyse asked him to come to the court to lie. The defendant said: "You are an Afrikaner, and you'll be on my side." He did not remember telling Nel that he read out the conditions of sale at the auction. He did not tell Jan Jacobs that he knew all about the lease on the day of the sale.

The next witness, Gordon, who read out the conditions of sale, said he did not remember reading anything about the ten years' lease.

Counsel for the plaintiffs having been heard on the facts,

Hopley, J., without calling on counsel for the defendant, gave judgment for the defendant, with costs. He believed that the document, which was drawn up about the ten years' lease, was intended to be used at the sale. His decision did not rest on the evidence of the defendant himself, but upon the probabilities of the case, and the direct evidence of other witnesses. The plaintiffs, he could not fancy, purchasing anything without knowing the conditions. The lease was a perfectly bona fide one, and he believed it was entered into for valuable consideration.

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

PROVISIONAL ROLL.

SOUTH AFRICAN PRODUCE, { 1905
WINE AND BRANDY COM- { Oct. 26th.
PANY V. RILEY.

Mr. Benjamin moved for the discharge of a provisional order of sequestration and for the application for the appointment of a provisional trustee to be struck off.

Order granted as prayed.

HARE V. HARTUNG.

Mr. M. Bisset moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

MOUILLOT AND DE JONG V. KOENIG.

Sequestration, compulsory—Ord. 6 of 1843, Sec. 5.

A creditor cannot oppose the compulsory sequestration of the estate of an insolvent debtor on the grounds that he has no security for his debt, that he is

willing to give time and that the time is inopportune for realizing the estate.

Mr. Burton moved for the final adjudication of the defendant's estate as insolvent.

Mr. Scureiner, K.C. (with him Mr. Upington), appeared for the defendant, and presented the petition of the Colonial Orphan Chamber and other creditors opposing the application.

Mr. Burton read the petition upon which the provisional order was granted, from which it appeared that there was a sum of £2,357 14s. 11d. due under a certain agreement, upon which judgment had been obtained. This judgment the debtor had been unable to satisfy. Goods of the value of £125 were pointed out to the Sheriff's officer but no other goods or chattels of the defendant were pointed out or afterwards found.

Mr. Schreiner, for the defendant, said that it was not denied that there had been an act of insolvency, but urged that it was not for the benefit of the creditors that the estate should be sequestrated. Counsel read a petition by the Colonial Orphan Chamber, the Siverlea Estate, and others, who said that they were unsecured creditors to the extent of £6,000 odd. Petitioners stated that the assets in the estate consisted only of landed property in Cape Town and Wynberg, which property was bonded to some of the petitioners, and in the present depressed state of the property market if sequestration was forced the property would be sacrificed.

Mr. Upington also read an affidavit by the defendant, Julius Koenig, merchant, Cape Town, in which he said that the petitioners claimed £1,650 under a partnership between Frank de Jong and Frederick Mouillot. Defendant entered in detail into his relations with the partnership, and with the Bank of Africa, who, he said, had brought about his present difficulties by discontinuing to finance him.

Mr. Burton read an answering affidavit by Mr. James Murray Wilson, who said that the applicants had received nothing on account of the partnership, and, as a matter of fact, had to meet liabilities of the partnership owing to the default of the respondent. He submitted that no ground had been shown by the other side why the provisional order of sequestration should not be made final. Counsel also read affidavits by Mr. Mullins, general manager of the Bank of Africa, who said that the bank repudiated the claim made by respondent, by Mr. W. A. Hofmeyr, of the firm of Messrs. Tredgold, McIntyre and Bisset, applicant's attorneys; and by the Sheriff's officer, who went to Koenig's premises to levy execution.

Mr. Uppington read a replying affidavit by the defendant.

Counsel having been heard in argument,

Buchanan, A.C.J., said the applicant in this case was executor testamentary of the will of the late Frank de Jong, who obtained judgment against the defendant for £2,357, and a return of *nulla bona* was made. In so doing, the defendant committed an act of insolvency. The question before the Court was whether that should be made absolute or not. The opposition to making the rule absolute was made wholly on the allegation that it would not be to the benefit of the creditors to sequester the estate. The part of the ordinance on which the application was based gave the right to a creditor, who could not get his demand satisfied to place the estate under compulsory sequestration. A creditor applying for the compulsory sequestration of an estate must be able to show that the liabilities exceed the assets, and that the sequestration would be for the benefit of the estate. In the present case certain creditors had joined in the opposition to the sequestration, and the only grounds they could bring forward were that they were unsecured, and were willing to give time for the payment, and that owing to the state of the market the present was not a good time to realise the estate. No creditor was bound to give time. He was entitled to payment. His Lordship could not find any good grounds to base the refusal of the application on, and the judgment of the Court would be for the final adjudication of the estate, with costs.

STANDARD BANK V. HOTZ.

This was an application for provisional sentence on a promissory note for £3,578 10s. 5d., made by the defendant in favour of Israelsohn Bros., payable at the Standard Bank, Oudtshoorn, for value received, dated August 18, 1904, and payable six months after date. The summons, was for the balance of £3,758 10s. 5d., less £200 10s. 5d. paid on account.

The defendant's affidavit stated that he admitted that the signature to the promissory note was his, and that the said note had been reduced by payments amounting to £200 10s. 5d. Defendant went on to say that certain bills discounted by Israelsohn Bros. had been forged, and that he agreed with the bank manager at Oudtshoorn to retire the bills in order to prevent the arrest of and criminal proceedings against his brother-in-law, Meyer Israelsohn. He guaranteed an overdraft, and passed a promissory note for £3,578 10s. 5d., but said that the note was given to the plaintiff bank without consideration, or for immoral

consideration. He also said that Meyer had been convicted of forgery at the Circuit Court on the 26th September.

The answering affidavit of Jacobus Johannes de Kock, now of Malmesbury, and formerly manager of the Standard Bank, Oudtshoorn, denied that he had promised not to prosecute Meyer Israelsohn. He said that the firm of Israelsohn Bros. were allowed a certain overdraft subject to a guarantee being provided. Mr. de Kock entered at some length into the whole matter of Meyer Israelsohn, and the bills alleged to have been forged by him and, as to defendant's association with the case, he said that he agreed to sign the promissory note and a guarantee for £880. During all the time there was not any question of compounding or compromising any crime.

Sir H. Juta, K.C. (with him Mr. Searle, K.C., and Mr. Uppington) for defendant; Mr. Schreiner, K.C. (with him Mr. Gardiner) for plaintiff.

Sir H. Juta submitted that this clearly was not a case for provisional sentence, but one in which it would be necessary for the plaintiff to go into the principal case, so that witnesses might be heard, and especially the evidence of Mr. De Kock, in view of the affidavit which he had filed in these proceedings. For practical purposes, the note and guarantee upon which the defendant was sued referred almost solely to the documents alleged to have been forged. The question to be determined by the Court was whether the note and the guarantee given in the month of August, 1904, were founded upon an improper and immoral consideration. Counsel submitted that a man who was in the position of Mr. De Kock, the manager of a branch in the country, who had made heavy advances to Israelsohn Bros., would move heaven and earth to do everything to put himself right with his general managers, and with the directors of the bank, in trying to retrieve the situation and getting money so that the indebtedness of Israelsohns might be paid. Mr. De Kock gave an explanation which was too ridiculous. He said that he told Israelsohns that he would sequester their estate. What was Hotz to get from this business? Why should he undertake this enormous liability if it were not to save his brother-in-law from being prosecuted? Quite naturally, when his brother-in-law was prosecuted, he refused to pay the promissory note. Counsel urged that the whole of the circumstances were consistent with the explanation given by the defendant as to how he came to pass the promissory note. Sir Henry cited the case of *Harris v. Krige's Executors* (2 Juta, 399).

Mr. Schreiner contended that this was eminently a case in which provisional sentence should be granted. It seemed

to him that this was one of those cases in which a little knowledge was a dangerous thing. Mr. Wiggitt, defendant's adviser, had had the case of *Harris v. Krige's Executors* in his mind. On the probabilities, the version of facts given by the defendant was not the correct one. A letter was written on February 3 by the defendant to the general manager of the bank in Cape Town, and it was incredible that if defendant had been induced by threats to act in the way he did, and by promises which had been broken, he should have written that letter when proceedings were pending. In that letter he said he was informed by the local branch manager that he was prepared to grant him (Mr. Hotz) an extension of time on his lodging security to the amount of £3,000, and passing a second mortgage. This he (defendant) was not prepared to do. He said that had he not come to the assistance of Israelsohn Bros., the bank would have lost considerably more than it had done. Having saved the bank a large amount, he thought that some consideration was due to him. Counsel asked whether that letter indicated the least objection on the part of the defendant towards the bank or the representative of the bank. He submitted that there was nothing whatever to show that the defendant was induced by the threat to pass the promissory note, except the improbable story given by the defendant himself. The whole case was one of vigilance by the local manager of the bank, and nothing more. The plaintiffs were entitled to provisional sentence, and the defendant, unless he could make out some better case, must pay the promissory note. As to the case quoted by his learned friend, he submitted that it differed in material respects from the present case.

Sir H. Juta having briefly replied, Buchanan, A.C.J., said: This is an application for provisional sentence upon a liquid document, a promissory note signed by the defendant, and now overdue. The genuineness of the note is not in dispute, but the defence set up is that there is no consideration, or rather that the consideration for the note was immoral, viz., that the note was given to retire forged notes and to prevent prosecution of the person who had committed forgery. I may say at once that, if this had been clear, I think no Court would have the slightest hesitation in holding that this was an immoral consideration, and that a note given for such consideration could not be sued upon. The law is quite clearly laid down in the case of *Harris*, which has been referred to. In the case of *Harris* there is no doubt that the person who took the note, viz., the bank manager, knew that the consideration for which he took the note was a forged note. I quite agree with Sir Henry Juta that even in this case, if

the bank manager knew that the notes were forged, the case of *Harris* would apply, but I must look at all the circumstances to see whether that is the case or not. At the time this note was given, Israelsohn Bros., the brothers-in-law of the defendant, had large discounts with the Standard Bank. Some of these documents were due, others were falling due, and one thing that may well create suspicion upon these notes is the fact that these notes, which the defendant signed, were not due at the time of the transaction in dispute. On looking at the affidavits I find that it is stated that the defendant in this case, together with his brother-in-law (Israelsohn), called at the bank and asked the bank to be lenient with Israelsohn Bros. This statement is not denied. Now it may well be that Israelsohn wished to have these notes, which were forgeries, and which afterwards led to his conviction for forgery, removed from the bank, and that this knowledge may have been imparted to the defendant, Hotz, without being imparted to the bank manager. If, from other circumstances, I could gather that the bank manager knew that these notes which he wished to be retired were forged, I should certainly refuse provisional sentence in this case. The notes were not retained by the bank, but given over to Hotz, and how they were given over to the Court in the criminal case is not made clear. Here is the bill signed by Hotz in favour of the bank on the 18th August. What is the conduct of Hotz? After the bill is given and before it is due, or rather when it is falling due, there is a communication with the local branch manager and with the head manager, with the object of getting time allowed in which to meet the liability which is undertaken. Israelsohns were even then threatened with a prosecution for fraudulent insolvency. I do not think that it is clear that a definite charge of forgery was laid. The defendant does not in any way suggest, either in his communication with the branch manager or with the head manager, that he should have special consideration for the character of the debt, being such as it was, a knowledge that forged notes were being taken up. Moreover, he makes a payment in February of £100, with interest due upon the bill, and he makes a similar payment also in March. He passed a mortgage bond, which is still in existence against his property, covering this bill. This mortgage bond is still registered, and there has been no attempt to set it aside. It was not until afterwards, when criminal proceedings were taken, that through his attorneys he alleged that it was an immoral consideration. On the 18th April, through his attorney, he called upon the bank at once to cancel the

bond and give up the guarantee he had given, and also to give up the note, and said that, unless they did so within ten days, he would take proceedings to compel them to do so. He did not take proceedings. When it became known that there was to be a criminal prosecution, one can quite understand that the defendant especially should not take proceedings until that question of forgery should be disposed of by the Court, and it might also to some extent explain the delay of the bank. The whole point I have before me is, that here is a liquid document—a genuine document, admittedly due secured by a mortgage bond—upon which payments have been made from time to time by the defendant. The defendant now repudiates his liability upon this bill, and says it was given for an immoral consideration. Now the immoral consideration has not been shown to have been known to the bank at the time the note was given. I cannot on the affidavits come to the conclusion that the bank knew that it was an immoral consideration. The bank gave consideration for this note. The defendant must, as far as the bank is concerned, pay the debt. On the ordinary principles which govern provisional sentence, I think the plaintiffs are entitled to succeed, and provisional sentence will be given accordingly, with costs.

PAARL BOARD OF EXECUTORS V. SILBERT.

Mr. M. Bisset moved for provisional sentence for £2,800 upon a mortgage bond, with interest at the rate of 6 per cent. per annum, the bond having become due by reason of the non-payment of interest; the counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

PURCELL V. LUBBE AND OTHERS.

Mr. De Waal moved for costs, the interest sued for having been paid.

Order granted for costs.

GROENEWALD V. DEYDIER.

Mr. De Waal moved for provisional sentence for £250 on certain conditions of sale, being second instalment of purchase price of certain property at Caledon.

Order granted.

VAN WYK V. LLOYD.

Mr. Roux moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court.

Decree granted, execution to be stayed upon payment of £1 a month.

AFRICAN HOMES TRUST CO. V. BOYCE.

Mr. Long moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court.

Decree granted.

MARTIN V. VAN RENSBURGH.

Dr. Rainsford moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court.

Decree granted.

SLADE V. JENKINSON.

Mr. Wright moved for provisional sentence upon two bonds amounting to £275, due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

VAN LILL V. HOLM.

Mr. M. Bisset moved for provisional sentence for £114 14s. 6d., balance of a cheque.

Defendant said that he had paid £200 off the cheque, and he disputed the balance. He applied for a postponement in order to get together his witnesses, who were scattered about the country.

Ordered to stand over for a fortnight. Buchanan, A.C.J., advised defendant to consult an attorney and file his affidavits within seven days.

ILLIQUID ROLL.

WATSON V. STEER. { 1905.
{ Oct. 26th.

Mr. Gardiner moved for judgment under rule 319 in terms of a declaration for an account, debate, judgment for such sum as may be found to be due, and delivery of documents, or, in the alternative, for payment of £507 3s. 9d.

Judgment in terms of declaration, subject to production of affidavit that notice of set-down had been served, account to be filed within one month, failing which alternative prayer to be granted.

SMITH V. JONES.

Mr. Van Zyl moved for judgment under Rule 319, in terms of a certain declaration.

Order granted as prayed.

GLIDDON AND ANOTHER V. ABLETT.

Mr. Gardiner moved for judgment under Rule 329d for £41 14s. 6d., balance due for disbursements and professional services.

Order granted.

MAHOMED V. SCHMILT.

Mr. Swift moved for judgment under Rule 329d for £30, rent due, with interest *a tempore morae* and costs.

Order granted.

WITTSTOCK V. SMART.

Mr. Payne moved for judgment under Rule 329d for £37 6s. 5d., goods supplied, with interest *a tempore morae* and costs.

Order granted.

NETHERLANDS BANK V. FALSE BAY QUARRY.

Mr. De Waal moved for judgment against Teechert (a member of the company) under Rule 329d for £425 8s. 1d., less £100 paid on account, balance of loan or overdraft, with interest and costs of suit.

Order granted.

ESTATE THIEN V. SCHNEIDER AND BARSDOFF.

Mr. Douglas Buchanan moved for judgment under Rule 329d for £1,700, balance of purchase price, under certain conditions of sale, with interest and costs.

Order granted.

PAARL AFRICAN TRUST V. DU PRE.

Mr. De Waal moved for judgment under Rule 329d for £210, being interest on £3,500 capital of a certain mortgage bond, and for interest *a tempore morae* and costs of suit.

Order granted.

BENSIMON V. HUTCHINSON.

Mr. Sutton moved for judgment, under Rule 329d, for £111, with interest *a tempore morae* and costs.

Order granted.

MACLEOD V. JACOBS.

Mr. Bailey moved for judgment, under Rule 329d, upon an account for professional services rendered and disbursements made.

Order granted.

CAPE TOWN TOWN COUNCIL V. PLOCKY.

Mr. Gutsche moved for judgment, under Rule 329d, for £70 19s. 9d. and £32 10s., municipal rates and water supplied.

Order granted.

DE VILLIERS V. BAUMGARTEN.

Mr. P. S. T. Jones moved for judgment, under Rule 319, for £9 0s. 6d., professional services rendered, with interest *a tempore morae* and costs.

Order granted.

ST. LEGER AND WILSON V. BONCKER.

Mr. M. Bisset said that the defendant had failed to file a plea within the time allowed, and he (counsel) now applied for judgment in terms of declaration.

Order granted.

MOTIONS.

CAPE TOWN TOWN COUNCIL } 1905.
V. MILLS. { Oct. 26th.

Mr. Schreiner, K.C. (with him Mr. Searle, K.C.), was for the applicants (defendants in the action). Sir H. Juta, K.C. (with him Mr. Benjamin), was for the respondent (plaintiff in the action).

Mr. Schreiner moved for leave to take certain evidence on commission. The case, he said, had been set down for the 7th November, but as there were several cases on the list which had priority on that date, it seemed very unlikely that this case would be reached. The action (counsel said) concerned the liability of the Council for a slip of mud or earth on the other side of the Lion's Head, beyond Clifton.

The case was set down for hearing on the 5th February, His Lordship remarking that there were no less than seven cases set down for the 7th November.

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

SHARPE V. SHARPE AND { 1905.
VENN. { Oct. 27th.

This was an action brought by Archibald John Sharpe, of Woodstock, against his wife, Elizabeth Jacoba Sharpe, of Salt River, on the ground of her alleged adultery, with one George Venn, against whom damages in the sum of £500 were claimed.

Plaintiff, in his declaration, said that he was married to the first defendant in Cape Town on the 22nd September, 1896. He alleged that on divers dates, in September and October, 1904, at Regent-street, Woodstock, and other places, the first defendant committed adultery with the second defendant. He claimed, as against the first defendant, a decree of divorce and forfeiture of any benefits accruing from the marriage, and as against the second defendant £500 damages.

The first defendant in her plea denied the allegations of adultery, and prayed that the claim may be dismissed.

Mr. Alexander appeared for the plaintiff; Mr. Lewis appeared for the first defendant. As to the second defendant, it was stated that he was confined in Roeland-street Gaol for crime, and that a letter had been received from him, saying that he "pleaded not guilty in this case."

Wm. Thomas Birch, clerk in charge of the Marriage Register, Colonial Secretary's Office, gave evidence as to the registration of the marriage.

Archibald John Sharpe (the plaintiff) said that when he married defendant she was known by the name of Mrs. Fenton. They first lived in Chapel-street, until November, 1899, when witness left his wife on account of the scandalous way in which she had acted. They went to Stellenbosch, and afterwards returned and lived together until November, 1901. Witness then went to Caledon to work on the railway, and subsequently to Simon's Town, his wife remaining in Aberdeen-street, Woodstock. Witness met Venn at Sir Lowry's Pass. Venn came to his house about the beginning of 1901, but after staying about a week, he went to Middeburg, and witness a little later went to Bloemfontein. Witness had allowed his wife £14 a month while he was at Bloemfontein. On his return in March, 1903, he found that his wife was occupying a room at 2, Goldsmith-road. There were two beds in the room, and when witness asked his wife whose bed the

second one was, she replied that it was "George's"—meaning George Venn. He asked her if she was a respectable woman to do such a thing, and she merely laughed, and said, "Oh, it's all right." He insisted upon Venn leaving the house, with the result that Venn went to Camp's Bay. After that witness's wife lived in Ormakirk-street, where, on several occasions, he found Venn in the same bedroom with her. He remonstrated with his wife about her conduct. He continued to live with her for the sake of the two children—girls of 9 and 5 years respectively—but last year, becoming certain of the relations between the defendants, he left his wife. He desired to have custody of the two children, but admitted that he had not made a claim to that effect in his declaration.

Cross-examined: He was never a particular friend of Mr. Venn; they were workmates, having been employed on constructions together. There were three rooms and a kitchen in the house witness and his wife lived in in Ormakirk-street. Mr. Venn visited them at his wife's request. Mr. Venn slept two nights in the passage, and another night he slept in the same bedroom as witness and his wife but that was without witness's permission. Witness was now living at Tennyson-street, the house being kept by a nurse, who was divorced from her husband. He admitted having written the letter (produced) from Touws River, but said it was merely a bit of bluff, and that he had since then lived with his wife. He said in the letter that he had "got somebody else who was better to him." He merely wrote the letter in order to frighten his wife. "Mr. Shortle" had also slept in the same room as witness and his wife. There was a great dance party at the house the night Venn was arrested. Witness often watched the house.

Henry Oliver, fitter, Doune-street, Observatory, said that he remembered the two defendants occupying a room in Goldsmith-road, Salt River. He had seen the defendants together in the bedroom. He had stayed at the same house as the defendants in Devon-street and Regent-street, Woodstock, the defendants occupying one room. Mr. Shortle used to sleep in the same room as Mrs. Sharpe when Mr. Venn was away. During a great portion of the time plaintiff was absent up-country. Mrs. Sharpe often used to speak to witness about Venn, and had told him that she loved Venn, and that she was vexed because he had another young lady. Witness on one occasion paid a visit to Plumer's-road at Mrs. Sharpe's request, when he found Venn in the same room. They had a glass of wine. Witness had got no interest in the case, and had no ill-feeling against either of the defendants. He had seen Mrs.

Sharpe in bed with another man, but he was not sure that the man was Venn.

Cross-examined: It was not true that Mrs. Sharpe had given notice to witness to leave the house. Witness occupied the same room as a blind woman. He had never seen plaintiff, his wife, and Venn all in the same room. Witness had never seen any guilty conduct between the defendants.

Johanna Osborne, a nurse, living at Tennyson-street, Salt River, said that she had known the parties for some years. In October, 1904, Mrs. Sharpe came and asked her to lend her £5, in order to get Venn away to East London, so that he would be separated from a young lady, with whom he was in love. Mrs. Sharpe told witness that she was devotedly in love with Venn.

Herbert George Hunt, signalman, Salt River, also gave evidence for the plaintiff.

Elizabeth Jacoba Sharpe (the defendant) said that her husband brought Venn to the house in the first instance, and said that she must make room for him. Mr. Shortle, her brother-in-law, was at the house at the time. Venn afterwards went to Middelburg, and witness's husband later on left for Bloemfontein. Witness subsequently removed to Goldsmith-road, and while she was there Venn came down and asked if he could live with her. She wrote to her husband, and he consented to Venn occupying another bed in the same room. When plaintiff returned from up-country, they all slept in the same room. Shortle also slept in the same room, and plaintiff raised no objection. Later on witness removed to Ormskirk-street. Plaintiff deserted her on the 1st July last. Her husband slept away for about a month before he deserted her, and on his return in the mornings he used to tell her that he had been out gambling. Oliver was sleeping in the same room as the blind woman; he was her guardian—to spend her money. Plaintiff afterwards cohabited with witness in Plumer's-road. She denied that she had gone to Mrs. Osborne to borrow money, on behalf of Venn.

Cross-examined: Venn never occupied the same room as witness without her husband's "instructions." She thought Oliver had given this evidence because she had "chucked him out," and he had got spite against her.

Michael Shortle, brother-in-law of the first defendant, said he was in the house in Ormskirk-street in 1901, when plaintiff brought George Venn there. Witness and Venn slept on the floor, while plaintiff and his wife occupied the bed. Witness had never seen any guilty conduct between the defendants.

Cross-examined: Witness was a recruiting agent for native labour.

[Buchanan, A. C. J.: Your name is Michael Shortle?]

Witness: Yes.

[Buchanan, A. C. J.: You have been here before, I believe?]

Witness: Yes, and so has Sharpe, my lord; he's been convicted in this Court for stealing a box.

Josephine Maria Rix, daughter of the first defendant, also gave evidence.

Cross-examined: Witness was living with a man named Wessels, but she was not married to him.

Counsel having been heard in argument on the facts,

Buchanan, A.C.J., said that after their marriage, the parties had lived in a way that was, perhaps, not very much to be commended. There was nothing, however, to show that they lived unhappily together. The husband went to work at Caledon, on the railway, where he seemed to have made the acquaintance of a man named Venn, and when Venn came down, as he was a poor man, plaintiff gave him accommodation at his house. At that time he was only occupying one room in the house. Afterwards, when her husband had gone to Bloemfontein for work, his wife took in this man, and they lived in the same bedroom together when the plaintiff was away. He (the learned judge) did not see that there was anything on the part of the husband which conduced to this conduct on her part, and, in fact, misconduct on his part was not pleaded. A decree of divorce would be granted, and defendant would be declared to have forfeited any benefits accruing from the marriage in community. There would be no order as to costs. No judgment would be entered against the second defendant, Venn.

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

BOLDT V. BURGER ESTATES, { 1905
OCT. 30th.
LTD. " 31st.
NOV. 1st.

Contractor—Work done—Retention money—Damages.

This was an action brought by Fritz Boldt, engineer and contractor, Cape Town, against the Burger Estates, Ltd., to recover certain sums alleged

to be due upon a contract for the construction of an irrigation canal in the district of Robertson, and for damages.

From the pleadings, it appeared that a contract was entered into between plaintiff and defendants on the 9th April, 1903, whereby the former was to construct over the defendants' property a certain canal, watercourse, or furrow, and in a certain time, in the Breede River, in the district of Robertson, in consideration of the said work the plaintiff to be paid the sum of £4,750. Plaintiff said that it was a condition of the said agreement that he was to be paid fortnightly for the work as it progressed, that the defendants fell into arrear with their payments, and that finally, on the 26th December, 1903, owing to the action of the defendants, he was compelled to desist from work. He claimed (a) judgment for the sum of £100 13s. 2d., due for work which had been performed and had not been paid for by the defendants; (b) £159 10s. 6d., retention money; (c) £500 damages, by reason of the wrongful and unlawful conduct of the defendants and their breach of contract; (d) interest *a tempore morae*; (e) alternative relief; (f) costs of suit.

Defendants, in their plea, denied that the plaintiff had fulfilled his part of the contract, and said that certain work which he had done was inspected by Mr. Burger, who was appointed for that purpose, and was condemned. They said that the plaintiff had not been compelled to desist from work on account of their action, but that he ceased work entirely at his own instance. They denied that they were indebted to the plaintiff in the sums claimed, or any other sums. For a claim in reconvention, the defendants said that, owing to the wrongful and unlawful conduct of the plaintiff, they had been compelled to engage another person to complete the contract, and that they had had, as a consequence, to pay a total sum for the work of £5,500, or £750 in excess of the amount of the contract, and also that owing to Boldt's breach of contract, they had sustained damages in the sum of £250, as a result of the delay in completion of the work. Defendants (plaintiffs in reconvention) prayed for judgment in the said sums of £750 and £250, and costs of suit.

The replication was general, but as a plea to the claim in reconvention, the plaintiff (defendant in reconvention) said that he was in no way liable for the expenses incurred by the plaintiffs, and repeated that it was through the wrongful and unlawful conduct of the plaintiffs in reconvention that he was compelled to desist from the work. He denied that the plaintiffs in reconvention had sustained any damages through any default on his part, and

prayed that their claim may be dismissed, with costs.

The rejoinder was general.

Mr. Searle, K.C. (with him Dr. Greer) for plaintiff; Mr. Burton (with him Mr. Van Zyl) for defendants.

The plaintiff (Eritz Boldt) said that he was a qualified civil engineer of Germany. He had been a railway engineer in Germany. He had been engaged on engineering works in this colony for nine years. The Government sent down Mr. Wright to make a survey of the canal. Mr. Wright

left, and witness took up and completed the survey. Witness, on his return from Europe in 1903, was met by Mr. Burger, who asked him to make a contract for the canal. He undertook to carry out the work on a certain specification that he had drawn up, the price being £4,750. One of the provisions of the contract was that the work was to be done under inspection by the defendant company. The so-called specification was rather an estimate of the cost than an actual specification. Witness prepared a plan showing the situation, widths, and depths of the canal. He started work about the middle of April, 1903, and went on until the 26th December. He worked without friction until the 13th October; the work had been inspected by Mr. Burger, who had been appointed inspector by the company. The payments had been regularly made by the company each fortnight up to that stage. He received no complaints as to the quality of the work until October.

Mr. Burger made a complaint in respect to a mistake in witness's pay-sheet of the 24th October. Witness made a claim on the 21st October to the amount of £176, but received only £75 on account. Mr. De Kock (second cashier of the company) saying that he had no money to meet the payment. Mr. Burger again visited the canal on the 30th October, when he expressed his satisfaction with the work, with the result that the balance of the money owing to witness was paid in full. Certain sections of the work were afterwards done by Mr. Blom, while certain other portions were done by Mr. Burger before witness went on the job. The suggestion was made on the 30th October by Mr. Burger that witness should sublet some of the work to Mr. Blom. On the 31st October witness asked Mr. Burger for an increase of price, because the work was much heavier than he had anticipated, on account of the nature of the ground. Burger gave witness a fortnight's notice to stop the work, but witness did not accept the notice, as he did not think Mr. Burger was authorised to give it. On the 3rd November he came to Cape Town and saw Mr. Michau (chairman of the company), and spoke to him about the price he was getting for the work. Mr. Michau told him to put his complaints

in writing, and witness then returned to Robertson. He (plaintiff) accordingly put his complaints in writing. He could not tell at that time whether he was going to gain or lose on the contract, because of the difference in the character of the ground from what he had anticipated. On the 4th November he made an ordinary fortnightly claim for £128 for work done. The claim was payable on the 7th November. He tried to obtain payment from Mr. De Kock, but he was told that he was not entitled to any money at that time. Mr. Burger proposed to witness that he should give a portion of the work to Mr. Blom, and let him have the tools in his (plaintiff's) possession. Witness declined to fall in with the suggestion, and Mr. Burger then said: "All right, wait until matters are ripe." Witness later on received a telegram from Mr. Michau telling him to apply to Mr. De Kock for £50. Mr. De Kock when seen replied that the money had not arrived. Mr. Burger afterwards said that the money would be paid on the 11th November, but it was not paid even then. Mr. Blom appeared on the work on the 9th November, and said that he had been sent by Mr. Burger. Witness told him that he must understand that he (plaintiff) had not engaged him and that if he started work it was on his own responsibility. Witness had to pay his workmen out of his own pocket. Witness had to come to Cape Town, and his attorneys, upon his instructions, sent a letter to the defendants, calling upon them to fulfil their part of the contract. Witness was present at a meeting of the directors held in Cape Town on the 13th November. His application for an increased rate was rejected. He agreed to continue the work at the old price, and he went back to Robertson. On the 14th November he sent in a new account, but that also was unpaid. Mr. Burger came about the 21st November, accompanied by Mr. De Kock. Mr. Burger inspected the work, and a complaint was made by Mr. De Kock in reference to a certain road crossing. A further contract was entered into, whereby the lower part of the section E to F was to be continued by Blom, and the witness was to receive 10 per cent. retention money. He entered into this contract in order to make things go smoothly. From that time Blom was always paid by the company. During November damage was caused by an extraordinary rainfall, the water rising considerably above the normal level of the furrow. Witness had set apart in his estimate a sum of £50 for contingencies of this kind. He had further disputes with the company with regard to the amounts due to him. Deductions were made on account of work which had actually been passed and paid for previously. On the 19th December he instructed his attorneys to write to the defendants informing them

that unless the deductions were remitted he should have to discontinue work. He received no reply to the letter, and on the 26th December he discontinued work. He had not been turned off the work by the company, but he had had to stop because they discontinued his fortnightly payments. There had been negotiations with a view to arbitration, but these had come to naught.

Cross-examined by Mr. Burton: Witness admitted having written a letter to the company, pointing out that, owing to the formation of the ground, he was hardly making 10 per cent. on the contract.

Mr. Burton: Are all the statements contained in this letter true?—Witness: No.

Then, why did you lie?—I didn't lie. At that time I was losing. I had not made up my accounts, but then I knew that my financial position was not good.

In answer to a further question, he admitted that he had written a silly letter, and said that if he had been calmer he would have written a more sensible letter.

Cross-examination continued: He said in one of his letters that the work was costing him three times more than he was getting, but he only referred to certain sections, which proved heavier work than he had thought. On the average, however, the cost was less than he had estimated for. He was working in the rock at the time he left the job. He denied that on the 31st October Mr. Burger said he was dissatisfied with the work. He did not tell Mr. Burger on that occasion that it was impossible for him to go on with the contract, because he was losing too heavily. Instead of witness proposing to leave the work, Mr. Burger and Mr. De Kock jumped to the idea of getting him to abandon the contract, proposing to give witness a fortnight's notice. Witness denied that he had ever given notice to the company that he was going to discontinue work on the contract, despite the report made by Mr. Burger to the directors. On the Sunday following the meeting that he had with Mr. Burger and Mr. De Kock, he met Mr. Burger, but he did not tell him that he regretted having given notice to discontinue the contract. On the other hand, he told Mr. Burger that he had not the slightest idea of abandoning the contract. He did not propose to Mr. Burger that he should get someone to assist him in the work. On the other hand, Mr. Burger proposed to put Mr. Blom into the work. He went into the contract with Mr. Blom, so as to help to bring the job to a peaceable conclusion. The construction of the canal was begun by Mr. Burger, and witness took up the work at the point where Mr. Burger had finished. Witness saw Mr. Blom at the job after he (Boldt) had left, but he never saw him repairing the work which he (Boldt) had carried out.

No work had been done over again, except a wall, which had not been placed at its proper height. Mr. Burger did not complain about the way in which he had sloped the krantz. Stones would still fall in from that slope. All the same, he considered that the slope he had made was sufficient. He had never made alterations of the work which he had done. Mr. Burger did not complain that he had not taken out his levels properly by the gravel pit. He did not complain to witness that he was making the canal too shallow. Mr. Burger made deductions on account of certain leakages. Witness did not know anything about the canal having leaked in various places during rains in January, 1904, and flooded the vineyards of Mr. Marais. Such a statement, he thought, must be an exaggeration. He did not consider that the walls of the culvert were too thin. He had only claimed for £35 out of £50, to which he would have been entitled if he had completed the culvert. He had very nearly completed the culvert when he ceased work. He had not been paid a halfpenny in respect of this part of the contract. On the 7th November he claimed £14 on account of the culvert, but he was paid nothing in respect of that matter. He did not receive a letter from the defendants saying that Mr. Scaife would inspect the works on behalf of the Government on the 5th December. He did not know anything about Mr. Scaife's visit until it had actually taken place. His attorneys received the letter, but he did not receive any intimation of the visit until it had been paid.

Re-examined: Witness was told by the company to carry out the work as economically as possible, and to do it for not more than £5,000. Canals of a similar length, when carried out by the Government, had cost £30,000.

[Buchanan, A.C.J.: Then, why did you undertake the work at £4,000?]

Witness: £5,000, my lord. I would have been able to carry it out at that price.

Replying further to the Court: Witness said that in carrying out the work he did not carefully follow the line of survey, but, in order to avoid the deeper excavations, he went round, and thus saved expense. He understood that the canal had given every satisfaction.

Charles D. Braime, A.M.I.C.E., said that he had had considerable experience of irrigation work. He inspected the work in question on the 25th or 26th January, 1904. The culvert was rough work, but it was perfectly sound, and suitable for its purpose. When he looked at the retaining walls built by Mr. Burger, he found that they were bulging in three places, and remarked at the time that there would be trouble in the future from the walls. The length of canal opposite Mr. Marais's vineyard was, in his opinion, an excellent piece

of work. On the section south of the Groot Rivier, the work was, in his opinion, in accordance with the specification. He thought the work had been carried out on proper principles. The canal was not too narrow. Witness took particular care to see that the widths were correct.

Dr. Greer: Would the canal, as far as the work had been carried out by Mr. Boldt, have answered the purpose for which it was built?

Witness (deliberately): That is rather difficult. In the first place, a canal, after it has been built, would almost invariably leak. You can hardly expect anything else. There has hardly been a canal built in the whole world that did not leak at first, and did not require maintenance.

[Buchanan, A.C.J.: It improves with age?]

Witness: A canal does, as a rule. If you have leaky places, they will silt up. They are bound to leak when they are new, sure to leak. In further evidence, he said that the canal was not very finished work, but he would regard finished work on an undertaking of that kind as a waste of money.

Cross-examined by Mr. Burton: Witness was now engaged in the Irrigation Department, Transvaal. He was formerly in the Public Works Department of Cape Colony for about four years, having been stationed in the Midland districts. Witness did not merely inspect such places as were pointed out to him by Mr. Boldt; he inspected the work according to his own ideas. He saw one place where there was only a very little excavation on the lower side, perhaps about 6 inches. He did not think that was insufficient. It would all depend on the embankment. They would expect leakages in such material as Boldt would be going through at that point. If Boldt had made deep excavations through the solid rock, the expense would have been enormous, and would have provided a worse scandal than a Government irrigation scheme.

R. H. Charters, M.I.C.E., said that he inspected the works on the 25th and 26th May of this year. Some water was flowing through the canal at that time. He saw a slight leakage on the first day in various parts of "e" and "f," and on the second day he saw a considerable leakage near the Krantz. He would have expected, if the canal had been running at full, to find no leakage, but he understood that the canal had not been running at full, and under the circumstances he would expect to find a slight leakage. He thought the canal was a very fair piece of work. He gauged the velocity of the water between sections "d" and "e," constructed by plaintiff, and found that it was running very uniformly throughout. The work was decidedly rough in character, but he thought it

was quite suitable for its purpose as a country canal. He saw nothing about the work that one could complain of.

Cross-examined by Mr. Burton: Witness saw the work 18 months after Mr. Boldt had left the job, and, of course, he had no knowledge of what might have been done in the meantime. The work could be improved both from an engineering and contractor's point of view, but he would not say that he would have condemned the work if he had been appointed to inspect it on behalf of the company. A good deal would depend on the price his employers were prepared to pay for the work.

Michiel Mauritz, formerly in the employ of Mr. Boldt, on the works, also gave evidence.

Cross-examined: During the progress of the contract, the plaintiff had a good deal of trouble through the Kafirs, who were employed on the works, running away.

Mr. Searle closed his case.

Thomas W. W. Perry, engineer, of the Public Works Department, said that he inspected the works on the 8th January, 1904, at the instance of the Government, and at the request of the company. He was instructed by the Government not to enter into the dispute. He saw the work in the course of other duties he had to perform. At the Krantz he saw a marked difference between the work done by Mr. Burger and that done by the plaintiff. The former's work was much more finished. The work done between sections E and F by the plaintiff was very unsatisfactory, and he would not, as an engineer, have been prepared to pass it.

Louis Jacobus Burger, the vendor of the property, said that he now resided in the River Hex district, Worcester. He began the work in question in 1900, and, while he was the owner of the property, he had some talk with Boldt about completing the work. Witness, upon the formation of the company, became the manager. Boldt tendered to the company, but no restriction was placed on the figure to which he might go. Describing the work done by plaintiff, witness went on to say that even in April he had to complain about the work at the Krantz and about the work beyond at the gravel pit. He had also to find fault with the way in which Boldt performed portions of the contract on subsequent inspections that he (witness) made. After Boldt had left the work, Blom was paid 15s. a day. When Boldt had given up, Blom had to remove part of the stone construction, and had to strengthen one of the walls by riding earth up to it. The water ran through the walls into Mr. Marais' property. A lot of work had also to be done over again at the Krantz. Blom had to finish the work begun upon the culvert by Boldt. If Blom had not

done over again work which was supposed to have been done by Boldt, the canal would not have been of any use.

Cross-examined by Mr. Searle: Witness made payments as the work progressed, in accordance with the value of what had been done by Boldt. He did not make any complaint in writing about Boldt's work. Each time witness paid him in July, Boldt said that he would be obliged to give up the contract. Witness was not anxious to get Blom on the job, because he was a friend of witness. He desired to get the contract completed as soon as possible. He had not spoken to Boldt of £5,000 as a sum that he should keep before him when he tendered for the work.

Barend Louis Blom, contractor, Robertson, said that he had to execute over again a considerable amount of work which was supposed to have been finished by the plaintiff.

Cross-examined: Witness commenced the job on the 9th November, but two months previously Mr. Burger had asked him to take on the work at 5s. a yard. Witness declined that offer. He arranged with Mr. Burger that he was to be paid 15s. a day. Eight days after he had begun the job, Burger came and offered him 4s. 6d. a yard, but this witness refused to accept, and he then entered into an agreement with Boldt whereby he was to receive 4s. 6d. a yard. He was promised that if he did not come out all right at that price, some allowance would be made to him. He was paid 15s. a day, as a matter of fact, during all the time he was on the job.

Johannes Jacobus de Kock, local secretary to the defendant company at Robertson, gave evidence as to why certain money was withheld from the plaintiff.

Cross-examined: There was nothing in the minutes of the company appointing him to the position of local secretary. He had been appointed informally. He also kept a store at Robertson. At one time Boldt had gone unpaid for a month.

Re-examined: During November, 1903, Boldt owed the company money.

[Buchanan, A.C.J.: "That is provided for in the contract. It has nothing to do with the settlement."]

John J. Michau, chairman of the defendant company, said that at a directors' meeting on November 13, 1903, Boldt said that unless he was paid another £250 he would not be able to continue the work. Witness was the only one present in favour of granting the £250, and the company decided to adhere to the contract. Up to the present the cost of the canal had been £5,741 14s. 11d., all of which, with the exception of £1,400 paid to the plaintiff, had been paid to Blom. Loss had been in-

curred through delay. In November 1 plaintiff owed the company £300, £100 of which was deducted. The balance was allowed to stand over, the understanding being that it should be deducted from the cost of the syphon which had been ordered from the plaintiff's firm.

Cross-examined: The plaintiff had to pay back the loan of £400 at the rate of £35 per month.

[Buchanan, A.C.J.: Then, why did you ask him for £100 in November?]

He was three months in arrears.

Mr. Searle: Was he?—Yes; it was reported to the Board that he was in arrear with his payments.

Where is it in your minutes; produce it?—It is not in the minutes.

[Buchanan, A.C.J.: You did not pay him anything on November. Why did you ask him for £100?]

We had to protect ourselves. We deducted it.

[Buchanan, A.C.J.: It strikes me you wanted to squeeze him out.]

No; I was sorry for Boldt.

Proceeding, witness said that the company had plenty of funds in hand; to which His Lordship and counsel replied that no one had suggested that it had not.

Counsel having been heard in argument on the facts,

Buchanan, A.C.J., said: Before 1900 Mr. Burger conceived an extensive scheme of irrigation, and with the assistance of a Government engineer he had some information given him as to levels and a sketch plan of the locality. I very much regret that a scheme of such great importance, and one so highly commended, should have been brought into court, but we have nothing to do now with the commendation of Mr. Burger for his enterprise; but we have to confine ourselves to the matters before the Court. After Burger had constructed the canal or furrow in 1903, negotiations were entered into with the plaintiff, who had been in the Government service, and had assisted in some of the preliminary investigations which had taken place. Unfortunately no proper plans or details were prepared, but on data he had before him he offered to complete the canal for £4,500. He entered upon the work in April, and worked until some time in December. He was not a man of means, and to assist him in getting tools and to import pipes, the company advanced £400 to him. They agreed that he was to send in a fortnightly statement, which was to be submitted to a representative on behalf of the company, and the amount approved of should be paid every fortnight to him for his work. At first things went tolerably smoothly, but as time went on the plaintiff found mismeasurements in the data upon which he had based his tender, and also that

there was a quantity of hard rock, the presence of which he had not anticipated. The cross-section annexed to the contract shows that where this rock was found the plaintiff was not intended to excavate on both sides, but only on one, the ground excavated to be thrown up on the other side. As to the mode of construction, it was left to a great extent in Boldt's hands, subject to the approval of the company. Burger formed his scheme into a company, but he seems to be the person who controlled the work. In September or October, 1903, one of the directors, De Kock, came on the scene, and from then difficulties commenced. Boldt, on finding the heavy rock, wished the company to increase his payment. To this the managing director, Mr. J. J. Michau, was favourable, but his co-directors were not, and Burger was one of those who objected. The company held that Boldt must adhere to the contract. There was an interview between Boldt, Burger, and De Kock about the end of October, and at this interview Mr. Burger came to the conclusion that Boldt had given him notice that he was about to terminate the work. Burger might have misunderstood Boldt, for shortly after Burger wrote to the directors in Cape Town, saying that Boldt had given notice, and that he (Burger) wanted money in order to settle with Boldt. Now, Burger must either have misunderstood Boldt or misrepresented him. That is quite clear, for Boldt on November 10 says that he was quite willing to continue the work even if he obtained no profit from it, as he was anxious to save his reputation. Boldt at that time had near the works a shop from which he had obtained profit through supplying native labourers with goods. De Kock and Burger introduced a man named Blom to Boldt, and induced the latter to take Blom on, although that was against Boldt's wish. When Blom took over the work, he supplied the labourers instead of letting them buy their things from Boldt. The things Blom sold were obtained from De Kock, and when De Kock and Burger found that Boldt was not going to give up the contract, Burger omitted to inspect the works for a whole month, with the result that Boldt was kept out of his money. This put him in a critical position, because he was not a man of means, and the next account he sent in Burger reduced in such a way that Boldt could only receive £3 9s. 6d. This brought Boldt to a standstill, and, although he wrote to town, he got no redress. At this time pressure was put upon Boldt regarding certain moneys borrowed by him, instalments of which he had been paying regularly all along. All these circumstances have convinced me that there was a desire on the part, not of Mr. Michau, but of Burger and De

Kock, to squeeze Boldt out of the contract, and, as Boldt could not get his money, he had to cease work. Burger has said that Boldt had over-measured the work done by 219 yards, but I am inclined to take Boldt's version of the matter, for his claim has never before been disputed. I, therefore, find that the amount of measurement claimed by Boldt must be allowed. On the question of the amount of work done, Burger says that 600 yards have not been done properly, but expert evidence has shown that the canal had, as it were, to find itself. I agree with Burger that the work was not quite completed, although at the same time it was an ambiguous position to place Burger in, viz., to pass the work. Blom, the defendants' own witness, has said that he thinks 3d. a yard would remedy the work, and Marais does not think that there is much to be done. However, as Boldt has said that he requires 1s. a yard—and I must say that I think it is high—I think I must allow that amount, viz., £30. There is another item of £25 for work done on the culvert. It is clear it was not completed, but the work was well done. Burger has deducted £5 from the account, and I think this must be allowed, so that from the £85 10s. 9d. claimed by Boldt for work done, the sum of £35 must be deducted. The next claim is for the 10 per cent. retention money, which has been held over by the company. Undoubtedly, this work, for which £159 10s. 6d. is claimed, has been done, and must be allowed for making in all £208 9s. 6d. With regard to damages, if Boldt had any reason for discontinuing his work, the question arises, is he entitled to damages? I do not think that he is, for two reasons. One is that he discontinued the work, and the other is that the work was not of a profitable nature, and that he would not have made the £500 which he is claiming. He would have got working wages only, and not a penny more. In reconvention, the defendants claim for £750 and £250, but I do not think that they are entitled to claim, for by their own conduct they forced Boldt to give up the contract. On the claim in convention Boldt will be allowed £50 for work done, and the retention money, which is clearly due to him for work completed and passed. As to the claim for damages, nothing will be awarded. As for the case for damages by the other side, I think they are barred. Judgment will be entered for Boldt for £208 9s. 6d., with costs.

[Plaintiff's Attorneys: Friedlander and Du Toit. Defendant's Attorneys: Michau and De Villiers.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

ORANGEZICHT ESTATE, LTD. { 1905.
V. TOWN COUNCIL. } Oct. 30th.

Mr. Searle, K.C. (with him Mr. Close), was for the applicants, and Sir H. Juta, K.C. (with him Mr. Benjamin), was for the defendants. The application was on behalf of the Town Council, of Cape Town, in a case which was pending, for permission to make certain excavations on the estate, which the Council say are necessary for the purpose of determining the issue in the suit, and for the appointment of a commission to take the evidence of Mr. Henry Rofe in London. If the latter application was granted it would necessitate a postponement of the trial from the present term. Both applications were opposed. The plaintiffs claimed a declaration of rights for an order against the defendants to pass certain plans and for £1,000 damages.

Counsel having been heard in argument,

Maasdorp, J., said: It seems that the defendants in this case are entitled to the use of the water of certain springs situated on the lands of the plaintiffs, and that the plaintiffs now propose to divide the land into building lots, and to sell these lots for the purpose of building. The defendants are afraid if the land is built upon in some way or other it may affect the purity of the water springs, and consequently they wish to prevent the plaintiffs from doing anything which would injure their rights. In this case it happens that they have had it for the time being in their power to prevent such buildings by refusing to sanction plans submitted by the plaintiff; that is, of course, only a temporary expedient, and the Court would ultimately have to decide whether they have the right to protect their springs by having the plaintiffs prohibited from building. Now some very large issues will be raised in this case, and among the questions will be a very large one, as to whether the owner of a servitude to water on land has a right to prevent building, because there is some probability that his spring may be interfered with. I think the defendant is now anticipating one of the issues raised. Such an order could only be granted on the final settlement of the rights between the parties after the legal position had been decided. Without expressing any opinion of the rights of the parties, the first application will be refused. With reference to the evidence of Mr. Rofe, it seems to be material evidence, and the application in that respect will be

granted. The parties will go to trial by the 12th February, Mr. Dwyer to act as commissioner, costs to be costs in the cause.

VAN DER RIET V. VAN ZYL.

This was an action brought by George Louis Werendy van der Riet, of Britstown, against Jurie Johannes Wilhelm van Zyl, of Simonspoort, in the division of Britstown, for an order calling upon the defendant to execute a contract of lease, or, in default, for judgment in the sum of £1,000. On the 22nd May, 1900, the plaintiff entered into a contract of lease in respect of certain buildings and erven situated in Britstown, and on the 18th February, 1905, the plaintiff duly exercised his right of renewal, whereby the lease was extended for a further period of five years. This the defendant denied.

Mr. Benjamin (with him Mr. Douglas Buchanan) was for the plaintiff, and Mr. Searle, K.C. (with him Mr. Bisset) was for the defendant.

George Louis van der Reit, the plaintiff, said on February 18 he gave notice of his exercise of the option of renewal for five years from July 1, 1905, and received a letter from the defendant accepting. On July 1 the defendant came to his office, and plaintiff asked for the option of another five years, and defendant said: "All right, you can have it." The original renewal was to be cancelled, and a new lease was to be entered into. They went over to Mr. Raath, the attorney, and instructed him to draw up the lease on the same day. In the afternoon the defendant came to witness's office, and said his wife was against it, and he could not do it. Defendant went away, and on Raath's advice he wrote to the defendant holding him to the agreement, but he got no reply, and defendant subsequently refused to sign the contract unless witness paid him £50.

In cross-examination, witness denied what defendant said in reply to his request for another five years' option: "No, I won't live that long."

Nanne Johannes Schmierstina, book-keeper in plaintiff's employ, gave corroborative evidence as to what took place between plaintiff and defendant in plaintiff's office.

Baron Jacobus Raath, attorney, of Britstown, stated that on an occasion of the plaintiff and defendant coming to his office, the plaintiff stated that the defendant had again given him the place for ten years, and asked him to draw up a copy of the old contract, and simply alter the dates. The defendant in a joke said: "I suppose I'll be dead when the contract expires."

Mr. Benjamin closed his case.

J. J. van Zyl, the defendant, denied making any new contract with the plaintiff. After the plaintiff kept troubling him time after time, witness told him positively that there could be no new contract. Van der Riet came to him subsequently, and said he wanted to draw up a contract for from ten to fifteen years, and witness refused. The plaintiff was constantly troubling him about the contract. When Mr. Raath spoke about the contract, witness denied that he ever agreed to the extension.

Cross-examined: Mr. Raath had been his legal adviser. The plaintiff asked for an extension of from five to fifteen years, and witness walked away in a rage.

Charles Johannes van Zyl corroborated his father as to what took place in the presence of Van der Riet, about the contract. His father said the old contract was quite good, and the plaintiff was trying to catch him for another five years.

Counsel having been heard in argument on the facts.

Maasdorp, J., said: At one stage of the case it seemed to me not at all improbable that this dispute was the result of a misunderstanding between the two parties, and that in the face of that misunderstanding it would be impossible for the Court to hold that the parties had arrived at a mutual consent. But as the case developed itself, it seemed to me that there was such a conflict of evidence, which placed the parties in such a position that there was no room for a misunderstanding, and both counsel have contended that there is a serious conflict of evidence in this case. The question now is whether the evidence in this case supports the position taken up by the plaintiff, or by the defendant. The positions are so far apart that they cannot both be maintained, and it cannot be said upon considering any of them that there is still any room for misunderstanding. As to what took place on the 1st July, the plaintiff's evidence is corroborated, and the defendant's evidence is uncorroborated. If that had stood by itself I would have still maintained that the plaintiff should prove his case. Upon the whole of the evidence, I am satisfied that Raath was not in possession of the contract—it may have been left in Mr. Cillie's possession, whose clerk, Raath then was. On the whole, I find that the contract, as set forth in the draft agreement, made by Mr. Raath, contains the terms agreed upon by the parties. An order will be given on the defendant to execute this lease, the defendant to pay the costs, the plaintiff declared a necessary witness.

SUPREME COURT

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

ANDERSON V. ANDERSON. { 1905.
 { Oct. 31st.

This was an action brought by Emily Agnes Anderson, of Salt River, against her husband Richard Anderson, an engine-driver, for restitution of conjugal rights, failing which, a decree of divorce, by reason of the defendant's malicious desertion. Mr. Bailey was for the plaintiff, and the defendant was in default. Counsel explained that the defendant had filed a plea, but his solicitors were not instructed to proceed further. The defendant's present whereabouts were unknown. The parties were married on the 26th December, 1900, at Cape Town, and on the 11th November, 1901, he deserted the plaintiff, and since then had not contributed to her support. The defendant, in his plea, admitted deserting the plaintiff, and he claimed in re-convention a decree of divorce, alleging that the plaintiff had committed adultery with one William Twentyman Jackson. The replication denied the allegations in the plea.

Emily Agnes Anderson, plaintiff in the suit, said she was married to the defendant on the 26th December, 1900. She lived with her husband for eleven months. On the 11th November, 1901, the defendant left her, and since then he had not contributed to her support. She knew Jackson, who was a friend of the defendant, and she denied the allegations made by her husband. The defendant got jealous of Jackson without any reason.

By Maasdorp, J.: She had heard nothing of the defendant since 1901. Witness supported herself for four years as a cook.

An order of restitution of conjugal rights granted, the defendant to return by 30th November, or show cause by the 12th December why a decree of divorce should not be granted. Personal service to be effected, failing which, leave to counsel to move again.

Postea (December 13). Rule absolute.

DIRKS V. SCHRODER.

This was an action for an order compelling the defendant to deliver to the plaintiff a certain receipt for transfer duty, dated June, 1895, and for £100 damages, for wrongful detention. The declaration set out that the plaintiff was a farmer, and the defendant an attorney, both residing in the district

of Gordonia. About August, 1894, the plaintiff purchased a farm from one Eiman, and paid transfer duty to the amount of £20 17s., and received through his attorney (Tilney) a duly-authenticated receipt. Thereafter Tilney handed the receipt to the defendant, and the defendant had the receipt still in his possession. The receipt belonged to the plaintiff, and through the defendant's wrongful detention, he was unable to pass transfer of the farm.

The plea admitted that the transfer duty was paid, and that a duly-authenticated receipt was signed. The defendant was instructed by Eiman not to pass transfer until the whole of the purchase price had been paid. The defendant detained the said receipt for the purpose of passing transfer when the purchase price was paid. There still remained £50 owing in respect of the purchase price. On the 10th April the defendant tendered to the plaintiff the said receipt, together with costs, which tender he repeats.

Mr. Upington (with him Mr. P. S. T. Jones) was for the plaintiff, and Mr. Gardiner (with him Mr. J. E. R. de Villiers) was for the defendant.

H. J. H. Dirks, plaintiff in the case, stated on the 29th August, 1894, he bought the farm from Eiman for £500. He got receipts, including one for £20 cash, which he paid. By one of the documents, Eiman was to pay the expenses of survey and transfer. As a matter of fact witness paid the transfer duty through Mr. Tilney. Witness had paid the whole of the purchase price in 1895. In 1898 he could have sold the farm for £750. Witness had paid his agent £25 in respect of searches, etc., over the receipt.

Cross-examined by Mr. Gardiner: It was one of the farms that came before the Concession Court, and transfer could not be given until the boundary was fixed. He did not know that the boundary was only fixed in 1903.

Charles Richard Steyn, an articulated clerk, in the employment of Mr. Tilney, attorney, Upington, gave supporting evidence.

Mr. Upington closed his case.

Alexander Thompson, farmer, of Bechuanaland, stated that in 1899 witness sold goods to Eiman, who showed him a copy of a promissory note, and witness, on writing to Mr. Schroder, received an original promissory note, but he could not get the money from Dirks. Witness returned the promissory note to Eiman, who eventually paid him. Dirks did not deny owing the money, but said he would pay nothing until he got his papers.

Cross-examined by Mr. Upington: The promissory note was not indorsed to him. He never traded in promissory notes, and he did not know that the note should be indorsed over to him. He

could not get across the line during the war to collect the money from the plaintiff.

Ernst Schroder, defendant, stated he was an attorney practising at Upington. Dirks and Eiman came to him on 20th February, 1895. They asked witness to do the transfer work in connection with the farm. In reply to witness Eiman said there was still a balance of £77 to be paid on the purchase price of £500. Dirks admitted the promissory note, of which the one produced was an exact copy. Witness took steps at once to get the grant, and eventually the grant was issued on 27th November, 1903.

Cross-examined by Mr. Upington: The moment Mr. Steyn wrote he found the transfer duty receipt.

Gert Eiman, who sold the farm to the plaintiff, said he was paid £423, and afterwards he went to the defendant, and said that £54 was still owing. Witness showed the defendant a promissory note, given by the plaintiff for £77, and explained that £23 had been paid off. The promissory note was lost by his wife. Dirks had not yet given him the £54. The plaintiff said he had no money when witness asked him for the £54.

Cross-examined by Mr. Upington: He told Mr. Steyn that as far as witness was concerned, he had done everything to enable the plaintiff to get transfer. He signed a paper at the Magistrate's Office in order that Dirks should get transfer. He did not want to give transfer before he got the money.

Other evidence having been called, and counsel heard in argument, on the facts.

Maasdorp, J., held that no damages had resulted from the withholding of the document, and ordered the defendant to deliver up the receipt, and pay costs up to the date of tender, the plaintiff to pay costs subsequent to that.

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

GENERAL MOTIONS.

Ex parte VAN REENEN. } 1905.
 } Nov. 1st.

Mr. Gardiner moved for an order authorising the executors in the estate of petitioner's late grandfather, Joseph

Vink, to pay a certain inheritance due to the petitioner.

Mr. Molteno appeared for the executors, and raised no objection to the application, but opposed costs being paid out of the estate, on the ground that the application was solely in the interest of the petitioner.

Mr. Gardiner contended that there was no need for the executors to have compelled the petitioner to seek an order of Court.

Order granted as prayed, costs to come out of the fund, which is released under the will.

ANSTICE V. ANSTICE.

This was an application upon notice, calling upon the respondent Walter French Anstice to show cause why an order of Court granted by Mr. Justice Maasdorp, restraining the present applicant (Mrs. Anstice) from withdrawing certain money, should not be set aside, and why the respondent should not be ordered to pay over a sum of £40 to enable her to institute proceedings for divorce or judicial separation, and also for alimony, pending the action.

A number of affidavits were read, from which it appeared that the present respondent was manager of an hotel at Dwars-in-de-Weg, district of Matjesfontein, and that his wife recently left him on account of domestic unhappiness, and removed to Cape Town. There appeared to have been frequent quarrels, and the wife alleged that her husband was addicted to drink, and that he had committed cruelty towards her, and had threatened to take both her life and his own. Two sums of money had been placed in the bank—£35 in the Post Office Savings Bank and £70 in the African Banking Corporation. The former sum had already been withdrawn by Mrs. Anstice, but the latter could not be touched until May next. Mrs. Anstice said that the money was hers; Mr. Anstice said that it was his. Mrs. Anstice said that her husband had boasted to her that he had committed adultery with a lady now in Canada, and with other persons; while the defendant, on his part, denied the allegations, and said that he was prepared to call evidence in support of his statements.

Mr. Gardiner was for the applicant; Mr. P. S. T. Jones was for respondent.

Counsel having been heard in argument on the facts,

Buchanan, A. C. J., said that he was not prepared to set aside the previous order of Court, but he thought that the wife should receive £5 per month from her husband by way of alimony, pending an action for divorce or judicial separation, as she might be advised. An

order would be made accordingly, the first payment to fall due on November 15. Costs to be costs in the cause.

SMARTT SYNDICATE V. PHILLIPS AND OTHERS.

This was an application upon notice of motion for removal of bar and for the appointment of a commission to take certain evidence in Johannesburg. Mr. Gardiner was for applicant; Dr. Greer was for respondent.

After hearing affidavits on both sides and counsel in argument,

Buchanan, A. C. J., said that an order would be given that the bar be removed, and leave would be given to file a replication forthwith, Plaintiff having been barred, must pay the wasted costs. A commission would be granted *de bene esse* to examine the witness Phillips in Johannesburg, Mr. Advocate Percival Smith to be commissioner. This was clearly a case in which the applicant should pay costs of opposition to the application.

CALMEYER V. DAMERELL.

This was an application upon notice of motion, calling upon Mr. W. G. Coulton, of Cape Town (attorney to the defendant Damerell) to show cause why he should not be ordered to pay costs of certain proceedings *de bonis propriis*.

From the affidavits it appeared that Calmeyer had commenced an action against Damerell to compel him to take transfer of certain property at Rosebank. That action was not proceeded with. The defendant's attorney then gave notice of motion that he would sign judgment against Calmeyer for not proceeding with his action. Subsequently, it appeared Mr. Damerell's attorney had no instructions from his client to take that step, and the matter was withdrawn. Then an application was made to his lordship calling upon the respondent to show cause why he should not pay costs *de bonis propriis*, and a rule was granted.

Mr. M. Bisset was for applicant; Dr. Greer was for respondent.

A considerable number of affidavits were read, and Dr. Greer having been heard in argument,

Buchanan, A. C. J., humorously commented upon the somewhat ludicrous change of front which had been undergone by counsel for the respondent between the previous hearing and the present one. He said that the costs of the original application, which was entered by the respondent and afterwards withdrawn by him, having been incurred through a totally unauthorised action on his part, the rule which had been granted calling upon him to show cause

why he should not pay the costs personally would be made absolute. Respondent said that it was due to a misunderstanding that he applied for leave to sign judgment against Calmeyer, and if there was nothing more than a misunderstanding, then he must pay the costs of his misunderstanding.

Ec parte **KEY.**

Mr. Roux moved on behalf of petitioner, a notary public, of Indwe, for leave to register a certain ante-nuptial contract entered into between clients.

Order granted as prayed, His Lordship remarking that the attorney ought to pay costs of the application.

KREFFER V. SALKINDER.

Mr. P. S. T. Jones moved, on behalf of defendant in the suit, for leave to sign judgment against the plaintiff for not proceeding with his action within the time required by the Rules of Court. Order granted accordingly.

Ec parte **EXECUTOR OF ESTATE WILSON.**

Mr. Baily moved, on behalf of the executor in the estate of the late Alexander Wilson, of Wynberg, for leave to mortgage certain property.

Order granted.

Ec parte **ESTATE WORDON.**

Mr. Van Zyl moved, on the petition of the minor heir, for an order authorising the payment of certain award and moneys to provide for petitioner's education at Graham's Town, and to pay taxed bills of costs of certain proceedings. The matter arose out of the well-known Wordon bill case, in which W. L. Scott and two others were proceeded against on a charge of being concerned in forging the will of the late Samuel Wordon, and were acquitted. The heir under the will now asked for certain payments to be made from the fund standing to his credit in order to pay the reward of £100 to Scott for discovering the will in question, as promised in an advertisement issued by Messrs. Van Zyl and Buissonne. Petitioner had also incurred certain costs in connection with an action which he instituted to clear himself from the imputation of illegitimacy, the said action having been settled. He desired further sums to be paid out for his benefit, as he was being educated at Graham's Town, and was intending to proceed to the South African College,

with a view of becoming an advocate of this Court.

The matter was referred to the Master for report.

Ex parte KILLINGSWORTH.

Mr. Gardiner moved, on the petition of the husband, who resides in Cape Town, for leave to sue his wife by edictal citation for restitution of conjugal rights, failing which, divorce.

Leave granted, citation to be served personally on the respondent, and to be returnable on December 31, with leave to applicant to serve intendit and notice of trial, with citation.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

WHEELER V. LOGAN. { 1905.
Nov. 1st.

This was an action to recover the sum of £57, made up by £54, which the plaintiff claimed in respect of expenses incurred in qualifying himself to give evidence in a certain arbitration of Logan and the Colonial Government, and £3 in respect of his appearance as a witness.

The declaration set out that the plaintiff was a contractor residing at Maitland, and the defendant a merchant residing at Cape Town. About November and December, 1903, the plaintiff made certain measurements and quantities at the request of the defendant, and gave evidence as to the amount of compensation to be allowed.

The defendant, in his plea, admitted that the plaintiff was entitled to £3 as witness's expenses. He duly tendered the said sum, and repeated the tender. He denied that the plaintiff made measurements for which he was entitled to any payment at the request of the defendant. The defendant further denied that the plaintiff made any measurements or valuation, or, if he did, he did so before he gave evidence at the Court.

Mr. Benjamin was for the plaintiff, and Sir H. Juta, K.C. (with him Mr. Close), was for the defendant.

Thomas Wheeler, railway contractor, of Maitland, plaintiff in the case, said he was asked by the defendant to give evidence with regard to an expropriation in 1903. Witness saw the defendant in his office, when he was asked to give evidence. Nothing was said then about the measurements. The Court, at Matjesfontein had no measurements and adjourned in order that measurements might be taken. The defendant approached him and asked witness to

proceed to Touws River to measure the quarry, the brickfields, and the buildings, which had been expropriated by the Government. The defendant's manager, Mr. Wright, and his solicitor, Mr. Kayser, also asked witness to go to Touws River for the same purpose. Shortly afterwards a Mr. Ellis told witness that he was to accompany him and assist in the measuring. From Wednesday until Saturday he was engaged on the measurements. On Saturday Mr. Ellis received a wire, which, however, had been lost. The telegram was to the effect that witness and Ellis were to proceed to Cape Town to give evidence before the Court. The survey was not completed; it would have taken three weeks or a month to do it. Witness was called by the other side at the commission to be further cross-examined, and the defendant's representative objected. He considered five guineas a day a fair and reasonable charge for measuring, and the balance of his claim was made up of the time lost from the time he left for Touws River until the commission concluded its sittings in Cape Town.

Cross-examined by Sir H. Juta: Witness denied that he volunteered to go up merely to give evidence on the brickfields. He was examined at the commission about his knowledge of brickfields and quarries. The Court might have adjourned for the information requested from the Government. He did not know that Mr. Marais, the surveyor, went and collected all the information which the Court wanted. Mr. Kayser did not tell him that he was not wanted at Touws River. The defendant, Mr. Wright, and Mr. Kayser asked him to take the measurements.

[Hopley, J.: What were you doing at that time?]

Witness: I was busy on my concession on the train from Maitland to Bellville.

Sir H. Juta: Will you produce your books to show that you were busy?

Witness: I will.

Sir H. Juta: Do so at two o'clock.

Witness: Yes.

Re-examined by Mr. Benjamin: He could not have given evidence as to the value of the site expropriated without making measurements.

John Brown Ellis, railway engineer, Touws River, said he went with the party to Matjesfontein, and was approached by Mr. Logan and his manager, Mr. Wright, to go to Touws River. They told him that Mr. Wheeler would accompany him. They were engaged until the Saturday, when he received a telegram, asking him to be at the court on Monday.

Mr. Benjamin closed his case.

For the defence,

Charles Marais, a Government land surveyor, said he was engaged by Mr. Logan, and went up to Matjesfontein.

Certain information was required at Touws River, and he and Mr. Ellis were sent down. Mr. Wheeler was there, but witness knew nothing about his coming down. Witness got some measurements, and certain valuations were made. He left that night, and there was then nothing left undone, but Ellis and Wheeler said they were not going to hurry down. He did not ask Ellis to stay. Witness got Wheeler to make a second valuation.

Hon. J. D. Logan, defendant, stated that he was plaintiff in the action that went before the Privy Council. The plaintiff came to see witness, and expressed the wish to go to Matjesfontein.

[Hopley, J.: You didn't take him down as a friend?]

He came down more as a friend than a witness, my lord.

Continuing, witness denied that the plaintiff was instructed to go down to take measurements.

Cross-examined by Mr. Benjamin: He knew the plaintiff previously as a friend, who insisted on going with witness on his election tour. He would swear that he never paid the plaintiff a penny in his life. The plaintiff was never asked to come up and give evidence. The plaintiff was going as a friend in the first place, and as a witness in the second. After his evidence was heard, counsel advised witness that his evidence was useless. All he knew of the plaintiff was that he was a persistent person in election matters. It was absolutely untrue that he sent the plaintiff down to Touws River to take measurements. He was not surprised at the letter from Mr. Ellis refusing twenty-five guineas in connection with his services, in which he pointed out that he was engaged with Mr. Wheeler.

John Kayser, attorney, in charge of the defendant's interests in the arbitration, and who went up to Matjesfontein, stated that the arbitrators adjourned on the first day for certain information from the Government. The plaintiff was not instructed by witness to take measurements. Witness was under the impression that the plaintiff, merely continuing his outing, went away with Ellis. Witness, taking the average of drink consumed, would put the plaintiff down for eleven shillings for the two days.

Cross-examined by Mr. Benjamin: Wright came to witness, and said that the plaintiff was worrying him to go to Touws River. While he would not have hesitated in spending money to obtain corroborative evidence, he certainly would not have selected the plaintiff.

Samuel Wright stated that in 1903 he was manager for Mr. Logan. The plaintiff was not asked by witness to come to Matjesfontein. He never heard of instructions given to Wheeler to go down to Touws River. The plaintiff said to

witness: "I hear Ellis is going down to Touws River, and I would like to go," and although Mr. Kayser did not want him, witness told him that he might go. It was quite possible that he did send a wire to Ellis, but certainly not to Wheeler.

Cross-examined: The plaintiff came to him, and said he was going up as a witness.

[Hopley, J.: He let the plaintiff go with Ellis merely to please him.]

[Hopley, J.: What was the great obligation that you should please him?] - He appeared to be very friendly with Mr. Logan.

Sir H. Juta closed his case, and counsel having been heard in argument on the facts,

Hopley, J.: I regret very much to see this case brought before this Court, when it might have been settled in the Magistrate's Court. Though the matter of friendship may have been the dominant factor in the mind of Mr. Logan, the fact remains that the plaintiff did give evidence as a witness, with certain qualifications. The letter from Mr. Wright, the then general manager for Mr. Logan, clearly treats him as a witness. His evidence was that of a person who affected to know about bricks, quarries, clay, etc. I have no doubt it was in the mind of the defendant that the plaintiff was a valuable witness. The matter was clearly left in the hands of Wright, and Wright had the power to bind Logan. I believe when Ellis and the plaintiff were left behind, the plaintiff or his agents were well aware of it. It is a pity that the plaintiff did not go before the Magistrate and ask for a small sum. I personally think that, considering all the expenses were paid both ways, the utmost I can allow is a couple of pounds for the three days I find he was working. The judgment of the Court will be for the sum of £6, along with the £3 tendered, with Magistrate's Court costs.

Mr. Benjamin and Sir H. Juta having been further heard on the question of costs,

Hopley, J., allowed the matter to stand over for affidavits as regards costs.

[Plaintiff's Attorneys: Moore and Son; Defendant's Attorneys: Van Zyl and Buissinné.]

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the
Hon. Sir JOHN BUCHANAN.]

ADMISSIONS. { 1905.
Nov. 2nd.

Mr. Russell moved for the admission of Frederick Wm. Beyers as an advocate.

Application granted, and oath administered.

Mr. De Waal moved for the admission of W. H. de Villiers as an attorney and notary.

Application granted, and oaths administered.

Mr. Roux moved for the admission of C. W. A. Coulter as an attorney and notary.

Application granted, and oaths administered.

HOULDER BROS. V. COLONIAL GOVERNMENT.

This was an application upon notice of motion, calling upon the plaintiffs in the action (Houlder Bros.) to show cause why the trial should not be postponed, and why they (plaintiffs) should not be ordered to pay costs of the application. Mr. Schreiner, K.C. (with him Mr. Searle, K.C., and Mr. Burton), was for applicants; Sir H. Juta, K.C. (with him Mr. Cloes and Mr. Struben), was for respondents.

Mr. Schreiner said that the matter was of some urgency, as the trial had been set down for hearing to-morrow (Friday).

[Buchanan, A. C. J.: The application has not been put down on the roll. It seems to me to be neglect on the part of the attorney. The matter was moved in Chambers some weeks ago.]

Mr. Schreiner: For postponement?

[Buchanan, A. C. J.: Yes.]

Mr. Schreiner: I do not know why it should not be set down.

[Buchanan, A. C. J.: Neglect, purely neglect. However, I will hear you, Mr. Schreiner.]

Mr. Schreiner read an affidavit by Mr. Reid, attorney, who said that a commission had been despatched to London, but up to the present the evidence which was to be taken on commission had not arrived from England, and it was uncertain when it would arrive. The case had been set down for hearing by the plaintiffs' attorney on the 3rd November.

Buchanan, A. C. J., said that he wished to withdraw the remarks he had

made in regard to the neglect of the attorney. He found that he was under a misapprehension, and that the case he had in mind was that of the liquidators of the Grand Junction Railway and Walker.

Sir H. Juta submitted that, as the case had now been standing over for a considerable time, the defendants should be put to terms.

The trial was ordered to be set down for Wednesday, the 14th February, costs to be costs in the cause.

PROVISIONAL ROLL.

WILSON V. GLYN. { 1905.
Nov. 2nd.

Mr. Douglas Buchanan moved for a provisional order of sequestration to be superseded.

Provisional order superseded.

KEMP BROS. V. SCOTLAND.

Mr. Russell moved for a provisional order of sequestration to be made final.

Order granted.

ALVERBACK V. DAVIDS.

Dr. Greer moved for provisional sentence for £52, upon a judgment of the Resident Magistrate's Court, with costs, and for certain property in Cape Town, registered in the defendant's name, to be declared executable.

Defendant appeared, and denied that he owed the money, which was alleged to be due on a promissory note.

Buchanan, A. C. J. (to defendant): The judgment of the Resident Magistrate's Court still stands. I can't help you now. Judgment will be given as prayed, and the property declared executable.

NETTLESHIP V. GARTON.

Mr. Sutton moved for provisional sentence on a mortgage bond for £7,000, due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

RATHFELDER V. OTTO AND SCHMIDT.

Mr. Struben moved for provisional sentence on a mortgage bond for £250, with interest, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

OHLSSON'S BREWERIES V. HALVORSEN.

Mr. Douglas Buchanan moved for a decree of civil imprisonment upon an unsatisfied judgment for £128, and certain smaller sums. Counsel said that he had received a copy of an affidavit, sworn by defendant, in which she said that she had been unable to meet the debt because of delay in receiving certain remittances. Deponent also said that she was a heavy loser by a recent lawsuit, in which she was the plaintiff. Defendant added that she was unable to appear to answer the summons on account of illness.

Decree granted.

VON HOLDT V. GARTON.

Mr. Watermeyer moved for provisional sentence for £189 5s. upon certain conditions of sale, together with interest and costs.

Order granted.

ADLER V. TUCHTEN.

This was an application for provisional sentence upon three bills of exchange for £23 4s. 10d., £26 1s., and £50 12s. 11d., respectively.

Mr. Joubert moved.

Counsel said that half an hour before the Court opened he was served with an affidavit by the defendant, and after that affidavit had been heard he would, if it was thought necessary, ask for the postponement of the case to enable the plaintiff to file answering affidavits.

Mr. W. Porter Buchanan (for defendant) said that the plaintiff should make up his mind either to apply for a postponement or go on with the case.

Mr. Joubert said that he did not apply for a postponement at the present stage.

Mr. Buchanan read an affidavit by defendant, who said that he had a counter-claim against the plaintiff, and that he had tendered and again tendered the balance of £10 7s. 9d., due to the plaintiff. Defendant alleged that he was entitled to a credit of £43 odd, in respect of certain liquor sent by the plaintiff to him, which had been confiscated by the Customs authorities at Port Elizabeth, on the ground of a breach of the Merchandise Marks Act.

Counsel having been heard in argument on the facts,

Buchanan, A.C.J., gave judgment for the plaintiff for £28 7s. 9d., and said that plaintiff must go into the principal case for the balance of his claim.

ESTATE WITTE V. SCHMIDT.

Mr. P. S. T. Jones moved for provisional sentence on two mortgage

bonds for £150 and £100 respectively, with interest, bonds having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

WILKINSON V. LANG AND GLENDINNING

Mr. Gutsche moved for provisional sentence on a mortgage bond for £190, with interest, the bond having become due by reason of the terms of the bond; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

ILLIQUID ROLL.

MALYON V. MAZZIN. { 1905.
 { Nov. 2nd.

Mr. Payne moved for judgment, under Rule 329d, for balance of account.

Order granted.

EAGLE V. WILLIAMS AND BATHGATE.

Mr. Sutton moved for judgment, under Rule 329d, for £121 11s. 6d., goods sold and delivered, with interest *a tempore morae* and costs of suit.

Order granted.

PHILIPS V. ZIEMAN.

Dr. Greer moved for judgment under Rule 319, in default of plea, for £16, being wages due, with interest *a tempore morae* and costs of suit.

Order granted.

CAPE TIMES V. STEVENSON.

Mr. M. Bisset moved for judgment under Rule 329d for £100 6s. 2d., goods sold and delivered.

Order granted.

LOUW V. LOUW.

Mr. Benjamin moved for judgment under Rule 319 for an order against defendant, calling upon him to render full and correct account of the proceeds of a certain sale, supported by vouchers and for data. Defendant had acted as auctioneer.

Mr. Close said that, on behalf of the defendant, who resided at Calvinia, he wished to move for leave to purge default.

Mr. Benjamin said that notice of the defendant's application was only served on plaintiff's attorney that morning.

He contended that his client was now entitled to judgment.

[Buchanan, A. C. J.: Do you apply for a postponement?]

Mr. Benjamin: Not unless the affidavit is one of merits?

Mr. Close read an affidavit by defendant's attorney.

Leave was granted to defendant to purge default, and he was directed to file his plea within seven days, costs of the motion to be paid by defendant.

CAPE TOWN TOWN COUNCIL V. LEWIS.

Mr. Gutsche moved for judgment under Rule 329d for £111 11s. 9d. and £34, for municipal rates.

Order granted.

CAPE TIMES, LTD. V. WILLIAMS.

Mr. M. Bisset moved for judgment under Rule 329d for £68 3s. 6d., advertising charges, with interest *a tempore morae* and costs.

Order granted.

CAMPBELL AND CO. V. DRUMMOND.

Mr. Lewis moved for judgment under Rule 329d for £13 11s. 6d., account for goods sold and delivered, and for rent. Counsel added that an interdict had been obtained against defendant restraining the payment of damages to him by one Bailey.

Mr. P. S. T. Jones said that there was a motion in the list at the instance of Messrs. J. C. Juta and Co. with regard to an interdict granted against the proceeds of the judgment.

Defendant said that he had a good answer to the claim of Campbell and Co., and he desired to enter appearance. He was served with the summons on Saturday last, and he understood that he was allowed six days within which to enter appearance.

Buchanan, A. C. J., said that the plaintiff's application was premature. The matter must stand over. The motion as to the interdict would come on in the ordinary course.

REHABILITATIONS.

Mr. Benjamin moved for the rehabilitation of Louis Lionel Goldsmid.

Granted.

Mr. Watermeyer moved for the rehabilitation of Mores Lynn and Abe Wistaff, trading as Lynn and Wistaff.

Granted.

Mr. Lewis moved for the discharge from insolvency of Frederick Pratt.

Granted.

Ex parte SEPTEMBER AND ANOTHER.

Mr. Benjamin moved, as a matter of urgency, on the petition of two sons of Samson September and his late wife, Caroline September, members of the Baca tribe, for an interdict restraining their father from marrying a second time, and the Rev. Charles Palma, or any other marriage officer of this colony, from performing the said marriage ceremony, and restraining the said Samson September from parting with the property bestowed upon the petitioners and their brothers by contract entered into between Samson and his first wife, until transfer be given to the petitioners and their brothers of the properties.

Buchanan, A.C.J., said that he could not see his way to make an order.

GENERAL MOTIONS.

Ex parte SERVICE. { 1905.
 { Nov. 2nd.

Mr. Bailey moved for a rule nisi under the Derelict Lands Act to be made absolute.

Granted.

SAWKINS V. HEDDON.

Mr. W. Porter Buchanan moved to have an award of arbitrators made a Rule of Court. The matter had been before the Court in September, but had been postponed to enable a copy of the notice to be served on the defendant.

The application was granted.

DE WAAL V. DE WAAL.

Mr. Gutsche, on behalf of the defendant, submitted to judgment in terms of consent paper put in. Judgment in terms of consent.

WESTBROOK V. MARTYN.

Mr. Close moved on behalf of the applicant, who is plaintiff in a case to be heard in the court for the appointment of a commission *de bene esse* to take the evidence of the plaintiff.

Dr. Greer opposed the motion.

An affidavit by Mr. Gee, the plaintiff's attorney, stated that plaintiff, who resided in Johannesburg, found it impossible to come to Cape Town for the trial.

The defendant's affidavit stated that the amount involved was only £37 10s., and would not pay the expenses of a commission.

Mr. Close contended it would be a saving to take the plaintiff, and his witnesses' evidence in Johannesburg.

Dr. Greer held that the plaintiff gave no valid excuse for not coming to Cape Town. The expenses incurred in a commission would be very large.

Buchanan, A.C.J., said the taking of the evidence on commission was to the plaintiff's detriment, and not that of the defendant. The application would be granted. Mr. Smith would be appointed commissioner.

Ex parte MARAIS.

Mr. Benjamin moved for an order directing the Master to pay out certain money in the estate of Marais minors. The Master's report was favourable subject to the permission of the Court.

The application was granted.

Ex parte THE TRUSTEE IN THE INSOLVENT ESTATE OF WHITWORTH AND CO.

Mr. Benjamin moved for an extension of time to file a liquidation account.

Granted.

Ex parte COETSEE.

Mr. Gutsche moved for the amendment of an order of Court. Transfer of certain property had been granted by the Court, but as there were two parties concerned, and it was not stated to which party the property was transferred, the present application was brought.

A rule *nisi* calling on objectors to the application was granted.

Ex parte OLIVIER AND WIFE.

Mr. Gutsche moved for the registration in Cape Colony of an ante-nuptial contract drawn in the Orange River Colony.

Granted.

MOHATLA V. MATLA.

Appeals from Native Territories
—Act 26, 1894.

Where the only European interested in a civil suit between certain Transkeian natives was merely an executor; the Court refused leave to appeal from the judgment of the Chief Magistrate.

Mr. Benjamin moved on behalf of the plaintiff for leave to appeal against the judgment of the R.M. of one of the districts in the Transkei. One of the parties was a European, and he took

the case to the court of the Chief Magistrate by mistake.

The case was adjourned to enable counsel to look into the Act.

The case was again mentioned later, but was ordered to stand over for further information.

At a still later stage, Mr. Benjamin said that certain questions of native law as to dowry and succession were involved in the matter. The only European interested was an executor.

Buchanan, A.C.J., said that this was essentially one of those cases which the Legislature wished to be settled by the Chief Magistrate of the Native Territories. There would be no order on the present application.

Ex parte WILKINSON.

Mr. Gutsche moved, on the petition of Arthur Wilkinson, for leave to sue his wife for divorce *in forma pauperis*.

Applicant appeared, and said that he was a labourer, but was in irregular work. He was without any property, except a few personal goods. He did not desire to marry again, but wished to get rid of his wife, because of her disgraceful conduct. He desired to have custody of the child of the marriage. His wife was living with her mother at St. Leger-street.

Rule *nisi* granted, personal service to be effected on respondent, rule to be returnable on the 10th inst.

Ex parte VAN DER MERWE.

Mr. Benjamin moved for the appointment of a fresh trustee to represent an insolvent estate in an action.

Order granted.

Ex parte ESTATE ROBERTSON.

Mr. Wright moved, on the petition of the executors testamentary in the estate of Alfred George Robertson, for an order for the survey of the property of the legatees, and for the transfer to them of the property, subject to a bond being passed in terms of the will. The property was stated to be situated in the district of George.

Dr. Greer, in the absence of Mr. Searle, K.C., said that he was asked by the attorney in the matter to say that he appeared for the tutor dative, and that he understood the matter was to be postponed.

Ordered to stand over till next motion day.

GOURLAY V. BAUMGARTEN AND JONES.

This was the return day of a rule *nisi* calling upon the respondents to show cause why the partnership carried

on by them in Long-street, Cape Town, as the South African Hackney Lighting Corporation, should not be forthwith placed under liquidation, why they (respondents) should not be restrained from alienating the assets, and why Mr. J. E. P. Close should not be appointed receiver.

From the petition, it appeared that the business carried on by the Corporation was that of acetylene gas lighting. The petitioner had advanced a sum of £1,500, but the business had resulted in considerable losses, and Mr. Gourlay decided that the business should be liquidated before further losses were incurred so as to protect his interests.

Dr. Rainsford was for applicant (William Dixon Gourlay); Mr. W. Porter Buchanan was for respondents.

Mr. W. Porter Buchanan, on behalf of the first respondent (Henry Baumgarten, now of Umtata), applied for a postponement for a fortnight, to enable him to file affidavits.

Dr. Rainsford read an answering affidavit, in which it was urged that the respondent had had ample opportunity of preparing his defence, seeing that the rule was granted on August 31.

Counsel having been heard in argument,

Buchanan, A. C. J., said that as the matter had already stood for two months it could stand a fortnight longer.

Respondent must pay costs of postponement. The matter was postponed until November 14.

Ex parte STRYDOM.

Mr. Sutton moved to make absolute a rule nisi, calling upon respondent to show cause why petitioner should not be granted leave to sue for divorce *in forma pauperis*.

Rule made absolute, Mr. Sutton to act as counsel, and Messrs. Fairbridge, Arderne, and Lawton as attorneys for the petitioner.

Ex parte FULLER.

Mr. M. Bisset moved, on behalf of Emily Fuller, a widow, of the Queen's Town district, for the attachment of certain property of Richard Webb, who had left the Court's jurisdiction, and for leave to sue him by edictal citation, in respect of a certain mortgage. The petitioner said that the respondent failed to pay the interest on the bond. The debtor was reported to have been seen in the streets of Johannesburg, but his address was not known to the petitioner.

Leave granted, citation to be served personally, failing which to be published once in the Government "Gazette," and once in the "Star," Johannesburg, and to be returnable on January 12.

Ex parte BETIEF.

Mr. De Waal moved, on the petition of the *curatrix bonis* in her husband's estate, for leave to expend balance of moneys in her hand, and to raise a mortgage upon certain property.

Order granted.

Ex parte VALENTINE.

Mr. Benjamin moved for leave to raise a mortgage of £450 upon certain property in Richmond-street, Cape Town.

Order granted.

Ex parte VAN RIET.

Mr. Struben moved for an amendment of plan of sub-division of certain property, so as to enable transfers to be made.

Order granted.

Ex parte DE KLERK.

Mr. Douglas Buchanan moved for leave to pass transfer of defined portions of certain property in the district of Barkly East, petitioner having agreed to a partition of the farms in question.

Order granted.

Ex parte DIAMOND AND WIFE.

Mr. W. Porter Buchanan moved for leave to register a certain antenuptial contract, as if the same had been entered into before marriage. The parties were married in 1898. The petition was to the effect that the parties had, from the beginning, intended to have separate estates, but that, through an oversight, they had been married in community. The application had been standing over for further information, which was now furnished by counsel. The marriage took place in this colony immediately after the second petitioner's arrival, and her affidavit set out that she understood the nature of the present application, and voluntarily consented to it. Both parties were possessed of property.

Buchanan, A. C. J., said he thought that the evidence was slight, but still it was sufficient to satisfy the Court that there was a pre-nuptial arrangement that the parties should retain their own property and control over the same, as they would have done if they had been married in England, before coming out to the Colony, under the Married Women's Property Act. Leave would be granted to register the contract as if it had been entered into before marriage, saving all just rights of creditors.

Ex parte SEARLE AND CO.

Mr. Struben moved, on the petition of Edward Searle and Co., carrying on business at Port Elizabeth, for the attachment of certain property in the town of Colesberg, *ad fundandam jurisdictionem*, and for leave to sue one Morris Bernstein, late of Colesberg, and now of Johannesburg, for £10 5s. 6d., for goods sold and delivered.

Leave was granted to sue as prayed, and one of the *erven* was ordered to be attached, citation to be served personally on the respondent and to be returnable on the 15th January.

Ex parte ESTATE CRONJE.

Mr. Payne moved for leave to pass transfer of certain property in the district of Barkly East, in accordance with a partition agreed upon.
Order granted.

DR. WILLIAMS MEDICINE COMPANY V. ALEXANDER.

This was an application brought by the Dr. Williams Medicine Company, upon notice of motion, calling upon the respondent, a chemist, carrying on business in Caledon-street, Cape Town, to show cause why an interdict should not be granted restraining him from selling, offering, or disposing for sale certain pills other than those of the company with a cover labelled "Pink Pills for Pale People," and restraining him from advertising the same as if they were the pills of the Dr. Williams Medicine Company. Mr. M. Bisset was for applicants; Mr. Molteno was for respondent.

Mr. Bisset, at the outset, said that he desired to call the attention of the Court to a report that the owner of the company was dead. This, however, lacked official confirmation. Counsel proceeded to read an affidavit by James Cameroun McKenzie, manager of the South African branch of the Dr. Williams Medicine Company, in which he complained that the respondent was selling pills styled "Pink Pills for Delicate Females." This, he said, was an infringement of the trade-mark of the applicant company, whereby considerable loss and damage was being sustained by them. Counsel said that what the applicant complained of was the use of the words "Pink Pills for Delicate People." The applicants' expression was "Dr. Williams's Pink Pills for Pale People."

[Buchanan, A. C. J.: Your trade-mark is not infringed.]

Mr. Bisset: We say that the essential part of our trade-mark is infringed.

[Buchanan, A. C. J.: What essential part.]

Mr. Bisset: The use of the words "pink pills."

[Buchanan, A. C. J.: You have nothing about "delicate females" on your labels.]

That is so, but, of course, the sting of the thing lies in the use of the words "pink pills." Counsel proceeded to read affidavits by several persons, who said they had gone to the respondent's shop and asked for "pink pills," and have been supplied with Alexander's own pills. When asked for Dr. Williams's pink pills, respondent had said that those he had tendered were quite as good.

Mr. Molteno read a number of replying affidavits.

John Henry Cooper, chemist, Plain-street, said that to his knowledge chemists in England sold pink pills other than those of the applicant company.

John C. Smith, chemist, Cape Town, formerly in the employ of Hedges and Co., of Birmingham, said that the applicants some years ago threatened Hedges and Co. with an action for selling pink pills of their own manufacture, but did not go forward with it.

Ernest Glover Alexander (the respondent) denied that he had infringed the applicants' label, and said that it was a common custom in England for chemists to sell pink pills other than those of the applicant company. He claimed that he had a perfect right to sell pink pills other than the applicant company's. He denied that he had represented to the persons who had sworn affidavits on the other side that his pills were superior to the applicants'.

Mr. Bisset having been part heard in argument,

Buchanan, A.C.J., said that as the matter seemed to be likely to take up a considerable time, he would hear the rest of the argument on some future occasion, when an opportunity offered.

Postea (November 15th).

Mr. Bisset continued his argument in support of the application. He said that when the matter was last before the Court he was endeavouring to establish the proposition that the infringement of a trade-mark may consist in the adoption by a rival trader of an essential part of such trade mark, even though the essential part may consist of only one or two words—only one word, for example, as in the *Eureka Shirt Case*, *Ford v. Foster and Porter* (1, Law Reports, Chancery Appeals). Counsel quoted at some length from the report of the case. He also cited the *Glenfield starch case*, *Waterspoon v. Currey* (Law Reports, 5, House of Lords).

[Buchanan, A. C. J.: What words do you say can be used in this case?]

I should say that respondent could say this. In the first place, he may use the word "pill."

[Buchanan, A. C. J.: Couldn't he use the description "pink pills?"]

No; I say not, because "pink pills" is an essential part of our trade mark, and our goods have become known to the trade in this Colony at any rate, as "pink pills."

[Buchanan, A. C. J.: Is not your essential part "Dr. Williams' Pink Pills?"]

No; I submit not. If one sees "pink pills" one's mind flies right away to "Dr. Williams' Pink Pills for Pale People."

Buchanan, A. C. J.: You claim pink pills as your exclusive right? Nobody else may sell "pink pills" in South Africa?]

Nobody else may sell "pink pills," we say, and certainly not under the same collocation as the respondent is selling pills, viz., "pink pills for delicate females." I should say, of course, that applicants could sell "Bland's pills for delicate females."

Mr. Bisset (proceeding) called the attention of the Court to the *Transvaal High Court case concerning Khedive cigarettes*.

[Buchanan, A. C. J.: If "pink pills" is only the description of an article, then you are not entitled to an interdict.]

That is an objection that might have been raised originally before our trade mark was registered. In further argument counsel quoted the Australian case of the "*Dog's Head Beer*," the English case of *Stone Ales (Montgomery v. Thompson appeal cases, 1891)* the Yorkshire Relish case (*Powell v. Birmingham Vinegar Co.*, appeal cases, 1897, p. 715). Counsel went on to argue that the description of "pink pills" had come to be specially associated with applicant's pills. Applicants had made those pills famous by wide advertising and, he supposed, by the virtues of the pills.

[Buchanan, A. C. J.: The question is whether "pink pills" is a description of a pill. The affidavits of the respondent allege that "pink pills" is a term commonly used among chemists in Great Britain and Ireland, and you have not answered that.]

Mr. Bisset said that the question was what was the user in this country. If the respondent had shown that "pink pills" was a term known to the public in this colony before 1893, when the applicants had their trade mark registered, the case that applicants would have had to meet would have been a very different one. All that the affidavits of respondent said was that the term was in common use in Great Britain and Ireland, but the respondent did not suggest that "pink pills" was a term known to the public out here before 1893, and the applicants said that other chemists such as respondent were now seeking to take advantage of the name and reputation obtained for "pink pills" by the appli-

cants. The primary words "pink pills" may have been merely descriptive at the beginning, but he contended that the words had now obtained a secondary meaning. Counsel went on to refer to the *Camel-hair Belting case* (14, House of Lords Appeal Cases, 1896, p. 199).

[Buchanan, A. C. J.: Can you tell me what you are registered as in England?]

Mr. Bisset said that he did not know. In closing he cited the case of *Dr. Williams' Pink Pills v. Tothill*.

Mr. Molteno said that this was an attempt on the part of the applicants to appropriate for their own use a portion of the English language. He did not wish for a moment to deny that his learned friend's statement of the law was perfectly correct with regard to the Eureka and the other cases. Those cases, however, went on a settled principle. Those were cases dealing, not with trade marks, but with trade names or fancy names, a totally different thing. Applicants were not entitled to appropriate the generic description of "pink pills." These pills were simply the ordinary ferric oxide pills, and they were pink just as the hydrangea was pink. If they looked at any of the circulars of manufacturing chemists on the continent, in England, or in America, they would find that "pink pills" was a common thing. Dr. Williams' were not the only pink pills in the world. Schultze and Co. of London, advertised "pink pills" in their circulars. This was an attempt which had been overruled time after time of a person trying to get a proprietary right to the English language, trying to trade mark a portion of the English language.

[Buchanan, A. C. J.: I could quite understand your argument if you were opposing the registration of the trade mark.]

Mr. Molteno: Then I will come to this, is the defendants' label a colourable imitation of applicant's, calculated to deceive the people? The point is whether by selling "pink pills for delicate females" we infringe the trade mark of "Dr. Williams' pink pills for pale people." All we do is to sell a common article in the chemical trade as "pink pills." We try to sell pink pills not for "pale people"—not for "anæmic people"—but we sell them for "delicate females." I submit that that would not deceive the most anæmic people in the world. Mr. Molteno went on to urge that it was absurd to suppose that "Dr. Williams' pink pills for pale people" had the sole right to use the term "pink pills." He contended that in this case the Court had not to decide a question such as was raised in the previous case of *Dr. Williams' Pink Pills v. Tothill*. One could conceive a colourable imitation of the applicants' trade

mark in the label "Dr. Wilson's Pink Pills." One could understand that the class of people who bought these pills—he believed that there was a large trade amongst coloured people—would not at once detect the difference between "Dr. Williams' Pink Pills" and "Dr. Wilson's Pink Pills."

Buchanan, A. C. J.: The applicants in this case have registered a trade mark under the former Act, and that trade mark still remains in existence. It is clear that the original trade mark is not one that could be registered under the present Act, and the question whether it should or should not have been registered under the previous Act has never been raised. No steps have been taken to have the mark removed from the register, and it stands there as one of the things to which, by registration, the applicants are declared entitled. The trade mark as the registration of a label which begins by describing them as "Dr. Williams' Pink Pills for Pale People Medicine Co." Now, had this been a question of first impression, I must say I would have hesitated very considerably before saying that this was at all a colourable imitation of the applicants' trade mark which is sold. I cannot help thinking with the affidavits before me that "pink pills" are a common article in the chemists' trade in England, and that pills are called by their coating, pink pills, purple pills, white-coated pills, and so on, but I have before me the previous decision in this case, where, not one Judge, but two Judges of the Supreme Court, sat on this very question. His Lordship, the Chief Justice, who gave judgment in that case, seemed to find his judgment mainly on the fact that the plaintiffs had this registration, and that nobody else is entitled to use the words which are distinctive and descriptive of the applicants' goods. It is true, as Mr. Bisset has argued, that there has been no disclaimer of any word in the trade mark registered, and it might almost be, if you drive his argument to an extreme, that nobody else can sell pills in this country. I hardly think we could go so far as that, because "pills" is a description of an article. The question is whether "pink pills" has obtained such a secondary meaning as to indicate the goods made by the applicants. There is no doubt that pink pills are well-known by advertising, and have become an article of commerce. After referring to what would probably have been the position of the trade mark under the English Acts, his lordship went on to say: I feel bound under the previous decision of this Court, and with the evidence before me, to say that nobody else is entitled to sell "pink pills" as such in this country. They may not describe them as such, because "pink pills" are supposed to

be "Dr. Williams' Pink Pills." The goods are made in England as "Dr. Williams' Pink Pills," but the applicants have been shrewd enough to get their trade mark registered in this country, and while that trade mark stands I am bound to keep it in view. The application will be granted as prayed, with costs.

[Applicants' Attorneys: Fairbridge, Arderne and Lawton; Respondent's Attorneys: Not on the record.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

SOEKER V. BLAKW AND
HENDRICKS. { 1905.
Nov. 2nd.
„ 3rd.

This was an action in which Lallie Soeker, a livery stable-keeper and speculator, of St. John-street, Cape Town, sought an order releasing him and his property from a certain bond granted in favour of Anna Susanna Blake and Baine Hendrick.

The plaintiff's declaration was as follows:

1. The plaintiff is a landed proprietor, residing at Cape Town. The first defendant is a widow, now or heretofore, residing at Paarl. The second defendant is a landed proprietor residing at Cape Town.

2. On the 21st April, 1902, a certain mortgage bond was passed and registered in the Deeds Office, whereby the second defendant acknowledged himself to be indebted to the first defendant in the sum of £6,000, and as security therefor bound as a first mortgage a certain piece of ground situate in the city of Cape Town in Glynville-terrace, at the corner of Hope-street.

3. The said mortgage bond further set forth that the plaintiff bound himself as surety and joint principal debtor for the payment of the said £6,000, such interest as might become due thereon, premiums of insurance and other costs and charges, and that for the security thereof the plaintiff bound as a first mortgage a certain piece of land in the city of Cape Town being part "A" of the land transferred to Barrio Hendricks on the 25th February, 1901, measuring 34 square roods and 45 square feet, and subsequently transferred to the plaintiff on the 19th February, 1902.

4. That portion of the said bond which binds the plaintiff and his property as aforesaid, was passed by virtue of a certain power of attorney, purporting to be granted by the plaintiff in favour of Jan Johan Michau, an attorney-at-law and conveyancer, to be sign-

ed by the plaintiff, with his mark, and purporting to authorise the said Michau to appear before the Registrar of Deeds and to bind the plaintiff and his property as aforesaid.

5. The said power of attorney was not granted by the plaintiff and the mark thereon, purporting to be the plaintiff's mark was not put thereon by the plaintiff or with his authority knowledge or consent, and the plaintiff never agreed to bind himself or his property as aforesaid.

6. The said mark was fraudulently put on the said power of attorney by the second defendant, or by someone else on his instructions.

Wherefore the plaintiff claims: (a) An order releasing the plaintiff and his property as aforesaid from the said bond. (b) An order directing the Registrar of Deeds to rectify the said bond and the entering thereof in the Debt Register by striking out therefrom all mention of the plaintiff or his property. (c) Alternative relief. (d) Costs of suit.

The defendant's plea denied the forgery, alleging that the plaintiff put his signature to the power of attorney.

Mr. Gardiner (with him Mr. Roux) for plaintiff. Mr. Searle, K.C. (with him Mr. J. E. R. de Vilhiers) for first defendant; Mr. Upington (with him Mr. Van Zyl) for second defendant.

The plaintiff stated he was a livery-stable keeper, and resided in St. John-street. He owned a considerable quantity of property, and had had several speculations with Hendricks. Mr. Chiappini acted as witness's agent. Witness did not agree to go surety for Hendricks on a £6,000 bond. Witness did not authorise anybody to put his mark to it. Witness discovered that he was surety when on one occasion he wanted £1,000, and went to Mr. Chiappini, who told him he could not advance the amount. Witness considered he was worth £1,000, and took his papers to a Mr. Woolf, who informed him that he owed £32,000. It was on that occasion he first discovered there was a bond for £6,000.

In cross-examination by Mr. Searle, witness denied that he had signed any document to pass transfer.

Louis Cerfontein stated he knew both the plaintiff and Hendricks. Witness was clerk to the latter, who brought him the document to sign as a witness in April, 1902. Soeker's mark was not there at the time. Witness did not see Soeker put his mark to the power of attorney when witness signed it.

By Mr. Searle: He was in Hendricks' employ when he signed the document. The paper was folded up, and what he signed was perfectly blank—that was the portion of the document shown to him.

By Mr. Upington: He had the strictest confidence in Hendricks, and there-

fore he signed his name without asking any questions. For all he knew, it might have been a confession of murder. It was never explained to him that he was witnessing a mark when he put his name to the power of attorney. When he went to see Mr. Woolf early in the year, he did not point out that his initials on the document were forgeries.

Courteney Cromack, clerk in the office of the Register of Deeds, produced the bonds.

Mr. Gardiner closed his case.

Barrie Hendricks, the second defendant, stated that in 1902 he purchased a certain property adjoining the one that was mortgaged. He wanted a loan to proceed with building operations, and Soeker consented to go as security. Thereupon witness gave certain instructions to Chiappini Bros. The money was advanced from time to time as the building proceeded. Witness signed the power of attorney in Mr. Chiappini's office, and went in search of the plaintiff. He saw the plaintiff talking to Taffie, and when witness showed him the document, Soeker, Taffie, and witness, at the former's suggestion, went to witness's house. Soeker made his mark on the security bond in the presence of the witnesses. He would swear that Soeker put his mark there in the presence of the witnesses. If the bond was called up, he would be able to pay it at present. In 1902 he owned considerable property; he was not pushed for money, and he could have raised it elsewhere. Since then he had accommodated Soeker to an amount of over £2,000. Both the plaintiff and Omar were in difficulties. Witness saw the thing coming on through the racehorses. The document was handed to Cerfontein open.

Cross-examined by Mr. Gardiner: If Soeker had refused to go as security, witness could have got the money on his other property. He could not say who gave Chiappini Bros. authority to use Soeker's name as security before the 26th March. Cerfontein, witness would swear positively, signed the document.

Alexander John Chiappini, partner in the firm of Chiappini Bros., acted for the plaintiff and the second defendant, in business for a number of years, stated until recently Soeker and Hendricks were on the best of terms. Hendricks required a loan of £6,000 on the buildings. Witness made arrangements to have the power of attorney signed. The following day Hendricks, who signed the power, said that he could not find Soeker. Hendricks subsequently returned with Soeker's mark, and the signatures of two witnesses. The plaintiff had frequently signed as security for Hendricks. Soeker came to his office later on, and wanted money to pay the liabilities of Hadje Omar, and witness

reminded him that he had already gone as security for Hendricks, and witness then gave him a cheque for £150. Soeker was constantly getting money of witness. In March this year Soeker wanted £1,000, to pay certain liabilities of Arend's. Witness said it was impossible to raise that amount of money, taking it for granted that Soeker, who offered no landed property as security, knew all about the mortgage of £6,000 on his property. Soeker further suggested the pledging of certain race-horses, but when witness spoke of having them taken to stables at Wynberg, the plaintiff dropped the conversation. Soeker begged of witness to assist him as he was being summoned, and witness advanced him £160.

Cross-examined by Mr. Gardiner: When Hendricks wanted the money he had no unbonded property. If he had sold his property at the time he would have had £1,500 over his bonds. Several powers were signed in the presence of other witnesses, and he did not think it necessary to have this power with £6,000 concerned signed in his presence.

Allie Taffie, building foreman, said he was present with Soeker, when Hendricks came up with the document to sign. Soeker said all right, and suggested going round to the house to sign the paper. Hendricks, in the house, called the two witnesses, and told them that they must sign as witnesses to Soeker's mark. Soeker put his mark to the paper, and then the witnesses signed.

Cross-examined by Mr. Gardiner: Witness was a relative of Hendricks. Witness was at work when Hendricks came up, and beyond having a cup of tea he did not know why he was brought round to the house as he could not write.

Hannah Hendricks, wife of the second defendant, stated that she saw Soeker put his mark to a document in her husband's house a little more than three years ago. After that the two witnesses signed the papers.

Cross-examined by Mr. Gardiner: She had been married according to Malay rites for a number of years, and was re-married before a Magistrate this year, when her husband settled on her a number of horses and carriages, and a quantity of property after she had signed an ante-nuptial contract.

James Robert Munnick, clerk in the employment of Messrs. Chiappini Bros., stated he witnessed a power to pass a mortgage bond for £3,000 in May, 1902. It was not allowed in the office to witness the signature of a man who was not present.

Francis Chiappini, partner in the firm of Chiappini Bros., stated it was a rule of the office not to witness any signature except it was written at the time.

Mr. Upton closed his case.

Mr. Searle called witnesses to give formal evidence as to the bonds passed between Soeker and Hendricks, and as to the passing of the bond in question.

Counsel having been heard in argument on the facts.

Maasdorp, J.: Before dealing with the circumstances directly connected with the transaction in question, it would be well to ascertain the personal relations that existed at that time between Soeker and Hendricks. I am satisfied that the relationship was of the most friendly character. It seems also that they accommodated one another on several occasions with their signatures. Of course, it may be said that this relationship Hendricks took advantage of in order to obtain irregular assistance in funds. Hendricks at that time was not in such difficulties that it was necessary to have recourse to irregularities in order to obtain funds. Of the two disinterested witnesses in the case there is nothing to choose between Cerfontein and Taffie, and consequently their credibility has to be tested. His lordship, after reviewing the evidence, accepted that of Mr. Chiappini, which he said disposed of the evidence given by Cerfontein, and he gave judgment for the defendants, with costs.

Attorneys for Plaintiff: Van der Byl and De Villiers; Attorneys for first Defendant: Walker and Jacobsohn; Attorneys for second Defendant: Dempers and Van Ryneveld.]

SUPREME COURT

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

WOOD V. SHERWOOD.

{ 1905.
Nov. 3rd.
„ 7th.

This was an action brought by John Henry Wood, of Claremont, a former Mayor of Muizenberg, against E. J. Sherwood, of Observatory, a member of the Mowbray Municipal Council, to recover cession of a policy of insurance, and damages in the sum of £100.

From the pleadings, it appeared that the matter in dispute went back to the early '80's, prior to either party coming out to the Cape. Defendant became surety to a firm named Wood Bros. for the plaintiff's running account, and in or about September, 1884, plaintiff

handed to him, by way of security, a policy of insurance upon his life for £400 with the Standard Life Assurance Company. Plaintiff, in his declaration, said that he made payments to defendant in full discharge of the liabilities undertaken by defendant, thus entitling him to the return of the policy and the cession. Defendant had returned the policy, but not the cession, although demands had repeatedly been made upon defendant in regard to the latter. He prayed for (1) an order for the return of the cession; (2) judgment for £100, as and for damages; and (3) costs of suit.

Defendant, in his plea, said that in July, 1888, plaintiff and defendant arrived at a settlement, whereby it was mutually agreed that plaintiff should pay to defendant the sum of £200, and that the said policy then held by defendant, with the rights therein, should become defendant's property out and out, and remain absolutely vested in him, plaintiff further undertaking, in lieu of paying interest on his indebtedness to defendant, to pay the premiums of insurance. Plaintiff paid £200, but such payment was not in full discharge of the liability of the defendant under the surety. The policy was handed to plaintiff, who was leaving for England, on his undertaking to pay the balance due to defendant of £390. Plaintiff neither on his return nor thereafter paid such amount, nor any part thereof, and it still remained due and owing. Defendant was still ready and willing, and tendered to deliver to plaintiff the said cession, on payment of the said amount (£390), now due to him. He prayed that the claim might be dismissed, with costs. In reconvention, defendant claimed an order that plaintiff hand over to him the said policy, and continue to pay the premiums from time to time as they fall due, or, alternatively, payment of the said sum of £390, with interest *a tempore morae*, and costs.

Plaintiff, in his replication, denied that he undertook to pay defendant the sum of £390, or any part thereof, or that he owed defendant any sum. For a plea to the claim in reconvention, he said that he had discharged all indebtedness that defendant might have had under the bond, and he prayed that the claim in reconvention might be dismissed, with costs.

Mr. Benjamin (with him Mr. W. P. Buchanan) for plaintiff; Mr. McGregor (with him Mr. Lewis) for defendant.

John Henry Wood (plaintiff) said that he was formerly a miller in Alford, Lincolnshire. Wood Bros., whose principal business was in Hull at that time, supplied him with foreign wheat. In 1879 defendant came to his place in Alford, and said that he was very much pressed for money, and asked witness for a loan of £100. He

had known defendant from being a youth, having been boys together. When they grew up, they married two sisters. Witness told defendant that he could not afford to lend him any money, because there was a great difficulty at the time in buying foreign wheat. They had had five successive bad harvests. Witness, however, agreed that if defendant would be security for him for foreign wheat, he would find him £100. Sherwood agreed to become surety for two bills of £250 each. Witness could not give defendant more than £60. When the bills became due, witness met them. Defendant entered into a deed of surety with Wood Bros. Some time during 1879 or 1880, he entered into a separate bond as a general security for witness's account. Witness remained in England until 1881. When he left, they had had a succession of bad harvests, and in order to secure Mr. Sherwood as his surety, witness gave him a second mortgage on the will and property, which he held, but unfortunately that mortgage was advertised in the London "Gazette" as a bill of sale. Witness did not go into insolvency. He let the business to a local miller, and advertised the mortgages of the property, with the consent of Mr. Sherwood. The result of the bill being advertised in the "Gazette" was that his creditors, Wood Bros., became anxious about their account. From time to time after he had come to the Cape, he received dunning letters from the defendant with regard to his indebtedness, and afterwards he received letters from Sutcliffe and Sutcliffe.

Mr. Benjamin put in a bundle of correspondence, going down to 1888. In that year the proposal was made that plaintiff should pay £200 absolutely, and that on payment at any time within twelve months of another £100, the policy should be handed back to him.

Witness (continuing his evidence) said that he paid the sum of £300 as agreed upon, making the final payment on September 6, 1890. In 1890 the policy was handed back to him by defendant. Witness went to England in 1897, and waited upon Sutcliffe and Sutcliffe with regard to the state of his account with Wood Bros. He was given a receipt by Sutcliffe and Sutcliffe. The cession had been the cause of a long-standing quarrel. Witness was in some difficulties in 1903. It was not until then that he made his discovery that the cession had not been given back to him. Defendant, on demand being made upon him, first agreed to hand the cession over to witness's son, and afterwards to hand it over to his trustees, but he failed to give up the cession. Witness discovered that defendant had been attempting to raise money on the policy. Witness spoke to an interview which afterwards took place between himself, Mr. Sher-

wood and Mr. Andrews, when the defendant claimed that witness had only paid £250 and that he was not entitled to the £100. Witness, who was in a rage, replied: "If that is the case, give him the money, if I can't have it honourable I won't have it at all." From time to time he had applications from the defendant for sums of money from 1891 to 1901. From 1890 to 1904 there was no intimation on the part of the defendant that witness was indebted to him in any way. Between 1890 and 1897 he decided to lend anything to the defendant because the latter would not give him a free discharge. From 1897 onwards he had continually lent to the defendant money up to large amounts. "In fact," said witness with warmth, "he has also been the torment of my life."

Mr. Benjamin read a series of letters couched in very fraternal terms which had passed years ago between the parties, plaintiff being visibly affected when the correspondence was read. Many of the letters contained applications by defendant for financial help.

Witness (in further evidence) said that he had paid all the premiums on the policy.

Cross-examined by Mr. McGregor: Witness had a good memory sometimes. He had been in a rage several times because of defendant's conduct. He was not bad tempered. He did not think that he had threatened personal violence to Mr. Sherwood. He did not remember saying recently to the defendant that if he (plaintiff) lost the case, Sherwood would have to suffer, even if he (witness) had to swing for it. Witness took exception to a misrepresentation made by the defendant to the insurance company. When he wanted to raise money on the policy, defendant represented that witness had consented to it. That was what witness referred to when he spoke in one of his letters about the matter taking a "criminal aspect."

Mr. McGregor: Have you used very positive epithets towards Mr. Sherwood.

Witness (with some feeling): I have called him almost everything that I could think of from time to time, because I have been so much annoyed by him.

Further cross-examined: Witness came out to this country in October, 1881.

In further cross-examination, witness said that defendant persecuted him from the very day he arrived in this colony in regard to the bond.

Mr. McGregor wanted to put a letter to witness to refresh his memory on a certain point.

Witness (bitterly): I don't want to see it; I am so sick of the whole thing.

In answer to the Court: Witness said that Wood Bros. died soon after he had given up doing business with them.

Further cross-examined: Years ago witness had asked the defendant for a statement of what he had paid to the firm of Wood Bros. He had threatened in one of the letters to remove beyond the reach of the defendant.

Mr. McGregor: Why did you threaten to go beyond his reach?

Witness: Because he was persecuting me. I would go to the ends of the earth rather than be persecuted, and I would go further if possible! Witness paid £20 to Sherwood's solicitors in England for a complete statement of the account, and in 1897 he made a full and final settlement. He had lent thousands of pounds since then to Sherwood. It was with Sherwood's consent that he came out to this colony. He did not see Sherwood before he embarked from Hull, because Sherwood was in London at that time. He admitted that it would have been better if he had inquired before he left England what his indebtedness to Wood Bros. was. It would have saved him a life-time of agony.

Mr. McGregor: Mr. Sherwood was in difficulties in 1879?

Witness: I have never known him out of difficulties, and I have known him since he was a boy.

Further cross-examined: A great many of witness's papers had been destroyed by the fire at his mill in Plein-street.

By the Court: Witness based his claims on the settlement arrived at with defendant's solicitors, Messrs. Sutcliffe and Sutcliffe, in July, 1888. Messrs. Sutcliffe wrote saying that they were willing to accept £300, paid in terms set out, and he agreed, paying the sum of £300 in full and final settlement. The amount of £300 was agreed to as a compromise. He sent £100 and three sums of £50, and paid the balance of £50 to the Sherwoods on their arrival in this colony in October, 1890. Sherwood used often to complain that he had paid £500, £600, or £1,000, and as witness was in good circumstances, he offered to pay to defendant anything more that might be owing to him. Witness said to defendant: "If you can prove that you have paid the amount of money that you allege, I will give you £1,000 and principal and interest." There had been a lot of trouble in the family, because some believed witness and others believed Sherwood.

Douglas Francis Mautry, clerk in the employ of the Bank of Africa, gave evidence as to certain drafts drawn by plaintiff in favour of defendants.

David R. Andrew, district manager for the Western Province of the Standard Life Company, said that the premiums had been paid up to July last, and the policy was still alive, although the premium for 1906 was now due. Witness was waited upon this year by Sherwood, and asked what loan value would be given on the policy. Witness

inquired from the head office, and was informed that the loan value was £126. It was a regulation of the office that both the holder and the cessionary of the policy should sign a bond if a loan were granted. Sherwood, on being asked if Wood was willing to sign the bond, said that he was. Wood afterwards called at the office, and objected to any loan being granted on the policy. Witness had in the meantime communicated with Johannesburg, and at the time Wood called a cheque and two bonds were in the company's office. There was an interview subsequently with Sherwood and Wood, at which the latter lost his temper.

Mr. Benjamin closed his case.

E. J. Sherwood (defendant) was then called. About 1880, he said, he went with plaintiff to Wood Bros., of Hull, gave him a letter of credit, and lent him £1,000. He denied that about that time he received a loan from plaintiff. Plaintiff gave him a second mortgage on his mill property for £500. He failed to meet his second bill. Witness made several payments to Wood Bros. When plaintiff's bills fell due he called upon witness to pay as much as he could to meet the bills. Witness scraped together all the loose cash that he could find and handed it over to Wood.

[Hopley, J.: Without any receipt?]

Witness: I simply handed it over to Wood. He would come to me and say: "Look here, there is a bill to meet," and I gave him so much towards it.

[Hopley, J.: How much?]

That I cannot tell you.

[Hopley, J.: Do you want us to believe that you handed over this money without getting any acknowledgment?]

I got acknowledgments.

[Hopley, J.: Where are they?]

I have not got the acknowledgments now, I never troubled about them. The second bill that was met was met through the selling of my furniture when I was away in London.

Witness (continuing) said that he transferred the rents of his property in Manchester for plaintiff's benefit.

Mr. McGregor: Did you get a statement of account between J. H. Wood and Wood Bros?

Witness: Certainly, as soon as Wood ran away I got that.

Mr. McGregor: What became of that statement?

Witness: I sent it after him to South Africa. Continuing, he said that when he could not go on paying cash, he passed a bond in favour of Wood Bros. Subsequently he surrendered the bond Wood had given him, for the sake of his (plaintiff's) father and mother. Wood took particular care not to see witness before he went to South Africa. Wood could have met him in Hull, where he started from, and where witness was. He (defendant) ran all over the town

trying to find him, but he did not succeed. The first news he had of Wood's whereabouts he received from his (witness's) wife.

[Hopley, J. (interposing): What is all this about? Do you want to impute dishonesty?]

No, not dishonesty.

[Hopley, J.: Then what is all the trouble about?]

I think he might have made some arrangement about the payment of his account.

[Hopley, J.: But that was arranged by you having taken it over?]

I did not take it over with the intention of having the account to pay.

[Hopley, J.: You must have been young in those days.]

Witness (in further evidence) said that he had expended on behalf of the plaintiff £600 odd, apart from legal expenses.

[Hopley, J.: Of course, you will produce documents to show this expenditure?]

Witness replied that he could not produce any such documents.

[Hopley, J.: Then hadn't we better come down to the settlement of '88, and leave this ancient history alone? The important date is '88.]

Witness (continuing) said that when the agreement of '88 was made witness was in England. Plaintiff did not pay the first £200 within three years. He did not avail himself of the option. Witness received £100, and two drafts of £50 each, but he got no more payments either by draft or note. Witness did not hand the policy to defendant in 1890, but it remained in his possession until 1897.

He handed the policy to the plaintiff in 1897, when the latter went to England. Plaintiff said that he wanted the policy for a purpose, but witness knew that he was not wanting to raise money, because he was in funds. Wood said that he had got plenty of money, and he was going to the Old Country, and was going to square up all his old debts. He was going to see Wood Bros. and Sutcliffe, witness's solicitors, and see how much he (defendant) had paid on his behalf. He promised on his return to pay to witness all that he (Sherwood) had paid to Wood Bros., with interest. Witness gave plaintiff the policy, but he told plaintiff that he would keep the cession. Witness knew that plaintiff could not raise money on the policy.

[Hopley, J.: What was the good of taking that policy to England?]

It was no good to him, only he seemed to have had a fad to have it in his possession.

[Hopley, J.: What good could it be to him?]

No good whatever financially; I knew that.

[Hopley, J.: What was the fad Here is a man with thousands to his credit in the bank at the time. Why should he have this particular fad?]

I cannot tell you. I must leave the Court to decide.

[Hopley, J.: That is what the Court wants to know. The Court has to decide on the probabilities when two gentlemen like yourselves contradict each other and call each other a liar, and say that you are mistaken?]

I have given the true statement of what passed between us.

Witness (in further evidence) said that he sent a letter to Sutcliffe giving plaintiff a full discharge from all legal claim. He took it that expression did not mean that the policy had been redeemed. When plaintiff returned from England, he flourished the receipt about, and put it in front of witness's wife and children. He said to witness: "I have got you; you have given a discharge." After the policy was handed to witness, plaintiff continued to pay the premiums. In regard to the attempt to raise a loan on the policy, witness said that he had the consent of plaintiff to raise a loan. One day plaintiff called at his office. He was crying like a child, and he asked witness to come outside. Plaintiff then said that the bother had been going on a long time, and he wanted it to be settled. Witness agreed, and said to plaintiff: "You give me £75, and we will sign receipts, here and now, between each other, which will settle this dispute for ever." Witness knew that plaintiff had no money, and he pointed out that he (plaintiff) could raise money on the insurance policy. Plaintiff was the very one to agree to it, and they went to Mr. Andrew, of the Standard Life Insurance Co., to arrange about a loan on the policy. At the interview with Mr. Andrew, witness happened to say something that did not suit Mr. Wood, and the latter got up in a towering rage, and said: "Keep the policy." Witness was an architect and quantity surveyor.

Mr. Benjamin called the witness's attention to a letter of the 11th November, 1901, which he had sent to the plaintiff. In his evidence, witness had said that plaintiff had only paid £200. Witness admitted that he wrote the letter (copy produced).

Mr. Benjamin (apologetically): It is a very long letter, my lord, and I am afraid the language is not very choice.

[Hopley, J.: I am accustomed to that sort of thing.]

Mr. Benjamin read the letter in question, in which defendant used very strong terms with regard to the conduct of the plaintiff, accusing him of pouring out "his devilish venom and spite" upon him (defendant). Defen-

dant in this letter said that plaintiff had paid him £300.

Witness (in reply to further questions) said he admitted that the plaintiff must have paid him £300.

[Hopley, J.: The funny part of that letter is that it is signed: "Your affectionate brother, Ted."]

Witness (further cross-examined) said he knew at the time that he had no legal claim upon the plaintiff.

Mr. Benjamin: You have got no legal claim upon him now.

Witness: No.

Then why do you contest this action?—It is not we that brought it in. I have done everything I possibly could to prevent it coming here.

Why didn't you hand over the cession to Mr. Wood?—Why should I?

Why should you not?—I can tell you.

[Hopley, J.: Why did not you hand him the policy? That is what counsel means by "settling the action."]

Witness: I wanted to get the matter settled, and that is the reason why I wanted the receipt. If I had handed back that policy he would have gone about boasting for the rest of his life that he had beaten the —.

In further cross-examination, witness said that he did not press the matter of the policy for some time, because they had been fighting for the last twenty years, and he had made up his mind that he would not re-open the question. In 1899 witness was in some difficulties. A meeting of his creditors was held. One of his creditors was Mr. Wood. He brought up a schedule which showed liabilities at £596 and assets at £1,145, making a balance in hand of £549. He paid his creditors 20s. in the £, with good interest.

Mr. Benjamin: Is this statement of affairs correct?

Witness: Yes.

Then why have you not brought up the policy of insurance as an asset?—I did not bring it up, because it was in dispute.

Charles Henry Littlewood (son-in-law of the defendant) also gave evidence.

Counsel having been heard in argument on the facts.

[Hopley, J.: The matter at issue between the parties to this suit—and it is regrettable that court of law should have to settle a dispute between two men who have arrived at their time of life, and who are closely connected by marriage—is, in short, whether the plaintiff is entitled to have returned to him a certain cession of a policy of insurance made by him in the year 1884 to the defendant, or whether, as a matter of fact, according to the pleadings, the defendant is entitled to regain that policy and to retain the cession against payment, which he alleges is due to him, of £390, together with interest. After briefly sketching the incidents connected with the lia-

bilities which the defendant contracted on behalf of the plaintiff to Wood Bros., of Hull, and the subsequent correspondence which took place between the parties as to the repayment by plaintiff of his debt to the defendant. His Lordship proceeded to say: I pass over that stage, because it seems to me to be rendered unimportant by the fact that eventually, in the year 1888, a settlement which we sitting in this Court must consider to have been given for consideration as between themselves, was arrived at, which fixes the hitherto disputed accounts as between the parties. It may be that Sherwood knew that he was losing a bit of money; it may be that Wood knew that he was gaining a bit; but he himself was not in such a position, although he was doing better here than he had done in England, as to be able to be too generous with over-payments, and, as he was disputing the account, and apparently annoying Sherwood, the letter of July was eventually written by Sherwood himself. On the 4th July, Mr. Sherwood writes from London to his brother-in-law and sets forth practically or pretty much the same terms as were afterwards made by the solicitors on behalf of the defendant. These terms are £100 at once, a bill for £100 in six months, and another bill for £100 in a further six months, and a further bill for £100 in twelve months. Now comes a very significant sentence to my mind: "Of course, I shall give receipt in full discharge, when the policy is redeemed." In view of that statement, I might revert to the fact that in 1882 or early in 1883, in the correspondence which was taking place Wood had offered to Sherwood to insure his life for £500 for the benefit of Mr. Sherwood. That had been done, and this policy had been taken out on the 30th August, 1883, in the company here for £400. At that time the exact amount was a matter of dispute between the parties. Wood swears that all along he knew that it was not more than £400, and that he insured his life for £400, and that he sent on his policy of £400 in security for that amount. The fact that the amount of the policy was £400 bears out pretty strongly Wood's evidence. But to come back to the correspondence, we have the letter of Messrs. Sutcliffe, the defendant's solicitors, sent two days later to the defendant, viz., the 6th July, 1888. In that letter, Messrs. Sutcliffe say that, acting on behalf of Mr. Sherwood, they would accept the terms offered by the defendant. These are the terms that were accepted, and these are the terms that it is impossible to go behind. It is impossible to follow Mr. Sherwood when he says that there is a much larger sum owing to him than that indicated by this statement. In pursuance of that agreement that he should pay £100 then, and then £50,

and another £50 within 12 months, there is no doubt that he sent £100, that another £50 was sent, and a further £50. This Mrs. Sherwood admits. What is in dispute is whether he carried out the further agreement to pay what was due at that time (another £100), and he (plaintiff) says that it is material whether the defendant paid it within 12 months or not. I see nothing in that agreement which changes the nature of the cession. For instance, Sutcliffe do not say whether that this agreement is contingent upon the plaintiff carrying out every letter of it, and that time is of the essence of the contract, and that if he did not redeem this policy within 12 months it becomes irrevocably that of their client. There was no objection taken at that time that the payments were out of time, or that anything would result from their being somewhat late. Now, the only other question is: Did the plaintiff carry out the further agreement and pay this £100? On this there is a direct conflict of evidence. Mr. Wood says that he did pay, and he says that he paid one part of it, at all events, in a somewhat peculiar fashion. He says that a £50 note came into his hands in the course of business, and that he sent it off by registered letter, and that he received a letter of acknowledgment from Mr. Sherwood, which was filed, together with the registered letter receipt, at the place where he carried on his mill in Plein-street, and that it was, in the removal which took place in 1891, lost with some other papers. He says that, as to the other £50, he can produce a receipt, and that he has shown that he paid the £50 when defendant came here. He says that with that payment he completed the payments which released his policy, and should have released his cession. If he made these payments, it seems to me that this cleared off the obligations between the parties. This cession, being only a security for money borrowed, if he discharged all that was due by him, this cession must, in due course, have been returned. Legally, he was entitled to claim it. The whole case, therefore, narrows itself down to this one matter—has the plaintiff discharged the obligation that is upon him; has he successfully shouldered the onus that is upon him of proving his case? I quite agree with Mr. McGregor that "nebulous hypotheses" will not do, and that we must have proof. Of course, there is in the first place, as far as legal proof is concerned, Mr. Wood's own oath, on which I should be, by itself, entitled to act if I thought he was entirely trustworthy. But I am asked to doubt that for the reason that he can produce no proof, and that the transactions are extraordinary. The question is: Is there any corroboration of these transactions? I think that as regards the payment of the sum of £50, Mr. Wood must be taken

on the documents to be right, and that this payment of £60 was payment wholly and entirely independent of the promissory note in favour of Mrs. Sherwood. In testing the worth of the evidence, I have the fact that at some period or other this policy of insurance was handed back by Mr. Sherwood to Mr. Wood, and I have not had a word of explanation which can commend itself to my mind as to the reason why it was handed back, unless it be the reason given by Mr. Wood. Mr. Sherwood does not offer any explanation. Again, taking the plea, I do not see why the plaintiff should undertake to pay the defendant the sum of £390. It seems to me that that paragraph of the plea is in direct conflict with the proved facts in this case. In October, 1891, we have letters containing abuse between the parties, which gentlemen of their position and age should not have indulged in. In October, 1891, defendant said: "We acknowledge we accepted what was equivalent to 10s. in the £, so that you would not go bankrupt, and we should get nothing, and now you boast of having settled with us, but your moral obligation is still the same. You have paid a few pounds over £300, which is not half of the £634 we paid for you." One cannot help feeling that this is a corroboration of the evidence of the plaintiff that he paid £300. In 1897 the plaintiff went to England, and we have the letter sent to Mr. Sutcliffe by the defendant, as follows: "In reply to your letter, I beg to say that Mr. John Henry Wood, formerly of Alford, Lincolnshire, who now resides in Cape Town, complied with the conditions agreed upon as stated in yours dated the 6th July, 1888, and that in accordance with such agreement, I have no further claim upon the said J. H. Wood." We can only take that letter to mean what it says. Whether we look at it from the legal point of view, or from Mr. Sherwood's own point, we can only take it to mean that the £100 for the policy had been paid, and that defendant had no further claim upon him for the policy or the cession or anything else. I am extremely sorry that two men, both apparently respectable men should have reached that stage when neither could see the points in the other's case, and I am sorry that they had to come to this Court, and that I have had to decide the matter between them. The only one point that I can congratulate them upon is that they have kept their wives and children out of the witness-box to support them. I find on the documents, and chiefly on the documents, that this account has been paid in full; and, to use Mr. Sherwood's own words, "all the conditions in the letter of his attorneys of 1888 have been complied with by Mr. Wood." On his own words, I must give judgment against him, and if he has any satisfaction hereafter in

explaining to his friends that his words do not mean what apparently they mean to anybody else, he may have that satisfaction. I must decide as an ordinary common-sense person, and a lawyer, in such circumstances, would decide, and say that the balance of evidence is against him, and that the plaintiff has made out his case. As to damages, there are no damages proved by the plaintiff. The order of the Court is that the cession should be returned to the plaintiff, and that the defendant should pay the costs of suit.

[Plaintiff's Attorneys: Buchanan and Boyes; Defendant's Attorney: A. W. Steer.]

	1905.
RHODESIA COLD STORAGE CO.	Nov. 6th.
V. BEIRA COLD STORAGE CO.	" 13th.
	" 14th.

Sale — Specific performance — Damages—Shares.

The defendants agreed to take on the plaintiff company for the purpose of amalgamating it with other companies of a similar character. Part of the purchase price was to be paid in cash, and the remainder in shares in the new company. The cash was paid, but the shares were kept over pending transfer. In an action for specific performance and the delivery of the shares, the defendant company alleged misrepresentation on the part of the vendors, but at the trial failed to establish this defence. Judgment was given for the delivery of the shares, or in the alternative for the payment of damages equal to their full value. A further sum was also awarded as damages suffered by the delay in making delivery: the shares being now unsaleable. On appeal, the latter sum awarded as damages was disallowed as no specific loss had been proved.

Semble (per Buchanan, A.C.J.): Where specific performance of a contract of sale is decreed, damages immediately arising out of and consequent on the mora of the vendors may be recovered.

This was an appeal from a judgment of the High Court of Southern Rhodesia.

The action in the Court below was brought by Emil Albert von Hirschberg, in his capacity as liquidator of the Beira Cold Storage, Limited, against the Rhodesia Cold Storage and Trading Company, Limited. Plaintiff sued on a written agreement entered into on February 10, 1903, between one Davis, as the duly authorised agent of the Beira Cold Storage, Limited, and one Bartman, as trustee for a company about to be formed, which agreement was subsequently adopted by the defendant company, who took over the rights and liabilities of Bartman on March 20 of the same year. The agreement was for the sale of the whole of the business and assets as a going concern.

[The record in this case having been very voluminous, we can only report those portions thereof which are more particularly essential to the issue. Counsel in the appeal case having quoted the pages in the record; the passages referred to are given from the record, and the page of the record is inserted in the margin.]

The declaration was in the following terms:—

p. 4. 1. The plaintiff is liquidator of the Beira Cold Storage, Limited, and sues in such capacity, and is the proper person to sue; the defendants are the Rhodesian Cold Storage and Trading Company, Limited, a company duly registered in England, and carrying on business in this territory.

2. The Beira Cold Storage, Limited, is a Company registered in Southern Rhodesia and carried on business in that territory and elsewhere and prior to the agreements and acts hereinafter set out the Company held certain assets consisting of leaseholds, plant, credits and other assets in this territory in addition to landed property and assets situated at Beira and elsewhere.

3. On the tenth day of February, 1903, an agreement was entered into between the Beira Cold Storage, Limited, called the Vendor Company, and one Sidney William Bartman on behalf of a company about to be formed the terms of which are more fully set out in the annexure hereto marked "A," which forms part of this declaration.

4. Subsequently the defendant company was duly incorporated, and on the 20th day of March, 1903, adopted and held themselves bound as the purchaser company by the terms of the said agreement. This will more fully appear from the document hereunto annexed and marked "B," which also forms part of this declaration.

5. In order to carry out the terms of the said agreement on the 13th May, 1903, it was decided by the shareholders thereof to wind up the Beira Cold Storage, Limited, voluntarily, and the plaintiff, Emil Albert von Hirschberg was

duly appointed liquidator of the company on the same date.

6. The defendants have paid to the plaintiff the cash consideration of £11,383 mentioned in clause 4 of the said agreement A.

7. The certificate for 22,768 shares, p. 5. part consideration of the said agreements, was handed to the Bank of Africa in London, in trust for both companies until transfer of the Vendor Company's property and assets to the purchasing company.

8. On or about the 18th day of April, 1903, the defendants took physical possession of all the premises and plant of the Vendor Company, and took control of and began carrying on the business hitherto carried on by the Vendor Company. Transfer of the Vendor Company's assets to the defendants has not yet been completed.

9. Though as above set out the defendants are in full control of the business of the Vendor Company, the defendants wrongfully and unlawfully refuse to deliver or allow the said bank to deliver the said shares to the plaintiff.

10. By reason of such wrongful non-delivery the Vendor Company has suffered loss and damage to an amount of £11,384.

11. The costs incidental to the winding up of the Vendor Company have been as follows:—The sum of £20 10s. 4d., being the amount paid to Messrs. Budd, Johnson and Jecks, of London, Solicitors; the sum of £18 2s. 1d., paid by the Vendor Company to their solicitors at Salisbury; the sum of £10 15s. 8d., being the further costs of liquidation prior to these proceedings and payable to the Vendor Company's solicitor at Salisbury; and a further sum of £400 for general expenses incident to such winding up, or in all the sum of £450 8s. 1d. In terms of clause 3 of the said agreement annexed and marked A the defendants have agreed and are bound to pay the said sum to the plaintiff's, but the defendants refuse to pay the same.

12. All things have happened, all times elapsed, and all conditions been fulfilled entitling the plaintiff to sue.

Wherefore the plaintiff claims:—

1. Delivery of 11,384 seven per centum fully paid-up preferent shares of £1 each, and 11,384 fully paid-up ordinary shares of £1 each in the defendant company in terms of the said agreement or payment of £22,768 their value

2. £11,384 as and for damages sustained.

3. The sum of £450 8s. 1d. as detailed in paragraph 11 of the declaration, with interest *a tempore mora*.

4. With costs of suit.

5. And such alternative relief as may seem meet in the premises.

p. 6.

"A."

An agreement made the tenth day of February, one thousand nine hundred and three between The Beira Cold Storage, Limited, a company incorporated in Southern Rhodesia with limited liability under the British South Africa Company's Ordinance No. 2 of 1895 (hereinafter called "The Vendor Company") of the one part and Sidney William Bartman of Finsbury Pavement House, Moorgate Street, in the City of London, on behalf of the company below mentioned (hereinafter referred to as the purchasing company) of the other part. Whereas the Vendor Company has for some time past carried on business in Rhodesia and Portuguese East Africa. And whereas it is intended as soon as may be after the completion of the sale hereby agreed to be made that the Vendor Company shall pass an effective resolution for the voluntary winding up thereof. And whereas the Purchasing Company to be called The Rhodesian Cold Storage and Trading Company, Limited, or some other similar name is about to be formed under the English Companies Acts with a nominal capital of five hundred thousand pounds divided into two hundred and fifty thousand seven per centum cumulative preference shares and two hundred and fifty thousand ordinary shares, the preference shares ranking both as to capital and dividend in priority to the ordinary shares, and having for its object among other things the acquisition and working of the undertaking of the Vendor Company and of the said business so hitherto carried on as aforesaid, and other similar businesses. And whereas by the Articles of Association of the Purchasing Company it is provided that such Company shall immediately after the incorporation thereof adopt (*inter alia*) the agreement therein referred to being these presents: Now it is hereby agreed as follows:—

1. The Vendor Company shall sell and transfer and the Purchasing Company, when incorporated, shall purchase and take over the undertaking business and goodwill of the Vendor Company, and all the lands, buildings, hereditaments, goods, chattels, moneys, credits, debts, bills, notes, trade marks, if any, and things in action of the Vendor Company, and the full benefit of all contracts, agreements and securities, to which the Vendor Company is entitled, and all other assets whatsoever and wheresoever of the Vendor Company other than and not including its uncalled capital together with the right to use any words to represent the carrying on of the business in succession to the Vendor Company.

2. As a part of the consideration for the said sale and transfer the Purchasing Company shall undertake, pay,

satisfy and discharge all the debts, liabilities and obligations of the Vendor Company whatsoever, and shall adopt, fulfil and perform all contracts and engagements binding on it either now or which shall become binding on it before the completion of the sale and shall indemnify the Vendor Company, its liquidators and contributories against such debts, liabilities, obligations, contracts and engagements and against all actions, proceedings, costs, damages, claims and demands in respect thereof.

3. As a further part of the consideration for the said sale and transfer the Purchasing Company shall pay and at all times hereafter keep the Vendor Company, its liquidators and contributories indemnified against all the costs, charges and expenses of and incidental to the winding up and dissolution of the Vendor Company, and of carrying the said transfer into effect.

4. The residue of the consideration for the said sale and transfer shall be the sum of thirty-four thousand one hundred and fifty-one pounds, which shall be paid and satisfied as follows:—As to the sum of eleven thousand three hundred and eighty-three pounds by the payment thereof to the Vendor Company in cash, and as to the further sum of twenty-two thousand seven hundred and sixty-eight pounds by the allotment to the Vendor Company or its nominees or the nominees of Robert George Davis of 113, Cannon-street, in the City of London, manager in London of the Bank of Africa, Ltd., of eleven thousand three hundred and eighty-four seven per cent. fully paid-up preference shares of £1 each, No. 250,001 to 261,384, both inclusive, and subject to no restriction as to transferability in the capital of the Purchasing Company and eleven thousand three hundred and eighty-four fully paid-up ordinary shares of £1 each. No. 8 to 11,391, both inclusive and subject to no restriction as to transferability in the capital of the same company.

5. The Purchasing Company shall, without investigation, objection or requisition, accept the title of the Vendor Company to the premises hereby agreed to be sold.

6. The sale and purchase hereby agreed to be made shall be completed on the twentieth of March, one thousand nine hundred and three, at the registered office of the Purchasing Company when the said residue of consideration in cash and shares shall be paid and satisfied subject to the provisions of this agreement, and the Purchasing Company shall issue certificates for the said fully paid shares in accordance with this agreement, and the Vendor Company shall at the expense of the Purchasing Company execute and do all such assurances and things as shall reasonably be required by the Purchasing

Company for vesting in it the said premises and possession thereof, and giving to it the full benefit of this agreement.

7. No shares in the capital of the Purchasing Company shall be allotted before the allotment to the Vendor Company or its nominees or the nominees of the said Robert George Davis of all the fully paid up shares hereinbefore mentioned, and no certificates of such fully paid up shares shall include more than one hundred shares. No special settlement on any Stock Exchange for any shares of the Purchasing Company shall be applied for until such shares shall be fully paid up.

8. The possession of the said premises shall be retained by the vendor Company up to the completion, and in the meantime they shall carry on the said business of the Vendor Company in the same manner as heretofore so as to maintain the same as a going concern, and they shall as from the first January, One thousand nine hundred and three, be deemed to have been and to be carrying on such business on behalf of the purchasing company. And shall account and be entitled to be indemnified accordingly, and the purchasing company shall, subject to the consent of the insurance offices and until completion of the purchase, be entitled to the benefit of the current insurances of the premises.

p. 8. 9. Unless before the thirty-first day of March, One thousand nine hundred and three, the purchasing company shall have become entitled to commence business and this agreement shall have been adopted by the purchasing company in such manner as to render the same binding on the same company, the vendor company may by notice in writing to the said Sidney William Bartman determine the same.

10. If from any cause whatever other than the wilful default of the vendor company the purchase shall not be completed on the said twentieth March, One thousand nine hundred and three, the purchasing company shall pay interest as from such date at the rate of five per cent. per annum on the sum of thirty-four thousand one hundred and fifty-one pounds until the purchase shall be completed.

As witness the execution of the Beira Cold Storage, Limited, by the hand of the said Robert George Davis, their duly authorised attorney, set hereto, and the hand of the said Sidney William Bartman set hereto the day and year first above written.

S. W. BARTMAN.

"B."

p. 9. An agreement made the 20th day of March, 1903, between the Rhodesia Cold Storage and Trading Company, Limited

of Finsbury Pavement House, in the city of London (hereinafter called "the company"), of the first part, the Beira Cold Storage, Limited, of Beira, Portuguese East Africa (hereinafter called "the vendors"), of the second part, and Sidney William Bartman, of Finsbury Pavement House aforesaid, of the third part. Whereas by an agreement (hereinafter called "the principal contract"), dated the 10th day of February, 1903, and made between the vendors of the one part and the said Sidney William Bartman as trustees for the company (which was then intended to be and has since been formed under the Companies' Acts 1862 to 1900), of the other part, it was agreed that the vendors should sell and the company should purchase the undertaking and property therein referred to upon the terms and subject to the stipulations therein expressed.

Now these presents witness and declare as follows:

The principal contract is hereby adopted by the company and shall be binding on the vendors and the company in the same manner and take effect as if the company has been in existence at the date thereof, and has been a party thereto, instead of the said Sidney William Bartman, who from henceforth shall be discharged from all liability under or in respect thereof.

As witness the common seals of the companies' parties hereto and the hand and seal of the said Sidney William Bartman.

The common seal of the Rhodesia Cold Storage and Trading Company, Limited, was hereunto affixed in the presence of:

P. LYTTTELTON GELL,

W. J. ELDER,

Directors.

S. W. BARTMAN, Secretary.

Signed, sealed, and delivered by the said Sidney William Bartman in the presence of:

S. W. BARTMAN.

To this declaration the defendants pleaded:

1. The defendants admit the allegation in paragraphs 1 to 8 inclusive of the declaration and deny those in paragraphs 10, 11, and 12 thereof. p. 10.

2. As to paragraph 9 thereof the defendants say that prior to the issue of the summons in this action they had delivered the said shares in London to one Davis, who was the agent of the said Beira Cold Storage, Limited, to receive the same. Subsequently, after the issue of the said summons, they obtained an order in the High Court of Justice restraining the said company or their agents from parting with the said shares; copy of the said order is annexed hereto and marked A.

Save as aforesaid, the defendants deny

the allegations in the said ninth paragraph of the declaration.

3. The defendants say further that when they entered into the said agreements of the 10th February, 1903, and 20th March, 1903, for the purchase of the business of the said company they did so relying on the accuracy of the balance-sheet of the said company made up to the 31st March, 1902, which was handed to them prior to the 10th February, 1903, by the said company as being a true statement of the financial position of the said company, and in order to induce the defendants to purchase the said business, and the defendants were so induced.

4. Subsequent to the dates of the said agreements and the events referred to in paragraphs 5, 6, 7, and 8 of the declaration the defendants discovered that the said balance-sheet was false and misleading, and the financial position of the said company was not as represented by them, and that the books and accounts of the said company were false and contained serious discrepancies.

p. 14. 5. The defendants have furnished the plaintiff with an extract from the report of the auditors whom the defendants employed to examine the said books and accounts of the said company after the defendant discovered that the said balance-sheet was false, giving particulars of such errors and discrepancies. A copy of the said extract is annexed hereto, marked B, and to which defendants crave leave to refer.

6. As soon as the defendants became aware of the said misrepresentations they commenced an action in London in the High Court of Justice, King's Bench Division, for rescission of the said agreements by reason of the said misrepresentation, which action is still pending. A copy of the summons in the said action is annexed hereto, marked C.

Wherefore the defendants pray that the plaintiffs' claim may be dismissed with costs.

The plaintiff made application as follows:

p. 17. 1. He admits the allegation in paragraph 2 that the said injunction was obtained, he says he was no party to the proceedings, nor has he any knowledge of the circumstances under which the said order was obtained. After service upon him the plaintiff availed himself of the liberty given him in the said injunction, and he has moved the High Court of Justice in England to set the order aside; his application is still pending in that Court.

2. As to paragraphs 3, 4, and 5, he denies that any statement of account or balance-sheet was handed to the defendants by himself or the Beira Cold Storage Company. No statement of account, financial statement, or balance-sheet was ever referred to during the

negotiations or formed any inducement to the defendants to enter into the said contract. Should this Court hold to the contrary, the plaintiff says the said balance-sheet was the ordinary annual business statement drawn up on the date mentioned, and that the same is true and correct balance-sheet.

3. The plaintiff admits the receipt of the report referred to, but denies that it is correct in any particular.

4. As to paragraph 6, the plaintiff says the action herein set out was only commenced after summons had been served in this action. On the 15th day of March, 1904, the defendants made application to this Court to set aside this action on the ground of the pendency of proceedings in the High Court of Justice aforesaid. The application was dismissed with costs against defendants.

5. Save as above, the plaintiff denies all and singular the allegations of fact in the plea contained. p. 18.

The rejoinder was general.

CONSENT TO AMENDMENT OF DECLARATION.

We, the undersigned, attorneys for p. 21. the plaintiffs and defendants respectively in this cause, consent to the amendment of the plaintiffs' declaration as follows, that is to say:

Paragraph 10 to read: "By reason of such wrongful non-delivery the vendor company has suffered loss and damage to an amount of £11,384," the amendment consisting of the substitution of the figures £11,384 instead of the figures £1,133 18s.

In the prayer at the end, amend Claim No. 2 by substituting the figures £11,384 instead of the figures £1,133 18s., so as to read "£11,384 as and for damages sustained."

And we further consent to the same amendment being made in the summons, so as to read (in paragraph 2): "2. The sum of £11,384 as and for damages sustained."

Sir,—We beg to give you notice of p. 22. the following further particulars under paragraphs 4 and 5 of defendants' pleas, viz.:

1. That under the item of £4,627 3s. to sundry creditors in the balance-sheet is included a sum of £3,000, which was a loan from the Bank of Africa, Limited, Beira, to the Beira Cold Storage, Limited, and should not have been included among the sundry creditors of the company, but should have appeared in the balance-sheet as a separate item.

2. That the value placed on the assets in the balance-sheet misrepresents the true value of such assets, no sufficient depreciation having been written off.

3. That at the time of the sale of the said business by the Beira Cold Storage, Limited, to defendants the business was not in the flourishing condition represented by the balance-sheet, but was in a

moribund condition, and being carried on at a great loss.—We have the honour to be, sir, your obedient servants,

GRIMMER, DU PREEZ
AND TOWNSEND,
Attorneys for Defendants.

p. 28. MR. WALLACE'S EVIDENCE.

A.—I may say that I asked Mr. Lawley for information as to the capitalisation and general position of the Beira Cold Storage Company, and turning to the Secretary, he said: "Where is that balance-sheet that arrived by the last mail, or 'the mail before last'?" And on it being produced, he handed it to me, he said, "There you have all the information, and know as much about it as I do," or words to that effect.

Q.—Was that balance-sheet and the report, and the information it contained, considered by those acting on behalf of the defendant company before they arrived at the agreement?

Mr. Wallace: I object to that. We have not heard that anybody else was acting on behalf of the defendant company.

A.—Yes.

Mr. Vaughan Williams: Who else was acting on behalf of the defendant company at that time in considering the acquisition of these businesses?

A.—There were the proposed directors and their solicitor.

Q.—Who were the proposed directors?

A.—Mr. P. Lyttelton Gell, Sir F. W. Forester Walker, and Mr. Elder. I have forgotten his initials. Mr. Hawksley was the solicitor, and Messrs. Jackson and Pixley were the auditors.

p. 39. MR. V. WILLIAMS.

Q.—Having formed the plan of getting in other companies, to whom did you go?

A.—I naturally went to Mr. Lawley, who I knew as a director of the Beira Cold Storage.

Q.—And you put the scheme to him, did you?

A.—I did not put the scheme to him at the moment. I went to ask him the position of his Beira Cold Storage Company. I did not know whether their capital was £5,000 or £500,000. I knew nothing about it.

p. 40. Q.—You cannot say when you called on Mr. Lawley?

A.—I should say October, 1902. I know we were shooting about that time.

p. 53. MR. WALLACE.

Mr. Vaughan Williams: Were all the negotiations with regard to this transaction conducted in this country?

A.—All of them, so far as the defendant company was concerned.

Q.—You told my learned friend, if I remember rightly, that you did not hear

that the directors of the plaintiff company intended to sell or unload or whatever expression one may use, their shares in the defendant company as soon as they could. p. 54

A.—I only heard that a year afterwards.

Mr. Wallace: Is it entirely wrong to suggest that Mr. Lawley was communicating with the Beira Company on your account?

A.—No, I should not think it is wrong to suggest so at all. I told you I approached Mr. Lawley in the first instance, and finding the position of the Beira Company, I made him that offer, and he sent it along. I should not think it would be wrong.

Q.—I mean that Mr. Lawley was acting rather as your agent in communicating with the Beira Company.

A.—I should say not. He acted in his capacity as director of the Beira Cold Storage Company.

Q.—As an agent only?

A.—I went to him as a director of the Beira Cold Storage Company, and as such I wrote to him.

F. GELL'S EVIDENCE. p. 50

Q.—During the negotiations did you make yourself familiar and acquainted with the figures and position, as far as you could, of the plaintiff company which it was proposed to buy?

A.—So far as it was disclosed in the papers which were laid before me.

Q.—Were the profit and loss account and balance-sheet of the plaintiff company shown to you?

A.—Yes, that was the fundamental evidence.

Q.—Did you go through them?

A.—I did.

Q.—Were they gone through by Messrs. Jackson and Pixley?

A.—By instructions, and as they signed it I suppose they did go through it. I went through it with Mr. Hawksley. p. 60

Q.—Ultimately we know that the agreement of the 10th of February, confirmed on the 20th of March, was entered into.

A.—Yes, we decided to adopt that agreement.

Q.—What influenced you in adopting that agreement?

A.—The statement of the value of the assets which was laid before me, and the value of the trade which I thought the company would be acquiring.

Q.—What impression as to the financial position of the plaintiff company did you form from those documents?

A.—I should say that looking upon the statement which they made that they were promising well, but that they were fettered by shortage of capital, and that they wanted fresh capital to put them into a better and stronger position.

Q.—In arriving at your willingness to pay the price which you agreed to pay, were you influenced by the apparent profit disclosed?

Mr. Wallace: That is a very leading question.

A.—Absolutely; practically I will say nothing else. For the value of the trade we are acquiring I went on their statements in the profit and loss account.

Mr. Vaughan Williams: It was suggested yesterday, if I rightly understood, that you were influenced by a desire to acquire a monopoly of the cold storage business. What do you say as to that?

A.—It was not in the power of the Beira Cold Storage Company to give us a monopoly. This came before me originally as a proposal to buy the Mashonaland Railway plant and the Railway a monopoly. This came before me the Chartered Company. That plant at the same time was being leased to the Beira Cold Storage Company; the Mashonaland Railway Company had erected that plant with the idea of reducing the cost of living in Rhodesia. It was a particular pet scheme of Mr. Rhodes. We were not at all unwilling to sell that plant to the new company, with which I then had no kind of connection, and knew nothing whatever of.

Q.—I think there was a difficulty as to selling it, and ultimately it was leased.

A.—It was already leased to the Beira Cold Storage Company, but on a short term, I think at six months' notice, therefore the Beira Company could only sell a six months' tenancy. I may not be right as to the number of months.

GELL'S EVIDENCE.

p. 63.

Q.—Until about ten days before the agreement this company was not your company, and did not interest you at all?

A.—Yes, that was so.

Q.—Except, of course, as a Chartered director?

A.—Yes.

Q.—Then, of course, when they asked you to be a director, and you were going to put your name on the prospectus, you wanted to see what you were doing?

A.—Yes.

Q.—Was it then that you got the report and balance-sheet which you have been alluding to?

A.—A little later, within those few days.

Q.—Do you describe yourself as a good accountant?

A.—No.

Q.—In examining the balance-sheet and the rest of the documents, how long did you have it before you?

A.—Several times that I can recollect. It came up once or twice at the Board when we were preparing the prospectus, when Mr. Hawksley was at-

tending. We were checking various statements, and so on. Then I remember one Saturday afternoon I had this and other papers before me with Mr. Bartman at my home, and I worked on the whole lot. I spent a long time initialling them all, and this one amongst others. (F. J. 5 handed to witness.)

Q.—Did you go through the figures p. 64. yourself?

A.—I did.

Q.—Personally?

A.—Personally. I checked them all off against the statements we made in the prospectus, for one thing.

Q.—What else did you do with them?

A.—They are not my figures. I could do nothing more with them than study them, and assume, as I did, that they were correct. I therefore found that two people whose names were known to me, Mr. Van Praagh and Mr. Martini, and an auditor whose name was well known to me, certified that the land and buildings were worth so much, and the plant was so much, and so on. What I attached a great deal of importance to was the trade we were buying.

Q.—What I may call the turnover?

A.—Yes. There were £8,000 brought in from revenue account. I forget what set-off there might be against that, but, apart from that, £8,000 return was a satisfactory return on a capital of £22,000, and I remember I also noted that they had not distributed their profits, but had carried them forward into capital, which created the impression in my mind that they were doing a growing business, but were short of capital.

Q.—I presume they had not distributed a dividend?

A.—They showed a very large and substantial profit. They did not distribute it, but carried into capital, which would make the impression that they were careful people with a growing business, and they were building it up out of dividends. It seemed to me to account for their desire to get the fresh capital that the amalgamation offered them.

Q.—Have you seen the telegrams that had passed between Mr. Lawley and the company?

A.—No.

VON HIRSCHBERG'S EVIDENCE. p. 212.

£450 represents the costs of liquidation at present, as far as I can ascertain. While I was secretary, only two occasions when shares of Beira Company were transferred for cash.

Cross-examined: The balance-sheet was drawn up for shareholders. It was printed before it was adopted by directors, and was sent out to shareholders. That would be all the information sent to shareholders who did not attend the meeting.

At the time it was published—unknown to ourselves—it was not correct

—it would be quite sufficient if statement was made by chairman of meeting. At meeting all shareholders present were aware of the mistakes, and therefore no statement was made. The next balance-sheet would have had to correct the items of Pauling and Co. and the rent for railway storages. The shareholders not present at the meeting would not know of this.

- p. 214. I certainly expected a small profit. Evans's balance-sheet shows a loss on year's trading, but I have no knowledge how his figures are arrived at. We started a butchery business, it was not exactly a failure, but not a success. Mineral water arrangement was with the view of making the business more successful. To save salaries the directors managed sections of the business themselves. Up to the end of 1900 we wrote off no depreciation. I have no knowledge of machinery. In 1901 the depreciation of £2,000—this was arrived at an estimated deficiency. As to values I would back the opinion of my directors, who have worked with the stuff for years, against that of Mr. Coxwell, who has only lately examined the assets.

Our balance-sheet of 1902:—I think I had drawn it up by April 15th. It was eventually ready about the end of April. It had by that time been handed back by the auditor. It was printed almost immediately. It would be ready towards the end of May. It was adopted by directors towards the end of June.

The judgment in the Court below was as follows:

- p. 300. Watermeyer, J.: The plaintiff in this case is the liquidator of the Beira Cold Storage, Ltd., a company that was registered in Southern Rhodesia, and from 1899 to 1903 carried on business in Portuguese East Africa and Southern Rhodesia.

He sues on a written agreement entered into on February 10th, 1903, between one Davis as the duly authorised agent of the Beira Cold Storage, Ltd., and one Bartman, as trustee for a company about to be formed, which agreement was subsequently adopted by the defendant company, who took over the rights and liabilities of Bartman on March 20th of the same year.

The agreement which is attached to the declaration is for the sale of the whole of the business and assets of the Beira Company as a going concern for a consideration which for the present may be summed up under four heads:

1. Payment by the new company of the debts and liabilities of the Beira Company.
2. Payment of a definite sum of money.
3. Delivery of a certain number of shares in the new company.
4. Payment of the costs of liquidation of the Beira Company.

The declaration alleges that in pursuance of this agreement the new company have taken physical possession of all the property and business of the Beira Company. (I presume they have also made themselves responsible for the debts and liabilities, though nothing is said about that in the pleadings.)

By some mistake not explained at the trial the declaration as originally drafted alleged that legal transfer had been effected, and this was admitted in plea. As it appeared clear from the evidence that this was not so, I allowed the declaration to be amended to be in accordance with facts. When the application for amendment was made Mr. Russell, for defendants, sought to make a condition, i.e., that certain additional particulars tendered by him should be admitted. I do not think he was entitled to make that condition. I think the two matters were quite distinct. I think the plaintiff was entitled to the amendment without condition. I decided also to admit defendants further particulars for reasons which I hope to explain at the proper stage, but I want to be understood that I treated the matters quite independently, as not hinging on one another at all.

The declaration goes on to aver that the monetary consideration has been paid, but claims (1) delivery of the share consideration, (2) £11,384 as damages for delay in such delivery, and (3) £450 8s. for costs of liquidation.

The first defence raised is that this matter is the subject of judicial proceedings pending in England. In proof of that copies of a writ of summons and an injunction taken out in the High Court of Justice against plaintiff and Davis, the agent who signed the agreement, are attached to the plea. The dates of these documents are instructive. The summons in this court was taken out on the 3rd March, 1904, and served on the manager of the defendant company on the 4th March. The English writ of summons was taken out on March 4th and the injunction on April 29th.

The inference is obvious that it was on cabled information of the service of the writ in Salisbury, Rhodesia, that the directors of the defendant company took out their writ in London. Further, defendants have tendered no evidence that they are proceeding with this action in London, beyond an application made to me on March 15th, 1904, for a stay of proceedings in this Court, which application I felt bound to refuse. The only evidence now before the Court as to further proceedings in this matter in London are the statement by Mr. Davis at the Commission that the action had been dismissed as against him, and the statement of Von Hirschberg that the injunction had been dismissed, and he knew of no further proceedings under the writ of summons.

If this defence was seriously relied on defendant should have offered some more information as to their proceedings since March 15th, 1904. But even presuming they are proceeding in London, I cannot see how that prevents me from dealing with the matter here. The matter is within the jurisdiction of this Court as laid down by the Order in Council, and I cannot refuse to hear a plaintiff and deal with his case simply because subsequent to the commencement of proceedings in this Court the defendants choose to commence, with regard to the same matter, proceedings in another Court, which, as far as I know, sitting here, may or may not have jurisdiction.

The defence of proceedings in another Court may be dismissed at once.

The real defence in the case is contained in paragraphs 3 and 4 and annexure "B" of the plea.

As the defendants admit the agreement it is incumbent on them to show why they refuse to carry it out.

Their reasons are set forth in the above-named paragraphs: They say that they entered into the agreement "Relying on the accuracy of the balance-sheet of the said company made up to the 31st March, 1902, which was handed to them prior to the 10th February, 1903, by the said company as being a true statement of the financial position of the said company and in order to induce defendants to purchase the said business, and defendants were so induced."

They go on to say that subsequently they discovered "That the said balance-sheet was false and misleading and the financial position of the said company was not as represented by them, and that the books and accounts of the said company were false and contained serious discrepancies."

And in annexure "B" they give particulars to support these allegations.

The essence of this defence then is that a false and misleading balance-sheet was produced to defendants by the company in order to induce them to buy, and that they were thereby induced to buy.

When I read this plea first I understood it as a direct allegation of fraud against the Beira Cold Storage Company, and certainly some of the documents produced in evidence would seem to show that defendants intended to get up a charge of fraud against the Beira Company. But Mr. Russell, for defendants, has argued that it is not necessary for his case to contend that there was actual fraud, but that it is sufficient to show that there was misrepresentation, however innocent, which misled defendants as to the true financial position of the company.

He relies on the judgment of Lord Halebury in *Adam v. Newbigging*, L.R. 13, App. Cases, 308.

He does not, however, actually withdraw the imputation of fraud. He stated in argument that if knowledge of the falsity of the representations were necessary the evidence proved it, but that it was not necessary to prove knowledge—only that the representations were false in fact.

In answer to the plea the plaintiff in his replication says that "He denies that any statement of account or balance-sheet was handed to defendant by himself or the Beira Cold Storage Company, no statement of account, financial statement or balance-sheet was referred to during the negotiations or formed any inducement to the defendants to enter into the said contract."

In case it is ruled otherwise, he pleads that the balance-sheet in question was a true and correct balance-sheet.

At the Commission in London Major Johnson put in the document which it is alleged misled and deceived defendants, and which in the plea is called shortly the balance-sheet of March 31st, 1902.

The document consists of three parts:

1. Balance-sheet as at close of business on the 31st March, 1902.
2. Profit and loss account as at close of business on the 31st March, 1902.
3. Directors' annual report to 31st March, 1902.

As this document is made the basis of defendant's case I shall proceed to examine it.

Firstly, as to what it shows in itself, apart from subsequent evidence;

Secondly, the circumstances under which it came into existence and the particulars as to which it is said to be false and misleading;

Thirdly, the manner in which it came into the hands of the promoters of defendant company; p. 308.

Fourthly, how far these promoters were in fact misled by this document.

Firstly, taking the document by itself, not as an expert accountant, but as an ordinary man tempted to invest in the shares of the company:

I agree with Mr. Lyttelton Gell and Sir John Cragge that it shows on the face of it a very promising state of affairs. It shows a profit brought forward from the previous year's working of £1,157 9s. 6d., and an apparent profit for the current year's working of £2,456 8s. 3d. But against this latter figure the directors in their report recommend the writing off of £1,289 12s. 8d. for depreciation of plant, lands, and buildings.

This still leaves a profit for the year's working of £1,177 15s. 7d. Thus on the two years together they show a total profit of £2,335 5s. 1d., slightly over 10 per cent. on their subscribed capital. Yet they do not suggest any dividend, but carry forward this profit.

Mr. Lyttelton Gell and Sir John Craggs would seem to be quite justified in saying that this statement of accounts seemed to imply cautious directors, who were building up a sound business out of profits. I cannot, however, agree with the manner in which this apparent profit was treated by the promoters of the defendant company and their accountants for the purposes of their prospectus. The current year's profit, which I work out from the balance-sheet at £1,177 15s. 7d., in the hands of defendants' accountants becomes a certified annual profit for the purpose of their prospectus of £3,274.

The process by which this is accomplished does not commend itself to me.

Firstly, they ignore the depreciation which the directors in their report propose to write off. They justify this on the technical ground that the directors did not bring this depreciation into their balance-sheet, but placed it separately in their report. I am quite prepared to accept the evidence of the expert accountants who have appeared before me and at the Commission that it would be a more correct method of preparing the annual statement to bring this depreciation directly into the balance-sheet, instead of placing it in a separate report attached to the balance-sheet. But as one unlearned in accounting matters, it seems to me that it was sufficient that it was there—apparent on the face of the document—where all interested in the financial position of the company could see it. And I think the action of defendants' accountants is, to say the least of it, inconsistent, when they utilise this technical error, if it be one, to swell the apparent profits which they advertise to intending shareholders in the prospectus, whilst later on they make it their most serious complaint against the Beira Company that the directors had not made sufficient allowance for depreciation. I have not lost sight of the fact that by a few words in small print the accountants protect themselves from a literal misstatement on this point—I refer to the words in the certificate: "After charging depreciation (except in the case of the Beira Company)." But I think those words are so placed in the prospectus that if an intending investor, not being an accountant, saw them at all he would conclude that only some small depreciation, not worth noticing, would have to be written off the Beira profits, and he would be very much surprised to hear that the accountants and promoters of the new company knew that the responsible directors of the Beira Company had recommended the writing off of so large a sum as £1,280. But these promoters add two other serious items to the profit as appearing in the balance-sheet.

Firstly, an item of £500 appears on the balance-sheet as "provision for rent

due on railway storages." This is subsequently made a complaint that the rent due at the time turned out to be £588. But when preparing the prospectus this £500 is eliminated from the balance-sheet so as to further swell the alleged profits. The accountant, Mr. Binnie, justifies this on the ground that it was intended to purchase the Railway Storages, and as therefore rent would no longer be payable, it should be eliminated from the expenses and thereby swell the profits, and as Major Johnson and Mr. Lyttelton Gell say that the certificate was carefully explained to them by Mr. Binnie or Mr. Pixley, and that they checked all the figures, I must presume that they adopt this reasoning. The only concession that Mr. Binnie would make on this point was that by an oversight which he could not understand, he had omitted to append a note that this increased profit would be due to the purchase of the railway premises.

Sir John Craggs, one of the other expert accountants, called, disagrees with that opinion, and says: "The profits must be certified according to the profits of that year, but it must be mentioned in the words of the certificate or elsewhere in the documents of that date that a change in the rent or other conditions had taken place."

I would suggest further that if the purchase of premises by doing away with rent to that extent causes increased profit, such increased profit should be apportioned to the premises purchased—in other words, that if £500 was going to be saved by purchasing the Railway Cold Storage, that would be profit on that purchase, and not on the purchase of the Beira Cold Storage, whereas it is carefully stated by the promoters that the profits alleged are exclusive of any estimate of profit from the railway plant.

But taking Mr. Binnie's reasoning in its most favourable light, it—by his own admission—absolutely falls to the ground when it appeared by the issued prospectus that the new company had abandoned all idea of purchasing the Railway Cold Storage.

When the draft prospectus (F.J. 4) was printed it was undoubtedly the intention of the promoters to purchase the Railway Cold Storage—that was February 4th—but when the final prospectus was issued on March 5th this intention had been abandoned, and it had been decided to lease the Railway Storages under the agreement with the Beira Cold Storage. I need not detail the evidence from which this appears, it is clear from comparison of the two prospectuses. Yet under the changed conditions the promoters issued this certificate of alleged profits which it had been carefully explained to them could only be correct on the assumption that they were going to purchase the Rail-

way Storages—and they had checked all the figures.

p. 306. The reasoning that applied to the rent seems to me also to apply to the interest on the £3,000 bond to the bank—if that was to be saved in the future the increased profit would be due not to the Beira Company, but to the extra capital provided to pay off this bond—and this, too, seems to have failed when the new company found themselves, as appears later, unprepared to pay off this bond—and this refusal of theirs to pay this bond of £3,000 has been the immediate cause of all this litigation.

It appears, therefore, that under the circumstances existing on March 5th, the certificates in the prospectus alleging the Beira profits at £3,274 was false, if it was not also false under the circumstances existing on February 4th, when the draft prospectus was printed.

It would appear, therefore, that the promoters who issued this prospectus containing this certificate, and who carefully "checked all the figures," when they now make allegations of misrepresentation against the Beira directors are rather throwing stones from a glazed habitation.

But it was not merely to show that the promoters of the defendant company committed the same sin that they lay to the account of others that I have gone at length into this alleged profit of £3,274, but to attempt to get at the real state of mind of these promoters in February, 1903, and to test whether they really so carefully examined this balance-sheet, and whether they based their calculation on it with the exactness of detail that they would now have us believe.

To sum this portion of the case, I say that the perusal of this balance-sheet and report shows to an ordinary mind a promising little company with a moderate capital of £22,000, with substantial assets, and making an annual profit of about 5 per cent., with cautious directors, who were refraining from paying dividends until the company should be well established. But that it was only a very wild imagination that from the perusal of this document could certify an annual profit of £3,274.

I now proceed to deal with the second point, viz., the circumstances under which this balance-sheet came into existence.

It appears that the Beira Cold Storage, Ltd., was a small company, chiefly owned by the directors themselves (see the share list put in).

The Attorney-General calls it a "family affair," and Mr. Martini, who was chairman in 1902, gives us to understand that he was the father of it.

It has originally been a mineral water and ice business, which they had developed into a cold storage business. (I understand from the evidence that

under the new company it has practically returned to an ice and mineral water business.)

As a cold storage business they had worked in Beira since 1899, and in the latter part of 1901 they had extended their business to Salisbury, Rhodesia.

There had at one time been a fair demand for frozen meat in Beira, but this demand had fallen off, and at the latter end of 1901 and 1902 the principal sales were in Salisbury.

At March 31st, 1902, the Salisbury business had only been in existence about six months, and I agree with defendant's witnesses that the period was too short to form a fair estimate of the possibilities or probable profits of the Salisbury business. It was, in fact, in an experimental condition.

The company was, as I said before, a small one, and was, in fact, the personal business of the directors, not only in the sense that they held nearly all the shares—but that they personally managed the business—each personally attending to the management of a department or section, thus reducing working expenses by saving salaries.

Mr. Coxwell has put forward his opinion that they were working with a view to refloating, and in support of this opinion he accuses them of intentionally neglecting to write off depreciation of their machinery, so as to make their profits appear large.

This is flatly denied by Mr. Martini and Von Hirschberg; they state that there was no idea of selling or refloating until they received the cable on August, to be referred to subsequently.

Having seen these gentlemen in the witness-box, I prefer to accept their denial in preference to Mr. Coxwell's suspicion.

Under these circumstances, the present plaintiff, who was then secretary of the company, proceeded in April, 1902, to make up his statement of accounts for the financial year ending March 31st, 1902.

This is the document attacked by the defendants, and which, according to them, was false and misleading.

I am satisfied that at the time that that balance-sheet was certified to be the auditor it was a correct account of the financial position of the company, as shown in the books.

I am also satisfied that it was issued by the directors as their bona-fide belief as to the position at 31st March, 1902.

In the light of subsequent events it is undisputed that that balance-sheet showed the position incorrectly with regard to two items, the rent, and the Waimate shipment—and there is now a difference of opinion as to whether sufficient depreciation was written off.

It will now be necessary to consider in detail the particulars annexed to the plea and those subsequently tendered.

These latter were objected to, and I was in some doubt as to accepting them, but ultimately I considered that they might as well go in as they did not seem to me to carry the case much further. Nos. 2 and 3 are not really new as I consider that the allegation in the original particulars to the effect that no sufficient depreciation had been written off is sufficient notice to plaintiff that the valuation of assets in the balance-sheet is challenged.

p. 307. No. 1 is fully disposed of by defendant's own witnesses in London.

Taking the items then in order—the first is the rent, which appears in the balance-sheet as "Provision for rent due on railway storages, £500." The accusation is that this was under-estimated by the amount of £98 7s. 7d.

The facts are now undisputed: The Beira Company had entered into a contract with the Railway Company (E. A. V. H. 30) for the lease of some cold storage chambers to be built at Beira and Salisbury. The rent is not fixed at a definite sum in the agreement, but was to be 8 per cent. of the cost of the buildings. The Beira Company took possession of the Salisbury buildings in November, 1901, and the Beira buildings in February, 1902. The exact rent payable was not ascertained, or, at all events, not made known to the Beira Company until June, 1902.

Under the circumstances the secretary, making up his books in April, 1902, put in an approximate estimate of £500 as rent due to March 31st. Subsequently in June it transpired that this figure should have been £598 7s. 7d.

This is the first misrepresentation complained of.

The second objection was to an alleged over-valuation of the Salisbury stock. This has now been abandoned by Mr. Russell, and he had to abandon it because each of his experts in turn, when faced with Mr. Von Hirschberg's explanation of the matter, had to admit that the objection was untenable. I shall only remark on it here that Mr. Binnie, the defendants' accountant, might have had that explanation at any time.

Mr. Evans, whose evidence impressed me very favourably, says that the persons connected with the Beira Company were always ready to give him any explanation he asked for—and he cannot understand Mr. Binnie's statement that it was impossible to obtain information because there was no one to inquire from—a statement made not once, but several times in Mr. Binnie's evidence. It seems that Martini, Diepeveen, and Von Hirschberg were in Beira at the time of the investigation, and the last named was anxious to meet Mr. Binnie to clear up any misunderstandings.

Again, when Binnie was investigating in Salisbury, Van Praagh actually approached his clerk, Ford, but was ap-

parently choked off. Beira and Salisbury are small places, and the gentlemen mentioned by him are so well known that I cannot believe that Messrs. Deary and Suter could have told Mr. Binnie that there was no one from whom he could obtain information as to the affairs of this company.

One is driven to the conclusion that Mr. Binnie approached this investigation in a very prejudiced state of mind, and has only himself to blame that he did not receive the explanations which have now been given in Court.

The next item in the particulars is that no sufficient depreciation was written off. As I remarked before, Mr. Binnie when certifying the year's profit ignored the depreciation that was as a fact proposed by the directors. Now the complaint is that the depreciation written off is insufficient. It is difficult now—more than three years after the date—to say whether the allowance of p. 308. £1,280 proposed by the directors was a fair amount at the time. Mr. Binnie's chief complaint was that the £2,000 for the previous year was an unscientific way of writing off. Evidence has been given of the present values of the plant and buildings. On this point the evidence of Anderson and Tetlow did not impress me favourably, and Coxwell, sworn valuator though he be, was not, in my opinion, in a position fairly to gauge the values in March, 1902.

I am of opinion that the depreciation written off was a fair one, and though possibly not exact, was sufficiently near the mark for the purposes that the directors then had in mind.

The next item is the bonus of £25 paid in April. This, Mr. Binnie guesses to have been for the previous year's working, charges of misrepresentation are not proved by guesses. There is no evidence to show what it was for, and therefore no reason given why it should be in the balance-sheet in question.

The next item is £835 4s. 2d. for what has been called the Waimate shipment, which does not appear in the balance-sheet, and which it is contended should increase the item of sundry debtors, and thereby decrease the profits shown. The explanation offered with regard to this item is as follows: In 1900 the company, through Lawley, then acting as their agent, purchased from the captain of the Waimate a shipment of frozen meat at a price to be calculated on the arrival of the Waimate in England at the ruling rate for meat in London at that date. The account for this meat was presented to Pauling and Co. in London, of which firm Lawley was a member. Pauling and Co. paid £1,835 4s. 2d., and sent their account to the Beira Company. The bookkeeper entered this amount at once to the credit of Pauling and Co. The directors contended, however, that at the ruling rate

for meat in London at that date the amount should not have exceeded £1,000, the book-keeper accordingly made fresh entries so as to reduce the amount due to Pauling and Co. to £1,000. The dispute with regard to this matter continued for nearly two years, and by March 31st, 1902, it had not been settled. In May, 1902, the directors were forced to give way, and the additional £835 was paid to Pauling and Co.

Minutes of directors' meetings were put in to show that in November, 1901, and at subsequent dates the directors were discussing the possibility of settling this dispute by compromise or in some way, but it was not till May that the matter was actually settled.

A good deal of evidence was given as to whether this amount of £835 which was in dispute should have appeared in the balance-sheet as a liability or as a special suspense account.

I am quite satisfied that when the entries were made in March, 1901, the directors were honestly of opinion that £1,000 represented the extent of their liability, and as the amount was not settled till May, 1902, I am satisfied that no blame attaches to them or their bookkeeper for leaving the item at that in making up the accounts to March, 1902. It would, of course, have to be rectified in the next year's balance-sheet. Mr. Evans and Mr. Ford say in effect that as they were not paying out a dividend no harm attached to what they did provided the matter was mentioned at the general meeting, seeing that the balance-sheet had been already certified by the auditor before this settlement was arrived at, and as to mentioning it at the general meeting, it is necessary to remember the family party nature of this company, and that all present at the meeting were aware of what had been done. And in any case, it must be remembered that this entry would have effected the profits for 1901 only, and not the 1902 profits, on which the promoters of the defendant company were basing their prospectus.

The next item is the Customs House Bar. I am quite satisfied that in March, 1902, Mr. Martini had good reason to believe that they had something approaching a perpetual lease, and he was quite satisfied in placing on it the value he did, i.e., £1,100, less its proportion of the depreciation written off lands and buildings.

The fact that it was burned down in September, 1902, and was only insured for £500 had nothing to do with the balance-sheet in March, 1902.

Turning to the additional particulars: No. 2 has already been dealt with. No. 3 has nothing to do with the balance-sheet at its date. As to No. 1, I cannot follow the reasoning of the accountants.

This balance-sheet was not drawn for

the purposes of a sale, but merely to show shareholders the assets and liabilities. I accept Mr. Duncan Cameron's evidence that it was quite proper for the purposes of this balance-sheet to place this bond under the heading "Sundry creditors." Whether it did in fact eventually deceive the purchasers will be dealt with afterwards.

I have come to the conclusion, then, that the balance-sheet as issued, together with the report, was at the time it was issued a fair bona fide statement of affairs sufficient for the purpose for which it was brought into existence, i.e., for the information of their shareholders.

Following the reasoning in Peck v. Gurney, this balance-sheet when issued to shareholders had accomplished its purpose, and the directors would not be responsible to any other parties into whose hands it might accidentally come, and who might act on it and be misled on account of matters which subsequent events have shown to have been wrongly stated.

But this brings the position only to March, 1902.

We have to consider the position at the latter end of 1902 and the commencement of 1903, when the sale, the subject of this action, was effected.

The position of the company as shown in the balance-sheet had changed in three main particulars. They had discovered the exact amount of the rent to be paid. They had been compelled to pay Pauling and Co. £835 for a debt contracted in 1900, and the Customs House Bar had been burned down. If at that time the vendor company submitted this balance-sheet to the purchasing company as a true statement of their affairs without drawing attention to the alteration that subsequent circumstances had necessitated, and the purchasing company relied on the accuracy of this balance-sheet, and were induced by the figures in this balance-sheet to enter into the agreement, I certainly think they would be entitled to claim relief.

And this brings me to the third point, viz.: The manner in which this balance-sheet came into the hands of defendant company.

It is the basis of defendants' case that this balance-sheet was handed to Major Johnson, the originator of the new company, by Mr. Lawley, acting as the agent of the Beira Cold Storage, as a true statement of the financial position of the said company. The plaintiff denies that Lawley was the agent of the Beira Company in the matter of the sale, and repudiates Lawley's authority to make any representations on behalf of the company.

This question of Lawley's alleged agency is the critical part of defendant's case, and has to be determined

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by a consideration of all the circumstances of the case.

The defendants have produced no evidence that Lawley was ever in express terms appointed the agent of the Beira Company, but their case rather seems to be that Lawley in the first instance constituted himself the agent of the Beira Company, and that the said company afterwards accepted him as their agent, and thereby accepted responsibility for what he did.

The evidence to support this is: Firstly, Lawley was a director of the Beira Company; secondly, Major Johnson states that Lawley purported to act as agent of the Beira Company; thirdly, an inference drawn by Mr. Russell from the wording of certain cables that passed between Lawley and the Beira Board.

On the first point it can hardly be contended that a single director can commit the whole Board, especially when, as is shown in this case, his opinion in the matter and his interest in the matter is opposed to that of the rest of the Board.

On the second point—Major Johnson's memory is so inaccurate as to dates—as to the circumstances under which he discussed the matter with Mr. Lawley—as to the length of time that that the negotiations took, and he has made such extraordinary statements with regard to other matters—notably the reason given by him for the delay in transferring the property he stated that the delay in the transfer was due to the methods of the Portuguese authorities (a most unwarranted attack upon the Government of a neighbouring State) and that plaintiff could not have reasonably expected transfer to go through till September, whereas it was shown that the delay was solely due to defendants' refusal to pay off a certain bond of £3,000 due to the Bank of Africa—that Mr. Cameron, agent for defendants, had the power of attorney and papers ready, and could have got transfer at any time if the bond was paid off, that I cannot accept his (Major Johnson's) mere statement on this point without further corroboration.

p. 311. But at the most his statement does not prove agency, supposing Lawley did purport to act as agent, he apparently produced no authority for so doing, and defendants can hardly put forward so extraordinary a proposition as that a self-constituted agent could bind persons who were not even aware that he was purporting to act as their agent. If Lawley purported to act as agent, it was Major Johnson's duty to ask him for his authority.

The defendants have selected not to call Lawley as a witness, though in the application for a Commission they mentioned him as one of the witnesses they intended to call, and from an affidavit

made in connection with that application it appears that his evidence was available if required.

On the evidence before me I am not satisfied that at the earlier negotiations Lawley ever told Johnson that he had authority to act as agent for the Beira Company.

The defendants must rely on what they can find in the cables. In order to understand the cables it is necessary to review to a certain extent the origin of the defendant company and Major Johnson's negotiations with Mr. Lawley.

In 1902 Major Johnson, as chairman of the Scottish Africa Trust, had a considerable interest in two companies trading in Rhodesia, viz., Deary and Co., Ltd., and the Rhodesia Cold Storage of Bulawayo, and in negotiations with the head of the firm of Suter and Co., it was apparently decided to combine these three companies, and it was then thought advisable to get in also the Beira Cold Storage Company, and to get possession of certain cold storage plant that had recently been erected by the Beira and Mashonaland Railway Company at Beira and Salisbury, a further addition was proposed in the shape of an Australian Cattle Estate, and then, with a contract with the Imperial Cold Storage Company of Pretoria, Transvaal, which, though it is very little referred to in the case, was, to my mind, a very important element, he proposed to start a huge trading concern, which seemed to him to promise unlimited possibilities—see the glowing terms of the prospectus. But it was very important for his scheme to get possession of the Beira Company, or, if he could not do that on reasonable terms—to get it out of his way.

In this state of mind he approached Mr. Lawley, whom he knew to be a director of the Beira Company, and asked him about that company.

Lawley thereupon gave him that much discussed balance-sheet.

Here again we have only Major Johnson's account of what took place, and it does not tell us very much. He says Lawley gave him the balance-sheet, saying something like this: "Here is the last report I have received. Now you know as much as I do."

This seems to me very slender evidence on which to found the alleged representation that this balance-sheet accurately described the financial position of the company as it then was—assuming that Lawley was an agent authorised to make representations.

The balance-sheet on the face of it represented a state of affairs several months old, and Johnson cannot say that Lawley added one word to warrant that the present position was as then described.

However, Johnson propounds to Lawley his scheme for this huge combine. p. 312

Lawley, besides being a director of the Beira Company, is a large holder in Suter and Co., Ltd., one of the companies to be brought in.

Lawley approves the scheme—in fact, we find that he becomes associated with it as one of the promoters—his signature appears below the articles of association printed with the published prospectus, as associated with the four proposed directors, the trustee of the underwriters, and the solicitor for the underwriters.

He undertakes to recommend the scheme to his Board at Beira, and so we get the first cable, August 18th, 1902.

In this cable Lawley sets forth the proposed combine, recommends the Beira people to come in on practically a share for share basis—and asks for a power of attorney. The reply is a prompt refusal. At the same time the Beira people appeal by cable to the Administrator of Rhodesia, then in London to protect them in their possession of the railway cold storage plant.

The production of this cable was objected to by defendants, but I think in this case, where it is important to ascertain the state of mind of the Beira directors at that date, an act done by them at the time is admissible to corroborate their present statement that at that time they were not anxious to get rid of their business.

A few days afterwards Lawley cables: "Telegraph lowest terms; shall try to negotiate." The reply, dated August 28th, 1902, is: "Cannot assist in carrying out the scheme for amalgamation; am quite prepared to sell cash. You had better submit offer on above lines, which will be laid before the next Board meeting immediately."

After that cable the negotiations were suspended for nearly two months.

Up to this point I can find no acceptance by the Beira Company of Lawley as their agent.

Mr. Russell relies on Lawley's words "shall try to negotiate," and Mr. Martini's statement in the witness-box that he was quite agreeable to Lawley's negotiating as much as he pleased. But they refuse to send him a power of attorney, and they ask him to submit a cash offer to them, which they will consider.

This seems quite consistent with the position now taken up by Martini that they considered that they were dealing with Lawley as the proposed purchaser of their business, probably in conjunction with others, but as acting for himself and those probable others, and not as agent for the Beira Company.

They said they were led to this belief partly by the cables coming from him and partly by their knowledge of Lawley's large holding in Suter and Co.

On October 20th Lawley wires again:

"Strongly advise accept the terms offered."

No reply to this has been put in. It must be noted that Johnson and Lawley consulted together about the various cables, and at this stage it was decided between them to put a little gentle pressure upon the Beira people. The next cable, dated 29th October, is simply a threat that if the Beira Board will not come into the combine, Lawley will sell some of his own vacant land at Beira to the amalgamated company, who will start an opposition business. This has its effect. The Beira Board apparently find themselves driven into a corner, and after consultation with Lawley's representative at Beira they state the terms on which they are willing to sell, viz.: Share for share and 10s. per share in cash.

The promoters of the new company try to beat them down, and Lawley proposes a variation of 5s. instead of 10s. per share, and again asks for a power of attorney.

The Beira Board adhere to their terms, and Martini incidentally wires that he considers business bright and improving. This is also alleged to be a misrepresentation, but I consider it simply an honest expression of Mr. Martini's opinion at the time, and is certainly not particular enough to warrant a charge of misrepresentation. I presume it is on this wire that the 3rd of the additional particulars is based. That particular can be at once dismissed.

On November 22nd Lawley again cables that he is still negotiating, and again asks for a power of attorney. This power of attorney is not sent to him, but eventually the bargain is concluded on the terms asked for by the Beira Company, and they send their power of attorney to the London manager of the Bank of Africa.

On this evidence I am asked to find that Lawley was the authorised agent of the Beira Board in opposition to the direct statement of the chairman and one of the Directors and the secretary of the Board that they never appointed him their agent, that they never imagined that he was acting as their agent, and that they would particularly have objected to his acting as their agent on account of the recent dispute re the Waimate shipment, and that they honestly believed he was the purchaser or the agent of the purchasers. Further, on December 5th, 1902, immediately after conclusion of the negotiations, Major Johnson writes to the manager of the Bank of Africa to the effect that they "will be prepared to take over the business of the Beira Cold Storage Company, on the terms arranged between Mr. A. L. Lawley and the Board of that company."

Surely if at that date Major Johnson believed that Mr. A. L. Lawley had in

the negotiations acted as the agent of the Beira Company, he would have used very different language in his letter to the bank manager.

I am satisfied that Lawley never purported to be and never was the agent of the Beira Company in this matter, and that the idea of his agency is entirely an afterthought.

p. 314. But if Lawley never was the company's agent, in what way can the company be said to have handed their balance sheet to the defendant company? There is some vague evidence that the Beira Company knew that defendants were using this balance-sheet. Possibly when inquiries were made about the exchange item the directors if they thought of it might have known that the purchasing company had seen and were using the balance-sheet—as at that time they thought Lawley was the purchaser this would not be surprising.

But there was nothing to indicate to them that the figures on this old balance-sheet were being taken as the basis of the purchase price. And when we come to the actual agreement of February 10th, not only is there no mention of this balance-sheet as the basis of the contract, but the agreement departs from the balance-sheet by a difference of 635 shares in the purchase price.

The promoters of this new company, who lay so much stress upon the small discrepancies they find in this balance-sheet, were prepared to pay without question nearly £1,000 more than would have been the purchase price calculated on the balance-sheet.

Further, at the concluding stage of the negotiations they were so anxious to get the matter completed that they seem to have thought the difference between 5s. and 10s. per share hardly worth a contest, though it made a difference of £5,692 in the amount they were paying for this business.

On the whole evidence, I am not satisfied that the promoters of the new company did pay such attention to this balance-sheet, and did so absolutely rely on it as the plea contends.

They were engaged in a big scheme, and it was necessary for this scheme to get rid of the Beira Company. First they tried to get the Beira Company to come in on their (i.e., the promoters') terms. Failing that, they tried to purchase the railway cold storages over the heads of the Beira people, which would have effectually broken the Rhodesian portion of the Beira Company's business. There being some difficulty about that, they threatened, by the purchase of Lawley's land, to set up an opposition. This threat brought the Beira people to terms, but far from the Beira Company inducing the new company to buy, the evidence shows that the new company by a threat compelled the Beira

Company to sell, and the new company were not at that time very particular as to what they paid as to a few thousands or so.

Major Johnson has told us of his contract with the Imperial Cold Storage, and we know that for five years the supplies for the company as far as Rhodesia is concerned were to be imported from the Imperial Cold Storage from Cape Town through Bulawayo, and not through Beira. And as we know that the Beira Company's chief sales were in Salisbury, this would at once render useless a lot of the Beira plant, for Beira we know from the evidence is not, owing to a falling off of the white population, in a position to support a cold storage business by itself, despite Major Johnson's statement that "it is almost a bigger town than any in Rhodesia," a statement he would hardly have made if he had given his evidence out here.

Incidentally, I may remark that as the Beira Cold Storage plant appears to have been practically standing idle for two years, except for the mineral water business, this fact may possibly explain the deteriorated condition in which Mr. Coxwell now says he finds it.

The big scheme of cold storage supplies for Rhodesia appears to have been p. 315 to some extent unsuccessful, not on account of any misrepresentations by the Beira Cold Storage Company, but, firstly, as hinted by Mr. Lyttelton Gell, that the failure to raise sufficient capital has necessitated the temporary abandonment of part of the scheme, and, secondly, because the demand for frozen supplies in Rhodesia has not risen to the magnitude prophesied in the prospectus.

Mr. Binnie tells us in one of his reports that there appears to have been a sufficient supply of fresh meat to seriously interfere with the demand for frozen meat.

For some reason not explained the new company were not prepared to pay off a bond of £3,000 due to the Bank of Africa. This delayed the transfer of the fixed assets of the Beira Company.

It is now alleged that the inclusion of this bond under the heading of sundry creditors in the balance-sheet misled the promoters of the new company—but I am perfectly satisfied from the evidence that the promoters in London knew of this bond before the agreement was signed, and in fact they never suggested in their plea or in their evidence in London that they were misled on this point. It is raised here by the local auditor at the last moment. I think it may be dismissed.

But this delay prevented the delivery of the share consideration. The secretary of defendant company, in his letter of October 8th, 1903, to the Bank of Africa, speaks of "unavoidable delays in completing the transfer."

This is the only reason proved for the delay, and it was quite avoidable if defendant company were prepared to pay the bank.

It does not appear clear from the agreement on what grounds the new company were entitled to prevent Mr. Davis handing over the share consideration to the plaintiff pending completion of transfer, but apparently they have forbidden him to hand over the shares, and it is common cause on the pleadings that Mr. Davis now holds these shares in trust for both companies.

But the delay in handing over the shares enabled the directors to discover that their newly-acquired Beira business was a losing one. They ordered an investigation. As a result of that investigation they refuse to complete the contract, and through their secretary write a letter to the Bank of Africa making most serious charges of fraud, misrepresentation, and negligence against the directors of the Beira Company.

With regard to that letter I shall only say that in my opinion no fraud, no misrepresentation, and no negligence has been proved against the Beira directors.

In my opinion, the defendants have entirely failed to establish the case set up in paragraphs 3 and 4 of their plea.

p. 316.

It was argued that there was no duty incumbent on defendants to inquire into the actual position of the Beira Company at the time of the sale. If actual representations were made to them by the vendor company, I can understand that there might be no duty on them to inquire into the truth of such representations. But inasmuch as the vendors were making no representations beyond Martini's vague cable that business was bright, I think they ought to have made some inquiry before they bought this business.

Von Hirschberg says that they (the Beira people) were on their side expecting an inquiry, and both Lawley and the firm of Suter and Co. were represented at Beira, and these representatives might at any time have obtained all the information which it is now alleged the Beira directors withheld.

I have come to the conclusion that defendants are really in the position of the purchaser in the hypothetical case suggested by Lord Romilly in his judgment, *Charlesworth v. Jennings*, who said, "I do not care whether the concern is thriving or what may be the extent of its liabilities, I am willing to pay so much to get out," and according to Lord Romilly, a purchaser who says that is bound by his agreement.

Under the old doctrine of *laesio enormis*, it is just possible that defendants might have claimed some relief, but on the facts before me I am satisfied that plaintiffs are entitled to succeed.

The plaintiff is therefore entitled to

judgment on the first prayer of the declaration.

As the shares are in the Bank of Africa in London, I presume there will be no difficulty about their delivery, but judgment will be for the first prayer as set forth.

The second prayer is for damages for delay in delivering these shares. The shares should have been delivered two years ago, and were then of a substantial value.

We are told that now they are practically unsaleable. The delay has been wholly the fault of the defendant company.

The plaintiff did everything in his power to expedite matters, writing frequently to defendant's agents from April 24th, 1903, onwards, asking them to complete the transfer and deliver the shares. He was put off on various pretexts, and it was not until September 16th, 1903, he learnt through the Bank of Africa that defendants were not prepared to carry out the agreement.

Even after summons the defendants delayed the matter in every possible way. (See the various applications made to this Court during the last year.)

It is said that it is not usual to order damages as well as specific performance for breach of a contract of sale, but the Supreme Court has held there are exceptions to this rule, and non-delivery of shares is one of these exceptions—in such cases "the mere statement of the breach would be sufficient indication of the nature of the damages sustained and claimed" (*Philip v. Metropolitan and Suburban Railway Co.*, 10 J., 55).

p. 317.

In the present case a judgment merely for the delivery now of these shares without damages for the delay would be a mockery.

The amount of the damages is more difficult to arrive at. In similar cases the damage is generally fixed at the difference between the selling price at the time when delivery should have been made and that at the time of action. But that assumes a market and a probability of sale at the price mentioned. Here we know that though a few shares were sold above par shortly after the flotation of the Company, it would have been impossible to sell 22,000 at anything like that price. But still some would have been sold at a good price and the rest would probably have been disposed of at decreasing prices. And the fault has been that of defendants. They by their failure to carry out their agreement have put it out of the power of plaintiff to show what he might have done with these shares, and they can hardly be heard now to say that he couldn't have sold them at any price.

The plaintiff claims damages at the rate of 10s. per share and though perhaps that is perhaps a rough estimate it may be taken as a fair calculation of

what might have been realised by the shares, seeing that at the date of breach they were nominally above par—anyhow it is defendants' fault that the matter was not put to the test.

Judgment will therefore be given also in terms of the second prayer.

The third prayer is based on the defendants undertaking to pay the costs of liquidating the Beira Company.

On this ground plaintiff claims £450 8s. 1d., but he has not produced evidence to support the claim.

Mr. Von Hirschberg put in a statement of his expenses up to date. Beyond his own fee as liquidator this statement consists largely of expenses connected with this litigation which the liquidator finds he cannot charge against defendants in his bill of costs between party and party. This is a roundabout way of trying to recover from the opposite party costs which the taxing officer disallows.

If I allowed these items to pass as expenses of liquidation the plaintiff would claim to recover the whole of his attorney and client costs in this action.

The earlier items of legal expenses before litigation may be accepted and these appear to amount to £50 8s. 1d. Add the liquidator's fee of £105, and the total costs of liquidation proved here will amount to £155 8s. 1d. for which amount the plaintiff is entitled to judgment.

The judgment will therefore be for plaintiff in terms of prayers 1 and 2 of the declaration and on prayer 3 for the sum of £155 8s. 1d.

Defendant must pay the costs, including those of the commission.

Mr. Schreiner: The declaration has been twice amended—once after the argument in the Court below had been closed. Of course, we could not have pleaded to the amended declaration, and it would have been much more satisfactory had we had the original declaration before us.

[Maasdorp, J.: Had you been prepared to carry out your arrangement by a certain date, they would have done all they were bound to do.]

I cannot find that in the pleadings as they stand. The Bank of Africa was holding transfers in trust for both companies.

[Maasdorp, J.: Had they tendered transfer, would that have been sufficient?]

They never did so; and I am not prepared to say that that would have been sufficient. We admit the shares which we handed over in trust from the transfer. They do not allege that we did anything to hinder the transfer. The claim for £11,384 for shares is absurd. (See Agreement A, pars. 1 and 2.) The shares were divided into 7 per cent. preference shares and £11,384 paid-up shares of £1 each. (See A., pars. 5 and 6.) By par. 10 sale and purchase were

to be completed by March 20th. Clause 10 of the memorandum states that any person, corporate or otherwise, must pay interest, but how could such purchaser be liable for any interest if the sale and purchase were to be concluded on the same day. Here the completion of the contract does not mean transfer, but an actual handing over of the property.

[Buchana, A.C.J.: Then you say that the interest should run on the portion of these shares not delivered?]

Exactly, but the preference shares would not have paid the dividend. So far these shares have been unfruitful. In our Courts damages have never been awarded in addition to specific performance, save by way of loss of *fructus*. (See Article, Vol. 22, part 3 of "Cape Law Journal" and authorities therein cited.) Our old law in a case like this would not order specific performance but damages. Our law would order specific performance—*Van der Byl v. Hanbury* (2 Juta, 82). Till 1858 even the Court of Chancery could not order both specific performance and damages. (Fry on Specific Performance, sections 1,300 and 1,306; Main on Damages, ch. 21, p. 513.) In our law, if a man claims a thing he must take it. He may ask for *fructus* lost, but not for damages. The case of *Kaiser Bros.* goes as far as the Court has ever gone. *Hutton v. Black Reef Mining Co.* (7 Juta, 77). In that case Smith, J., dissented, and cited *Williams v. Archer* (17 C.P., 82), and *Lippert v. Adler* (5 Juta, 389). Smith, J., had previously dissented on a similar point. I can find no authority for the statement of Watermeyer, J., in that case as to the measure of damages. (See *Philip v. Metropolitan Railway Co.* (3 C.T.R., 55). *Mitchell v. Sam Weil Syndicate* (15 C.T.R., 217), where see the judgment of Maasdorp, J., at p. 220, in which he referred to *Fort* (19, 1, 20). That case is decisive in my favour. See also *Silverton Estates v. Bellerize Syndicate* (Transv. Rep., 1904, p. 462). *Frame v. Berg* (Buch., 1879, p. 183). *Kaiser Bros. v. Wesleyan Church* (12 C.T.R., 147). *Cohen v. Shirley, McHattie and King* (1 Kotze, 41). As to the *utilitas emptoris* see *Digest* (19-1-121-3). The purchaser can claim only *id quod interest*. Damages he cannot claim, and that is exactly what the respondent Company are endeavouring to do.

[Counsel proceeded to discuss the evidence.]

Major Johnson was by no means clear as to the dates of his communications. That, however, is not the question. The real question is: Was Lawley an agent of the Company or not? The evidence at page 54 shows that he was an agent of the Beira Company. I cannot argue that a director is necessarily an agent for the purpose of committing the Company; but the Company, by Martini ratified the acts of

Lawley. Johnson's evidence is contradicted. Lawley was a director and yet he seemed to be very hazy as to the balance-sheet. He knew that the report was not correct. I do not say that he acted fraudulently, but he was negligent. If he was an agent to negotiate, his acts are the acts of his Company. Von Hirschberg's evidence (pp. 20 and 212) shows that all the correspondence is not before the Court. The evidence on behalf of the Beira Company shows that the other company has their balance-sheet. The report of June 24th was false and misleading. Turning to Gell's evidence: it was favourably commented on by the Judge in the Court below (p. 59). Gell was a director of the Chartered Company, and must therefore have well known the value of a concession in Rhodesia. His evidence at p. 64 as to the prospects of purchasers is very important. Gell had not seen these cables, and so could not have been influenced by them. See judgment of Watermeyer, J., p. 309. That is quite in our favour. What is said at p. 16 does not seem to be entirely consistent, but this passage is the *cruz* of the whole judgment. If Lawley was an agent to negotiate for the Beira Company, his Lordship's conclusion was wrong, and the Rhodesia Company have a right to resist an action for specific performance. As to whether the balance-sheet led to the contract or not, that is a very simple point. His Lordship, however, looks to the prospectus. If the balance-sheet was faulty, the prospectus was still more so. Two wrongs cannot make a right. There is nothing to show that Lawley was a promoter of the company. The respondents must have had full knowledge of the balance-sheet at the time they negotiated with a view to purchase. The judgment seems to go on the ground that the balance-sheet and the report were contemporaneous; but in point of fact the date of the former was March 31st, 1902, and that of the latter June 24th.

[Counsel proceeded to deal with certain items of account on the balance-sheet.]

The balance-sheet was very misleading. The vendors show their gains, but the condition of the business is not correctly represented (see p. 22).

[Counsel further discussed the evidence; more particularly as to the dates relating to a certain bond due to the Bank of Africa, and cited *Redgrave v. Hurd* (20 Ch. D., 1, and 45, L.T., 485), where see judgment of Jessel, M.R.]

This case shows that if a representation is not true in point of fact, it is not necessary that there should have been fraud or even negligence in order that the contract may be set aside. Our Roman-Dutch Law stops with *exceptio doli*, and English law is gradually tending to this. That case is quite in my

favour. Here we were induced to enter into a contract by a representation which was not true. See *Reese Silver Mining Company v. Smith* (4 H.L., 64). The whole point in these cases is the validity or otherwise of a contract entered into by reason of a misrepresentation. The liability of directors is a different matter.

[Hopley, J.: The Court is quite with you on that point.]

See *Peek v. Gurney* (6 H.L., 392, 403, and 43 Ch., 19). This case has no bearing on the present case, nor has *Andrews v. Mockford* (1 Q.B., 1890, 372); nor *Derry v. Peek* (14 Ap. Ca., 337); nor *Newbiggen v. Adam* (34 Ch. D., 504, and 50 L.T., 267). One of our own cases is *Stellenbosch Municipality v. Hurd* (3 Searle, 345). The facts in the case of *Charlencorth v. Jennings* (11 L.T., 439) are analogous to those in the present case. See especially the judgment of Romilly, M.R.

As to the third part of the judgment, affecting about £155: if we succeed, that must fall away; if we do not, I leave the matter in the hands of the Court. All the plaintiff company can obtain in any case is specific performance; they cannot claim damages as well.

Mr. Burton (for respondents): In our Courts misrepresentation does not avoid a contract unless it is fraudulent. For the appellants two technical points have been raised: (1) As to the state of the pleadings. (2) That transfer has never been given. These points were not raised in the Court below. We admit that legal transfer had not been completed, but the defendant company had physical possession. We did all we could do from April onwards. We did not delay the giving of transfer, but Johnson suggests that the Portuguese Government are very slow, and whatever delay there was was their fault. There is nothing in the agreement binding us to effect transfer within a certain time: see par. 6, p. 7. Their case is that we refuse to give transfer (par. 9 of the declaration. As to damages, we have no decision on that point, unless *Mitchell v. Sam Weil Syndicate* (15 C.T.R., 217) can be so considered. The judgment of the C.J. of the Transvaal in *Silverton Estates v. Bellevue Syndicate* (Trans. Rep., 1904, 466) is quite reconcilable with the decisions of our own Courts. I may remark that the reference there to *Voet* should be (22-1-23): the discussion begins at 22-1-24, and in par. 28 the writer holds that the person in *mora* is liable for *fructus, id quod interest, and poenam conventam*. The *poenam conventam* would here seem to refer to specific performance. As to *id quod interest*, see *Voet* (45-1-8). The whole question with us is whether the damages are or are not too remote, see *Pothier*, par. 466).

[Maasdorp, J.: You say that you are entitled to the difference between the profits which might have been made and the loss sustained?]

It admitted on the other side that compensation may be allowed for deterioration, and that would include depreciation: *Philip v. Metropolitan Railway Company* (3 C.T.R., 55) has been cited, but there the remark of De Villiers, C.J., on which stress has been laid, was only an *obiter dictum*, and the case went off on another issue. The case of *Kaiser Bros.* (also referred to) is in our favour, for there compensation was allowed. In *Mitchell v. Weil Syndicate* (15 C.T.R., 217) there was a tender, but was not contemplating specific performance, plus damages. That was merely a case of loss of profits. It is said that my clients might have claimed a rescission of the whole contract: but the contract has been partly performed, so there can be no question of *restitutio in integrum*. We are, therefore, justified in demanding that the contract should be completed, and also damages. The appellants in their replication do not ask for a rescission of the contract, but simply tender a quantity of comparatively valueless scrap.

[Counsel proceeded to argue on the measure of damages, and to contend that the damages were not remote. He cited *Pothier on Contract of Sale* (Art. 169), *Wolff v. Pickering* (5 C.T.R., 447), *Lippert v. Adler* (5 Juta, 389).]

As to damages, more particularly *Gilchrist v. Stone* (5 H.C., 353). See also *Van Reenen v. Republican Gold Mining Company* (Trans. Rep., 2 Kotzé, 236). Here we have a case in which the line between contract and tort is very fine. See *Williams v. Archer* (17 C.P., 82). This was a case of detinue: here we have a case of tort, but the distinction is very narrow. These shares were to be allotted in order that they might be dealt with. Secs. 4, 5, and 7 at p. 7. Time was evidently of the essence of the contract. *Stewart v. Sichel and Others* (4 Juta, 438). The defendants, in point of fact, were eager buyers. As to consequential damages, *Allen v. Brady* (6 Natal Rep., 20). If there was delay in giving transfer that was the fault of the appellants. See letter of August 12th, 1903 (p. 285). This letter clearly shows that the bank refused distribution until the auditor had made his investigations. Counsel takes up the line that they were not liable till the date of Johnson's letter. I contend that they were liable from August 12th, 1903. All we are bound to show is that these shares were sold on a certain date. The other side were wilfully in mora. Our market has been spoiled, and we have not made what we might have done had the shares been delivered to us when they ought to have been. We do not ask for rigorous compensation, but

for fair compensation, and I submit that can only be given by awarding us both specific performance and substantial damages.

Mr. Schreiner was not heard in reply.

Buchanan, A.C.J.: The discussion about the amalgamation of certain companies began in a most casual way. When Lawley handed over the balance-sheet of the Beira Company to Johnson he said: "You know as much about it as I do." Negotiations were not commenced with the Beira Company until after March, 1903. The first document was a cable from Lawley to the Beira Company, dated 15th August, 1902, where Lawley informed Martini that the Rhodesian Company had arranged amalgamation on certain terms. On this correspondence, it was alleged that Lawley was the agent of the Beira Company, and negotiated the transaction. As a matter of fact, the Beira Company did not sign any power of attorney to Lawley. He authorised the bank to deal for them in London. The contract was for the sale of the whole of the Beira Company's assets for the sum of £11,000 odd in cash and £22,000 in shares, half preference and half ordinary. This contract was guaranteed by Bartman, and the contract was to be completed by the 20th March. Shortly afterwards the £11,000 in cash was paid to the bank, and the shares were delivered to the bank; but it was alleged they were to be held by the bank pending transfer of the property. Some time in April the defendants took over all the assets of the Beira Company, and continued the business for a time. They did not take transfer of the immovable property situated in Portuguese territory, while the company was in liquidation the liquidator applied to know whether they had completed the transfer. When the pleadings in the action were drawn, both parties assumed that the transfer had been completed, but at the trial it was suddenly discovered that the transfer had not been passed, and leave was granted to the plaintiffs to amend their declaration. The only negotiation seemed to be between Johnson and Lawley. I am not prepared to admit that Lawley was ever authorised to bind the selling company in any way. The balance-sheet was incorrect, but with the exception of some small error it could not be regarded as fraudulent or misleading. The principal defence in the case was on the ground of misrepresentation by the selling company, and I think that the learned judge in the Court below was right in his decision on that part of the case. The first part of the judgment must stand, and the contract must go through. His lordship in the Court below was justified in saying that they must deliver the shares or pay the nominal value. I am not prepared to lay down as a general principle that

when a person buying shares gets his shares he cannot claim for damages. The difficulty is to ascertain when the shares should have been delivered. The shares were handed over to the bank in April, and the selling company allowed the shares to remain in the bank and not to be handed over until transfer was given. There is no evidence to show that after October these shares could have been sold for anything at all. It is true a small number of shares were disposed of in England immediately after the company was floated, for above par down to 12s. 6d. in August or September, but it was not shown in this case that the plaintiff company, if they had got the shares, ever intended to dispose of them. The appeal will be allowed on the second claim for damages, and the judgment in the Court below altered to judgment on prayers (1) and (3); that is delivery of the shares and the amount of costs in liquidation, with costs in the Court below, the appellants to have their costs of appeal. (Maasdorp, J., and Hopley, J., concurred.

[Appellants' attorney: G. Trolip; respondents' attorneys: Syfret, Godlonton and Low.]

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

SOUTHEY V. SOUTHEY.

	1905.
Nov.	7th.
"	8th.
"	10th.
"	20th.
"	21st.
"	22nd.
"	23rd.
"	24th.
Dec.	4th.
"	5th.
"	6th.
"	7th.
"	15th.

Water—Storm water—Respective rights of upper and lower riparian proprietors.

When water flowing into the channel of a river has once entered therein and joined the stream within the river banks, whether such water be a portion

of the usual flow, or of freshets, or of more considerable floods after heavy rains: such water becomes part of the perennial stream and is subject to all rules regulating the user of the ordinary flow by the riparian proprietors.

The rule that an upper proprietor, after using a reasonable quantity of water for irrigation, must allow the surplus of such water to flow back into the stream, does not contemplate such return being made at any uncertain spot by percolation, but obliges him to return such water by a visible flow at some point in the stream above that at which it joins the property of the lower proprietor.

This was an action brought by Mr. Ohas. Southey against Mr. William Southey, both being farmers in the Middelburg district, for a declaration of rights as to water rights on the Brak River. The river flows from the upper farm of the defendant, and then over that of the plaintiff's farm at Culmstock. The declaration was as in the following terms:

1. The parties are farmers resident in the Middelburg district, Cape Colony.

2. A public perennial stream, called the Brak River, rises on land above the farm Varkenskop, of which defendant is the registered owner, and flows on to and over the said farm on to and over the adjoining and lower farm Culmstock, of which the plaintiff, Charles William Southey, is the registered owner, and thence on to and over the adjoining farm Temple Farm.

3. The plaintiff as riparian proprietor upon the said stream was, and is, entitled to the user of a reasonable share of the water in the said stream.

4. For some years past up to the present time the defendant has been gradually from year to year by various works, constructed by him, taking more and more water out of the said stream. In the years 1876, 1893, and 1902 respectively the defendant constructed three solid mason weirs at different points across the said stream, and by means thereof and by furrows leading therefrom he has as aforesaid been diverting more and more water from the said stream, and by gradual means, viz., filling up the sluices, widening and deepening the furrows connected with the said weirs, spreading the water and heightening

the furrows, he has placed large tracts of land, hitherto dry and still uncultivated, under irrigation, and in doing so has diverted large quantities of water away from the said stream, into an entirely different catchment area or watershed, and does not after user of the said water return the same into the said stream, the Brak River, and the said water is thereby wholly lost to the plaintiff.

5. In addition to the above works, the defendant in or about the year 1902 erected a windmill on the banks of the said river, at a spot below the said third weir, and by means thereof and of pipes laid from the said river, pumps and diverts from the said stream a considerable quantity of such water as there is below the said weir, and which water had up to that time always flowed in the said stream down to the plaintiff's land.

6. By reason of the said works the defendant has gradually been diverting more water than he is legally entitled to use, and the plaintiff has been gradually deprived of more and more of his reasonable share of the water in the said stream, and while the defendant has from year to year been using more water and placing more and more of his lands under irrigation, the plaintiff has gradually become more and more unable to cultivate his land and to raise crops thereon, and the plaintiff says that, especially from the year 1903 up to the present time, the defendant has wrongfully and unlawfully diverted from the stream and used more than his reasonable share of the water in the said stream, and has wrongfully and unlawfully diverted the said water into the aforesaid new watershed, and has not returned the said water after user into the said stream.

7. By reason of the premises the water so diverted has been and is wholly lost to the plaintiff, and he has been deprived of the user of a reasonable share of the said water, and has been unable to cultivate his lands as theretofore, to water his lucerne fields, and to raise his crops, and has suffered great loss and damage, to wit, the sum of £500, and the defendant continues to use and divert the water as aforesaid, and refuses to desist, and claims the right so to do.

Wherefore the plaintiff claims:

(a) An order declaring that he is entitled to the user of a reasonable share of the water in the said stream.

(b) An order declaring that the defendant is using, and is not entitled to use, more than a reasonable share of the water in the said stream, and directing the defendant to return to the stream water diverted therefrom after user by him.

(c) An interdict restraining the defendant from using more than a reasonable share of the water in the said

stream and from diverting the water so that it is not returned into the said stream.

(d) The sum of £500 as and for damages.

(e) Alternative relief and costs of suit.

To this declaration the defendant pleaded as follows:

1. The defendant admits para. 1, 2, and 3 of the declaration.

2. As to par. 4, defendant admits that he built two solid masonry weirs in the Brak River in the period referred to, but says that only one is used for diverting the defendant's share of the ordinary flow of the water in the river. The third weir was bought by defendant from an upper proprietor, with all the said proprietor's water rights in respect of the Brak River, but defendant has used it little, and for small quantities of water only.

3. Defendant admits that in the aforesaid period he has continued increasingly to divert on to Varkens Kop water from the said river, but such increased diversion has been in respect only of surplus flood water after good rains. The water so diverted on to Varkens Kop could not, owing to the quantity of the flood water and the lie of the country have been utilised by lower proprietors, and would have been waste water but for defendant's user. The defendant is almost entirely dependent on flood water to irrigate his crops.

4. By means of such diversion and of the manner in which the water diverted has been used for irrigation purposes on defendant's lands, the plaintiff's property has been greatly benefited and enhanced in value. The water, after use by defendant, has flowed on to plaintiff's lands, and the plaintiff has thereby been enabled to cultivate large tracts of land which otherwise he could not have cultivated; and the springs on plaintiff's lands have been greatly strengthened by the said diversion and use.

5. As to par. 5, the defendant admits having erected a windmill, and says that he did so for the proper enjoyment of his user of the water in the river. The piping was laid to economise the use of the water for watering stock, and no appreciable difference in the quantity of the water in the river is caused by the use of the windmill and piping. The defendant denies that a considerable quantity of water is so obtained.

6. As to par. 6, the defendant denies that he is or has been making, and does not claim that he can make unreasonable use of the water of the said river, and says that he has not been using or diverting the water (whether flood water or otherwise) to the extent to which he is in law entitled so to do. The defendant can flood the tracts of dry land referred to in the said paragraph at times only when the river is in such flood that there is far more

water in the river than can be used by lower proprietors.

7. The defendant says that from the year 1903 to January, 1905, there was a severe drought, and such want of water as plaintiff may have experienced was due to the continuous dry season, and not to any wrongful user of the water in the river by defendant. From 14th March, 1904, to January, 1905, no water came down the Brak River, and defendant himself suffered severely from want of water, not only for irrigation, but for watering his stock.

8. As to par. 7, the defendant denies specially that plaintiff has suffered any damage for which defendant is in law liable. The defendant admits that he claims to be entitled (and is continuing) to use the water of the river as he has been doing.

9. Subject to the above, defendant denies pars. 4, 5, 6, and 7.

Wherefore, subject to the above, defendant prays that plaintiff's claim may be dismissed with costs.

The replication was general.

Sir H. Juta, K.C. (with him Mr. Upington) for plaintiff; Mr. Schreiner, K.C. (with him Mr. Close) for defendant.

Charles Southey stated that in 1871 his brother and himself bought undivided shares in Culmstock and Varkenskop, and ultimately his brother took over the latter farm. Culmstock was partly dependent on freshets and floods in 1871. He built a weir on his boundary in 1894 and 1895. In an ordinary flood, he got no benefit from the diverted water from weir No. 3. Not long ago the defendant began to cut a furrow out of that of the defendant, which ran on to the veld. That furrow, belonging to witness, irrigated the lucerne ground. An obstruction was also put up by the defendant to prevent the flood water flowing on to witness's farm. The water which the defendant stated benefited plaintiff's farm simply flooded the road, over which plaintiff had to drive. The effect of the defendant's works was to diminish witness's supply; it was rapidly decreasing. The windmill, he believed, was built in 1903. It pumped water from the river into two dams. At the end of 1904, witness had no water, and went up to examine the windmill. There were traces of the dam having overflowed its banks. In 1904, witness's lucerne died for want of water. The water never actually stopped previous to the erection of the windmill, but it had been getting weaker and weaker on account of the action of the windmill. Before February this year the windmill was almost constantly running, but since then it had practically stopped.

Re-examined by Sir H. Juta: This year he measured 25,000 gallons below the windmill which was practically useless for his lucerne land. Formerly it was 75,000 gallons. As far back as 1871

he had grown oats, and that was the principal product of the land.

Arthur Smythe said he was manager to the plaintiff since February, 1904, and before that he had been on an adjoining farm for four years. The water on Culmstock had recently been weakened. Witness re-sowed the lucerne this year. In October there was a good rain, but the river did not come down at Culmstock. Witness took the rain records at 8 o'clock each morning. On January 13 there was rain, but the water came down only slightly to Culmstock. Witness went up to Varkenskop, and saw water running over the veld. On several occasions when the river came down there was no water at Culmstock, while there was water on the adjoining farm. The lucerne had to be re-sown this year, partly for want of water.

Gert Kock, who lives above Varkenskop, stated he took water from the Brak River for his own farm. In October last water came down the river, and the water witness used passed on to Varkenskop. In January there was rain; the river passed him and went on to Varkenskop.

Cross-examined by Mr. Schreiner: Although he could not give the date, he was positive there was rain in October.

Reginald Greaves, Government land surveyor gave evidence as to the plan he had drawn up.

Arthur Forbes, who is farming on a portion of the place in dispute, stated he had been there for the past eight years. He took particular interest in the result of this case, as the farm he was at present on had been willed to him by the landlady (his mother). Witness had proof that Mr. W. Southey had made his cutting to injure witness. When the flood was large it went on to the Thebus.

S. Montague Gadd, a farmer at Springfield, who is on good terms with both farmers, measured the water above the dam at the homestead (Weir No. 5). He did so in December, 1904, and it was 15,120 gallons in twelve hours. Weir No. 4 was dry. Lucerne was grown on the farm.

Wilfred Southey, nephew to the parties concerned in this action, gave evidence for the plaintiff. After further evidence, Sir H. Juta closed his case.

William Southey, the defendant, was examined at considerable length on plans and photographs of the farm. He stated that the dam was often dry for nine months in the year. It was a large, shallow dam, and very quickly dried up. The water in the case of extraordinary floods would run into the Brak River at the junction of the two rivers. Any water that came on to the Temple Farm in that way would find its way to the Brak, and not to the Thebus River. For the properties that he purchased subsequently he had not a solitary drop of water. Witness denied that he had made a cutting to take off

lucerne during the year depended on the supply of water, but witness could not say how often it could be cut in an average season, as in his farm he had never experienced an average season.

Frederick Southey, a son of the defendant, said he asked Forbes to show him the cutting that he and the "old boss" had an argument about. If the water came through the cutting above 100 morgen could be cultivated. Witness had seen traces of water on the veld at that spot. Anderson pointed out that there was weed there. On Anderson's suggestion they returned to the dam that pushes back on Culmstock. There was a strong stream of clear water running into the dam. It was ridiculous to say that the water was the result of a flood or a freshet. The river was absolutely dry where he crossed it. At Forbes's place there was sufficient force of water in the river to fill a 3 in. pipe. When witness was a lad there was cultivation on the abandoned lands, but there never was a good crop. He could easily distinguish river water from brak water by the colour.

Cross-examined by Sir H. Juta: There was a good strong flow into the weir at Forbes's farm. Fifty acres could have been irrigated in that stream. The lucerne was not in a good condition; it might have been fed off. He did not know that the present was a good year. He did not go down with Mr. Anderson for the purpose of giving evidence; he merely went down to show Mr. Anderson round. On the abandoned ground he could only remember some mealies or pumpkins.

Re-examined by Mr. Schreiner: He saw Forbes's evidence in a newspaper, and he was determined to see for himself.

Petrus Jacobus Venter, farmer, who was in the employ of Mr. Forbes for about 14 months up till April, 1905, said he knew the cutting on the veld. He had seen about two morgen of Mr. Forbes's ground wetted from Mr. Wm. Southey's farm. Witness made the cutting, and only remembered water coming down it once. The day witness finished the cutting, which he believed was in January, the river was down on Temple farm. The river came right over the dam. It was so full that the cows had to swim over. The flood water from the defendant's farm must come down to the Brak River. Some time this year there was a thunderstorm over the Brak River. The rain lasted about 20 or 25 minutes. When witness returned to the farm the road was full of red water, so were the river and the sluits.

Henry Trollip stated that after the flood of 1874 the water grew stronger for a couple of years. After the flood of

1874 the river flowed for a year. From 1895 the water gradually weakened. He would not consider the abandoned lands good soil. He was not under the impression that the defendant's works were constructed to take more water than years ago.

Cross-examined by Sir H. Juta: It was the custom of the upper proprietor to take all the water he could make use of. Witness was an upper and lower proprietor, but the upper farmers in his case had not the works to take an unfair share of water.

Herbert Collett, farmer, residing at Saltpansdrift, on the Brak River, stated his farm was where the Fish and the Brak Rivers united. Witness was president of the Cradock Farmers' Association, and had been farming by himself for twenty years. He was on good terms with the plaintiff and the defendant. He was familiar with Culmstock, Varkenskop, and Temple Farm. About the beginning of May he went to see Varkenskop. Witness went in company with Mr. W. Southey to see where the water would run at the nineteen foot furrow at No. 2 weir. He saw by the grass that there had been flooding. The flooding done by the defendant did not appear to be in any way excessive. The river was dry at the time. Every man took as much flood water as he possibly could, whether it was a freshet or a flood. It would not be practicable to divide a small freshet. In this case it was better for the upper proprietor to take as much flood water as he could, and establish a permanent supply below. The upper proprietor never thought of the lower proprietor.

Cross-examined by Sir H. Juta: He was the person who had a scheme for supplying Cradock with a water supply, and that would mean the diversion of a deal of water from the river. He would not say he was vitally interested that the case should not go against the defendant. He had never seen the defendant turning out the water when the river came down. He could not say how long it took to fill the dams. There were any amount of degrees between a small freshet and a big flood that would reach the lower neighbours.

By Measdrop, J.: The Cradock scheme would be a flood scheme. The idea was to pipe it into a large reservoir.

Edmund Wainwright, farmer, at present of Queen's Town, said he formerly farmed at Culmstock, then known as Kliprift, from 1865 until after 1868. In August last he revisited the place, when Mr. W. Rubidge was there. Then he made an inspection as to the use of water on both farms. Witness was farming the west of the river. At that time there was a dam he took the water from. The homestead lands which the plaintiff had now were at present more irrigated than in witness's

time. The lands witness had at the homestead were watered from the weir; water was very scarce. The permanent water on Culmstock in August was much more than in witness's time. He was fairly familiar with Varkenskap, the irrigation on which had increased greatly. In August he saw the lucerne lands of both parties. There was not a drop of flood water. Witness saw no perennial water at Varkenskap. He saw water at weir 2, but he did not know where it came from. The sluices were all down at weir 1, but he did not see any water. The condition of the lucerne on both homesteads was about equal. There was a little water at the windmill. There was no indication that there had been irrigation from the dams. Witness was positive there was a very fine stream of water at No. 4. As the defendant took the flood water, it would strengthen the springs below. Witness was of opinion that the defendant benefited Culmstock.

Cross-examined by Sir H. Juta: The farmers on the east side used the water out of the brakke River. There was a cutting near the homestead that was cut further back. There was practically no cultivation at Cawood when witness was there; now there was lucerne. He did not know what perennial water there was at Varkenskap in Cawood's time. Witness was not entirely dependent on freshets. In the early days it was very probable the weirs were much smaller than they were at present.

Walter Rubidge, farmer, residing in the district of Graaff-Reinet, said he had close on forty years' experience of farming. He was a member of Parliament for Vryburg. He would consider himself a fortunate lower proprietor. Both parties to the suit were friends of his. Witness took a great interest in the irrigation question. During the present year he was asked to inspect Culmstock and Varkenskap. In 1868, witness saw Culmstock. Witness had been to the farms on and off since then. In August last witness was on the farms, and also on last Saturday. Here and there he took measurements of the weirs and sluices in August. There was no water in the river. The water-works of both parties were inspected, with the exception of the works made from the Rooi Spruit. To the best of his recollection, the water was still in the dam at weir No. 1. The furrow from weir No. 2 was blocked up; it would only take flood water on the east. There was just a little oozing of water in the river bed below weir No. 2. The furrow on the west, at weir No. 3, would take water down to the vlei. That was simply a construction to take flood water; he had never seen perennial water there. The dams at the windmill could not be used for

irrigation. There was no indication that the veld, through carelessness, was watered from the dams. At the deep footpath and a little below it there was a clear stream—apparently permanent. About 100,000 gallons were flowing at the deep footpath. The water might percolate down, but it must go down to the plaintiff's dam. The Rooi Spruit would go to Varkenskap, and then to Culmstock. The lucerne at plaintiff's homestead lands showed signs of growth. In 1904 the ostriches were dying on the defendant's farm. In August this year he saw a splendid supply of water below weir 4, on the plaintiff's farm. The water at the cutting was between 60,000 and 80,000 gallons. Culmstock was decidedly better off for water than Varkenskap. There was a great deal more water at Culmstock now than when he visited it in 1868-1869, and then there was an exceptionally good season. He would not say, judging by the lucerne, that the plaintiff had suffered a great deal of damage. Much more could be done to take water from the Rooi Spruit when it was flooded. It would be a dangerous experiment to attempt to irrigate the flood from the eastern side of weir 4 on account of the ground being very steep and full of sluits. It would be more convenient to flood the new lucerne lands from the Rooi Spruit than the river. The furrow from the weir was decidedly not a flooding furrow. Varkenskap was almost entirely dependent on flooding. With a sharp thunderstorm over the catchment area, it would take a considerable quantity of water to fill the dam at Grasbult. All such water was now cut off by the flooding water. Crossing the bridge towards Schoombie Station, he noticed the bed of the river was wet. Witness corroborated Mr. Collett on that point. Below Temple Farm, in the Brakke River, there was about 100,000 gallons of clear water flowing. The water from Grasbult would go to the Thebus River. The lucerne lands at Forbes's farm were in fairly good condition. The water was standing well back, and Forbes said it was about four feet deep. Forbes said the water came from the banks of the river up to the willow tree. The cutting on that farm would put a large area under irrigation. Witness could see that water had been over about 100 acres. Four or five acres were distinctly marked, and witness asked him if that was the piece he described as big as the Court-house, and remarked that was a big Court-house. He estimated 200,000 gallons at the least was flowing into Forbes's dam. The water was perfectly clear. There was a considerable flow of water from weir number five, irrigating the homestead lands of the plaintiff. The defendant, in his opinion, did not make excessive use of flood water. A small freshet

coming down the river would not be capable of division. He would not like to undertake a fair division of the flood water. The quantity and velocity being so uncertain. With a permanent flow it would be possible. He certainly thought it was to the benefit of the lower proprietors that the defendant should take the flood water as he did; it strengthened the underground sources.

Cross-examined by Sir H. Juta: Last year there were two lucerne lands with very nice stacks on the defendant's farm, but he could not explain why the ostriches were dying. There was nothing to show that the water had overflowed at the two small dams at the windmill. He was not prepared to say that Mr. Charles Southey suffered no damage to his lucerne.

Walter Haltz, farmer, of the district of Wodehouse, stated he knew the parties to the suit very casually. Never before the 17th of this month had he been to Culmstock. He had a great deal of experience of waterworks, and was part proprietor in the Carnarvon dam. He had some experience of the measurement of flowing water. He came to Varkenskop at the invitation of the defendant, and saw weirs 1, 2, and 3. That afternoon he estimated the flow at weir number 1 at 30,000 to 35,000 gallons. There was no running flood water in the river. The flood furrow on the east appeared to him to be a reasonable construction for taking flood water. There was no water between weirs numbers 2 and 3. Going across the railway bridge later on he noticed a little water from a freshet up above. He corroborated the evidence given by Mr. Collett and Mr. Rubidge as to what they saw and what Mr. Forbes had said. Near Forbes cutting, about three or four acres showed traces of having been flooded, and lower down fifty or sixty morgen, though not so clear had apparently been flooded. The largest permanent perennial stream he had seen was above Forbes's dam on Culmstock, consisting of about 200,000 gallons. He took it as a permanent stream. The flood water must go back to the Brakke River. The permanent water for Culmstock was infinitely more than that on Varkenskop. The water above Weir 3 and below Weir 4 was found to be strengthened by percolation of the flood water. There were standing pools at the windmill. There was nothing unusual there; if the dams had been his he would have had them made a little large. There was no trace that the dam had overflowed. If the cutting was not obstructed at Weir 4 by the bank the water would go into the Brakke River. All the lucerne they saw was in a reasonably good condition. He could not see any practicable scheme that would divide the small freshets. It was very much more important to have permanent water instead of flood waters, and

he considered the defendant was materially benefiting the plaintiff. To lay down a rule as to the divisions of flood water would be unpracticable and unjust. It was incidental to flood irrigation to take the smaller freshets.

Cross-examined by Sir H. Juta: The water he saw flowing into Weir No. 1 had all the appearance of being a permanent stream. The strength of the water varied very much. A fairly good idea could be formed as to the volume of water required to go down the river to Culmstock. It was difficult to know where the water in a deep hole in the bed of the river below Weir 3 went to, but in the grasbult side it would percolate towards the lowest place. He did not see the oozing in dam No. 2.

Re-examined by Mr. Schreiner: The catchment area of from three to four square miles was a particularly good catchment for impounding water. The whole thing seemed to him to be a case of the value of surface flooding.

The witness proceeded to say that had he been in the place of the lower proprietor he would have joined hands with the top man and helped to pay expense to make his weirs, dams, etc., as strong as possible, and keep all the water on the land for the purpose of establishing permanent spring streams.

Frederick William Pack, formerly a tutor at Varkenskop stated Mr. Oscar Southey was a pupil of his. He was there from November, 1894, to January, 1901. He taught Mr. Oscar Southey how to take rain-gauges. Oscar Southey made some of the entries in the book and witness made some. The entries were absolutely correct. Witness deposed to the accuracy of particular entries which he remembered as being associated with certain incidents, one being the visit of the Governor, and another an occasion on which photographs (produced) were taken. These photographs were taken at a time when there was a small flow. The river usually went over No. 3 weir. The entry in the book, "river down," was, as a rule, made when the water went over Weir No. 3, but it did not always mean that.

Charles Southey (recalled) stated that the cutting above Weir 4 was with the intention of taking flood-water on to the vlei from the river. Its appearance might easily deceive Mr. Rubidge. The work was not abandoned.

Mr. Schreiner closed his case.

Sir H. Juta: The defence raised in the plea does not agree with the line adopted by the defence in the course of the case. The plea alleges that this river is a public perennial stream. The defendant admits that we are entitled to a reasonable share of the water; but in spite of this admission he has diverted an unreasonable quantity. In our declaration we make no distinction be-

tween flood water and the ordinary flow. The defendant in his plea makes no distinction, but admitting the diversion of the water, he said it was "surplus flood water." He admits that he can flood dry tracts of land only when the lower proprietors cannot use the water. He does not claim the right to divert small floods or freshets. He says nothing about a watershed, but says that he returns the water to the stream. He now claims to take all the flood water he can get. That is quite a different case from the one set up in the plea. At last he denies that this river is a perennial stream, save as between himself and Schoombie. The evidence shows that some of the water of this river flows in a defined underground channel. The defendant now says that we are not entitled to any increase of water resulting from rains, and that in respect of such increased flow he is *dominus fluminis*. Every public perennial stream varies much in force at various seasons; but where does the defendant wish to draw the line; and how much water does he say must be in the river before he can deprive us of our *pro rata* share of water? What is "usual and permanent flow"? A man is entitled to do as he likes with the rain water which falls on his land, provided it does not find its way into the channel of a public perennial stream; but if it does that, he is in no better position than any other riparian proprietor. The evidence shows that this river is largely dependent on rains. It is said that when water comes down all the upper proprietors take all they can. That may have been so, but in the days to which that evidence refers dams had not been built to enable an upper proprietor to take all the water. In this case huge works have been constructed so as to enable the defendant to turn a large quantity of water on to his dry veld lands. He now seems to say that he is entitled to all the water in the river, save spring water; but springs depend on rains, and I can find no authority for drawing any distinction between rain water and spring water in a river. The defendant says that the lie of the land is such that the water put on his veld must find its way back to the river. As far as the eastern side is concerned, it is returned to the river at a place where it cannot be used. An upper proprietor may not return the water wheresoever he pleases on the land of the lower proprietor. He must return it into the stream at a point above where the stream reaches the lands of the lower proprietor. In this case the water would not naturally flow on to defendant's veld, but on to our ground. It has been artificially diverted. Water will not percolate through barren veld unless it is poured on it in very large quantities. In this case we have no evidence as to percola-

tion and return of the water to the river. Water will not percolate through land which is not constantly irrigated.

Then as to the weirs. There are three of them, and what Nos. 1 and 2 do not catch No. 3 does.

[Counsel described the construction of these weirs and certain beams connected with them, which obstruct the flow of water. Counsel also dealt with other portions of the evidence with a view of showing that often when there was practically no water in the Brak River defendant's farm was flooded, while that of plaintiff had no water.]

We have suffered damages, and defendant should not be allowed to use this unreasonable quantity of water; and I submit that if the Court is with me in this, it will leave the parties to settle their differences, either by arbitration or by the judgment of a Water Court. I cannot find any authorities in our law to warrant any distinction between ordinary flow and flood water in a perennial stream: but see the judgment of Kotzé, C.J., in *Meyer and Others v. Johannesburg Waterworks Company* (reported in "Cape Law Journal" for 1893, p. 159); *Angell on Watercourses*, p. 544, where see judgment of Tenterden, L.Ch. (this case is reported 1 B. and A., 874 and 887); *Broulbert v. Ramsbottom* (11 Exch., 615), *Coulson and Forbes (Law of Waters*, p. 136), dealing with the obligation of receiving flood waters—are all in favour of my contention, viz., that flood waters are an integral part of a public stream. See also *Struben v. Collett* (9 C.T.R., 620), particularly the judgment of De Villiers, C.J.

[Maasdorp, J.: In that case the question of flood water was not discussed.]

No, but the matter was alluded to. See also *Struben v. Cape District Waterworks Company* (9 Juta, 68); *Hiscock v. De Wet* (1 Ap. Cas., 58). A man may do what he likes with water falling on his own ground until it goes into a public stream, but not after that, and he must not divert the water of such stream.

Mr. Schreiner: The trend of my argument will be to show (1) that the defendant is not bound to allow flood water to flow down below his land. (2) That even if such an obligation be incumbent upon him, he has not made an unreasonable use of the water.

The first of these points has never been decided in the Courts of this colony. A man may claim *aqua superflua* on his land by the title of *occupatio*, just as he may claim *fructus naturæ* or any other wild thing. I contend that flood water in a river is subject to the same rules as water on a man's land. His title is *occupatio*. He can take it, and do as he likes with it. Institutes of the Law of Cape Colony, by Maasdorp, C.J. (Bk. 2, Ch. 13). He there refers to *De Pascoe v. Rawson* (1 Roscoe,

133), and to *Struben v. Cape Town Waterworks* (9 Juta, 68). See this case also as to water flowing by a subterranean passage. I wish to show that my contention is based on Common Law authorities, that the principles I advance are founded on right reason, and that no decision of this or any other Court of this country is against me. Counsel for the plaintiff pleads dearth of authority to support his contention. As plaintiff he was bound to prove his case by authority. I have found authority for my position. *Voet* (43-13). Assuming our judicial made law as to water in the summer season, there is no authority for the granting of an interdict to make the water "flow otherwise (*uliter*) than it did in the previous summer season." We have had the use of this water for several summer seasons. *Voet* regards the summer flow as the natural normal flow. But my point is that the year is here divided into summer and winter, and the time when water is scarce must be regarded as that of the normal flow. The passage I have cited is by no means obsolete; though it is true that in *Hough v. Van der Merwe* (Buch., 1874, p. 148) one of our then judges criticises this title as somewhat inconsistent with *Voet* (39-3-1). But that refers to the right of the lower proprietor to keep off water. His Lordship's criticism on that point shows that he was not thinking of storm water. See his remarks on Dig. (8-3-17): "Flood-water means water in the watercourse. Of course, everybody may do as he likes with overflow water which runs on to his land." In our plea, by "flood-water" we do not mean only water coming down after big floods. In par. 6 of our plea we allude only to special portions of our land. The river can come down only after heavy rains. The levels are such that we could not take water from the ordinary flow either at weir No. 2 or No. 3. All authorities speak of the ordinary flow as something ascertainable with precision. *Relief v. Louw* (Buch. Ap., 1874, p. 165) may be regarded as overruled by *Hough v. Van der Merwe* (Buch., 1874, p. 148). See particularly the tests as to proper user by the upper proprietor. My contentions are (1) that we are entitled to take all the flood water we can get. (2) That no decision has ever yet determined the use we may make of it. In *Relief v. Louw* (Buch., Ap., 1874, p. 165) there was no question of storm-water, but of streams which hardly flowed at all. See the judgment of Cloete, J., *Grotius* (2-35-15), Nathan "Common Law of South Africa" (Vol. 1, pp. 486, par. 19). The author there summarises *Voet* 39-3 and 4. All our Roman-Dutch authorities deal with the question of storm water under the title "*De aquam pulvis arrendo*. There is a remedy against me if I turn my

storm water on to my neighbour's land, but he has no remedy if I keep it off his land, no matter how useful he might have found it. His only remedy is given in *Voet* 43-13, which has nothing to do with storm water. See also *Voet* (8-3-6), Dig. (39-3-11 and 21), Van Leeuwin Cens. Foren. (2-1-6) on title by occupation and flowing streams. The sole authority against me is the case of *Meyer and Others v. Johannesburg Waterworks* ("Cape Law Journal" for 1893, p. 159). The judgment of Kotzé, C.J., was delivered soon after *Struben v. Cape Waterworks*. Evidently His Lordship had studied this latter case, and did not approve of the judgment (see "Cape Law Journal," part 2, vol. 10, p. 167). Here the channel from which the flood water was taken was on defendant's own property, and if a man denies the rights of another to do something on his own property, he who denies must prove the restriction. The rights of lower proprietors to ordinary water cannot be extended to storm water. *Struben v. Cape Waterworks Company* quite supports my contention.

[Maasdorp, J.: What is the exception to a man's right to deal with water on his own land?]

It is stated in *Vermaak v. Palmer* (Buch., 1876, p. 25). That case was commented on in *Jordaan v. Winkelman* (Buch. 1879, p. 79). See Burge (vol. 3, p. 421), where he cites Cod., 3-4-47). All authorities speak of a source when speaking of a river; but we cannot speak of the source of flood water. In *Vermaak v. Palmer*, De Villiers, C.J., refers to *Voet* (8-3-6) citing Cod. (3-4-10). In *Struben's* case he said that underground water is in the same position as storm water, citing Dig. (39-3-21). *Mouton v. Van der Merwe* (Buch., 1876, p. 18) did not turn on the question of prescription, but on user exercised without restraint—*Voet* (39-3-5). In *Jordaan v. Winkelman*, the leading case on prescription, *Vermaak v. Palmer*, was strongly relied upon. *Existimatio circumcolentium* is the best test as to whether a stream is public or private, and hence the importance of the evidence of local witnesses. *Hoff v. Van der Merwe* evidently deals with the accustomed flow. If the lower proprietors on the Liesbeek River had had a right to storm water, it would not have been so necessary to discuss what was "accustomed flow" or to limit the interdict so strictly to "accustomed flow." *Van Heerden v. Visser* (1 Ap., 5) again deals with limitations of the rights of an upper proprietor to water. There the appeal was dismissed, but see the judgment of De Villiers, C.J. *Voet* (43-12) must be read in the light of this judgment. As to what is a public river, see Dig. (43-12-1). As to the windmill, we say that by its means we have taken

only water for ordinary use for cattle, but the plaintiff says that we have used the water extravagantly.

[Maasdorp, J.: If the defendant says that he can take all the flood water, why does he raise the point that he returns it to the river?]

Weir No. 1 takes none of the ordinary water. Nos. 2 and 3 take only what he is entitled to. Between weirs Nos. 2 and 3 there is never any flow on the surface. Below No. 3 the surface flow reappears. It is our right under our former judgment, and in virtue of our purchase from Schoombie, to take all the water at weir No. 2.

[Maasdorp, J.: You seem to divide this river into several public perennial streams.]

That is so; below No. 3 it is a perennial stream.

[Maasdorp, J.: If it is not perennial above that, of course you are entitled to all the water.]

It is perennial in a sense. It goes down to No. 2, and then is lost till it rises below No. 3, but we say that the springs below No. 3 are caused by our flooding operations.

[Maasdorp, J.: I think the evidence shows that the stream is perennial, but you cannot break it up into sections.]

Then we say that our weirs do not obstruct all the water. Some goes under the weirs and reappears on plaintiff's property. This is a case in which the plaintiff has acquiesced, and *volenti non fit injuria*. See *Voet* (39-3-5). This passage will help us in considering the case at large. The plaintiff knows that weir No. 1 was built in 1872. Weir No. 2 is 20 years old.

[Counsel dealt with the evidence as to the quantity of water taken out of the stream by the defendant, and the means whereby it is removed, and proceeded to argue the consent of the plaintiff from the fact that there had never been a *denuntiatio novi operis*.]

The plaintiff was not quite sure that the weirs were not an advantage to him. True, he found many years afterwards that they were not; but he cannot go back on his previous belief. He has brought no action de *damno infecto*; he lies by nearly thirty years, and now comes forward and objects, and virtually claims a better position than that of a *dominus fluminis*. The right of a lower proprietor is not a servitude; it arises *ex natura loci*. *Edmonds v. Scheepers* (1 Juta, 317). This is a clear case of lying by. The doctrine on this point which applies to a registered servitude, applies *a fortiori* to a mere right of user. Even a dominant tenement cannot after so many years demand the removal of works constructed by the servient tenement; much less can a man do so who has a mere right of user. It is impossible to apportion flood water. It is a *quid incertum*. To

attempt to do anything of the kind would be to put a stop to the defendant's enterprise, without benefitting anybody else. Plaintiff has been content to lie by, and *qui tacet consentire videtur*.

[Counsel proceeded to deal with the correspondence, and with various facts of the case.]

Sir H. Juta (in reply): In my argument in chief, I said that I could find no authority for the opinion that water which once finds its way into a public stream is not part and parcel of that stream. You cannot divide that water in a stream into layers, and say "so much is ordinary flow, and so much is storm water." No legal authority has been cited on the other side for any such proposition. Counsel relies on *Voet* (43, 13), and *Coif.* (8, 6, 5). These were relied upon in *Hore v. Van der Merwe*. These authorities have since been discredited, and if they are to be upheld, all our later decisions as to water rights are wrong. What is "customary flow"? Every stream begins with a fountain, and is augmented by tributaries. It has been argued on the other side that tributaries are *aque fluvii*, and hence the only customary flow must be that derived from the fons. In what other way can the customary flow be gauged? Counsel sees this difficulty, and takes refuge in *Voet* (43, 13). That passage does not consist with our law, since, according to us, if a stream dries up, it does not necessarily cease to be a public perennial stream.

[Maasdorp, J.: *Voet* is going back on Roman Law.]

If a rainfall is to make no difference in the customary flow, what becomes of water coming from rains, which cause the river to flow again after a period of drought?

[Maasdorp, J.: Permanent waters are produced by soakages.]

Just so. But let us suppose that 1903 was an exceptionally dry year; 1904 was wet, but in 1905 the flow of water was weak. In such a case the upper proprietor can take in 1904 all the water, save such as ran in 1903. In 1905 the lower proprietor can insist that the water should come down as it did in 1904, and then the upper proprietor will get nothing. According to *Van Schalkwyk v. Herman* (14 S.C.R., 214), in times of scarcity each proprietor must abate. As to the interdiction, "*Ne quid fiat in flumine publico, etc.*," *Pothier* translates "*alter*," as referring to a different course of the stream, and not to any change of the volume of water therein. (See the latter part of the Edict). Such an interpretation does away with all inconsistencies which the Roman Law may appear to present to our own law. Hence this passage of the Edict has nothing to do with this case. As to

occupancy see the latter part of *Story's* judgment, given in *Gale on Easements* (p. 205).

Cur. Adv. Vult.

Postea (December 15).

Maasdorp, J., said: The plaintiff is the owner of the farm Culmstock, which adjoins the farm Barkemkop, of the defendant, and a perennial stream called the Brak River, after flowing through the land of the defendant, passes through that of the plaintiff. The plaintiff states in his declaration that he as riparian proprietor upon the said river, is entitled to the use of a reasonable share of the water in the stream, and he complains that for some years past up to the present time, the defendant has been gradually, from year to year, by various works constructed by him, taking more and more water out of the stream, by means of which he has placed large tracts of land, hitherto dry and still uncultivated, under irrigation. He says the defendant has diverted large quantities of water from the stream into an entirely different catchment area or watershed, and does not after user of the water return the same into the river again. That the defendant also draws a large quantity of water out of the stream by means of a windmill. That in the result the defendant takes more than a reasonable share of the water, to the injury of the plaintiff, who is unable to cultivate his lands as he used to, or to water his lucerne fields, and has consequently suffered damage in the sum of £500. He asks (a) an order declaring that he is entitled to the user of a reasonable share of the water in the stream; (b) an order declaring that the defendant has used more than a reasonable share, and directing him to return to the stream water diverted therefrom after user by him; (c) an interdict restraining the defendant from using more than a reasonable share of the water; (d) the sum of £500 as damages.

The defendant, in his plea, admits that he built two weirs in the Brak River, but says that only one is used for diverting his share of the ordinary flow of the water. He also admits that during the period mentioned by the plaintiff he has continued increasingly to divert water from the river, but such increased diversion has been in respect only of surplus flood water after good rains, and the water so diverted on to Varkenskop could not, owing to the quantity of the flood water and the lie of the country, have been utilised by lower proprietors and it would have been waste water but for the defendant's user. The defendant also says that he is almost entirely dependent on flood water to irrigate his crops. He states that the plaintiff so far from

being injured has been benefited by his manner of using the water, because after the water is used by him it flows on to the plaintiff's lands, and the plaintiff is thereby enabled to cultivate large tracts of land which otherwise he could not have cultivated, and the springs of plaintiff's lands have been greatly strengthened by the said diversion and use. As to the windmill, the defendant says he only uses it to obtain water for his stock. He denies that he makes or claims to make an unreasonable use of the water, and that he has been using and diverting water (whether flood water or otherwise) to the extent to which he is in law entitled so to do. He can flood the tracts of dry land referred to in the declaration at times only when the river is in such flood that there is far more water in the river than can be used by the lower proprietors. He attributes the damage complained of by the plaintiff to continuous dry season, during which he himself suffered severely, and he denies that the defendant has suffered any damage for which he is in law liable. With respect to the more important facts in this case, there is no conflict of evidence, and it is only when we come to matters of inference, conjecture, and opinion that important differences arise. The parties to the case are men of the utmost integrity, upon whose word upon questions of fact the fullest reliance can be placed, and it will be seen that, in respect of such matters as were treated occasionally during the trial, as touching upon the veracity of the witnesses, there merely existed divergence of views held by men who were advocates of opposing interests and opinions in the subject—agriculture and irrigation. The main outstanding fact admitted on all hands, and established by the evidence, is as to the nature of the stream with regard to the use of which the legal issues are raised between the parties. The stream is question is a perennial stream of the kind so common in the country. It might puzzle those who have had no experience of our rivers to detect the perennial character of streams in channels which for so large a part of their course present the appearance of dry, sandy watercourses. The defendant himself succeeded in an action between him and an upper proprietor to have this river declared by judicial decision to be a perennial stream, and I can find nothing in the evidence to throw doubt upon his own admission that such is the nature of the river. It appears that the Brak River is a river of some magnitude, and rises in the mountains a considerable distance above the farms of the parties to this suit, and possesses a channel, the bed of which is a deep, sandy bottom. This loose sand lies between well-defined banks to such depth

that the current of water is not strong enough throughout the course of the river to fill the channel up to the surface of the ground, and to produce a continuous surface flow visible to the eye. The water sinks into the sand, and only rising up where it meets some solid obstruction in its course, and then it becomes available for use by the riparian owners. The invisible underground constant flow of water between well-marked banks in a defined channel has been held to be of such a character as to constitute a perennial stream. I am not prepared to say that such rivers may not reach a tract of country, the bottom of which may be of such a nature as to destroy the character of the river, through the irretrievable loss of the water in the soil, and that, in consequence, a channel or watercourse may be a perennial stream in one part of its course and a dry river bed further down. But it would be impossible to distinguish in this case between the nature of the Brak River on the defendant's farm and that on the farm of the plaintiff. It may be thought that the perennial character of the river being admitted, these remarks are superfluous, but they will be found pertinent when the main issue in the case comes under consideration. Especially as it appeared at times as if the defendant repented of the admission he had made, and called in question the correctness of that admission. It is, however, now established by admission, and evidence that the Brak River in its passage through the farms of the plaintiff and defendant is a perennial stream, and that a perennial stream flows in the channel between its banks, whether visible or not. On the farms Varkenskop, Culmstock, and Temple Farm, the water shows itself at intervals where it is forced up by intervening dykes, in quantities sufficient for common use. This natural emergence of the water is partial in its character, and favours the different farms in varying degrees. Because of the lay of the country and the nature of the river bed, Temple Farm possesses greater natural advantages than the other two farms, and on the whole Culmstock seems to be more favoured than Varkenskop. The nature of the channel and river bed is such that in places it is possible to lead out the water on to the neighbouring soil by means of trifling structures, in others it is necessary to construct some substantial works to raise the bed by means of the silt brought down, and by that means to carry the water out of the channel. The necessary structures have been made, and whatever their effect may be on the flow of the water, no complaint has been raised by the parties on that score so far as the use of the more permanent flow of water is concerned. Although the question is not pointedly raised upon the pleadings by the plaintiff, it is

undoubtedly the case that the dispute between the parties turns upon the use of the water periodically brought down by freshets during the rainy season, and if it were not for that the case would not have come into court. The issues are somewhat extended by the introduction of the action of the windmill erected by the defendant by means of which he pumps water into two dams for the use of his cattle. It is clear that the moderate and reasonable use of the water for that purpose would not have been objected to, and it is only when taken in conjunction with the other use of the water by the defendant, that the plaintiff complains that such use becomes unreasonable. It is true that in this connection evidence was elicited to prove that the water raised by means of the pump was allowed to flow over the surrounding land, and the plaintiff felt that this was done of set purpose, and was not merely the result of negligence or accident. A good deal was made of this in the evidence, and it may be well to clear the ground by disposing of this point before considering the more important issues. As I have said, I have no reason to doubt the veracity of the defendant, and I accept his statement that his sole purpose in erecting the windmill and constructing the dams was to place a reasonable quantity of water into a reservoir, where his cattle could drink. That some water may have escaped and run over the neighbouring ground, as deposed to by some of the witnesses, is quite possible; but I am of opinion, upon the whole of the evidence, that it has not been proved that an unreasonable use was made of the water raised by the pump. If an unreasonable use should hereafter be made by the defendant in this manner, the plaintiff will have his remedy. However, I do not believe anything would have been heard of this complaint, if it were not for the conduct of the defendant in other respects. The plaintiff feeling, as he says, that he was not fairly dealt with by the defendant, became apprehensive, when he saw the windmill being put up, that the defendant was meditating further inroads upon his rights; but, in my opinion, his suspicions are not justified by the facts, or at least not supported by the evidence. There is not sufficient proof in this case that in taking the water for his cattle, the defendant made an unreasonable use of it. This primary lawful user cannot be objected to, because it happens to go in company with other alleged unreasonable users. We come now to the central dispute between the parties. It appears that the Brak River is subject during the year to freshets or floods from its upper reaches. These are heavier in character and more frequent in occurrence according as the rains are more or less plenti-

ful. Their duration also depends upon the character of the rainfall. After thunderstorms they rapidly run off, after long-continued rain the flow is more prolonged. And as the rains fall over a larger surface, the surface water takes longer to run off. It will be found necessary—for the purpose of the contentions raised—to distinguish carefully between surface water after rains, which constitutes the freshets, properly so called, and the subsequent percolations through the soil, which, after soaking down-pours, find their way into the channel, and which belong rather to the permanent flow of the stream. It is not disputed that a long continued current of water by which the usual flow of the river is increased after steady rains, is such as is subject to the rules of common use by the riparian owners. As to the freshets, they vary in volume; at times they are so small that they can be wholly diverted by weirs placed in the river by some of the riparian owners; at others they suffice to feed the furrows of all the proprietors, and then again they are so violent and impetuous that most of the water rushes down the course of the river to the sea. With respect to the last, no question of reasonable use has arisen in this case. It is as to the two former that questions both of law and fact are raised. The question of law is whether the ordinary rules applicable to the common and reasonable user of the water of a perennial stream apply to them, and the question of fact is whether the defendant has made an unreasonable use of these freshet waters. It must be ascertained what it is that the defendant has actually done. He has placed three substantial weirs in the river for the purpose of diverting the water. The existence of the upper weir is immaterial to the case, it being only used to feed the second weir. Weir No. 2 is intended to divert the usual flow of water, and also to turn out such flood water as it is capable of doing. It is so constructed that it diverts all the water through a furrow on the west bank of the river, until the water comes down in such volume that it flows over the crest of the Weir, and when that happens a portion of the water flows over a beam lying across a furrow on the east side, and so down that furrow on to the land of the defendant on that side. If this beam were lifted the water would rush out in the furrows both on the west and east side, and in that case a strong freshet will be needed to take the water over the crest of the weir. When the water does rush over weir No. 2 it is intercepted by weir No. 3. This latter weir is used solely for the diversion of flood water, for there is no perceptible permanent surface flow between weirs No. 2 and No. 3. A furrow carries away the water on the west out of

weir No. 3, and is used to irrigate the vleys and land of the defendant, other than cultivated fields. Weir No. 3 would take all the flood water out of the river, unless the freshet were so strong as to pass over the crest of the weir. It follows, therefore, that, even when the beam is down at weir No. 2, a considerable quantity of water coming down in a freshet will be diverted by the defendant's weirs. In this way very small flows will be diverted, which might be of little avail to the lower proprietors. But most undoubtedly the weirs are capable of turning off, and have been used to turn off a large volume of water, which would be sufficient for common use. I shall refer later to the dispute respecting the lifting of the beams, confining my attention for the present to the quantity of water taken by the farmers on the west, and the overflow over the beam. As a matter of fact, the defendant claims the right to take as much of the flood water as he pleases, and denies the existence of any right in the lower proprietors to confine him to a reasonable user thereof. His claim as set forth in his plea is not as large as that. In his plea he states that he admits that in the period mentioned in the declaration he has continued increasingly to divert on to Varkenskop water from the river, but he says such increased diversion has been in respect only of surplus flood water after good rains, and the water so diverted could not, owing to the quantity of the flood water and the lie of the country, have been utilised by the lower proprietors, and would have been waste water but for defendant's user. The reference to good rains seems to imply that he only uses the water when there is abundance of it, and consequently enough for all. But then it is difficult to see why, owing to the quantity, it could not be used by the lower proprietor. If it could be used by defendant, it could surely be used by others, whatever its quantity. If the explanation is sought for in these words, that owing to the lie of the country it could not be served by the lower proprietors, then the contention is disposed of by the evidence, because it is quite clear that both Culmstock and Temple Farm are adapted to the use of flood water. The pleader was not prepared to assert boldly the rights claimed by the defendant himself, but alleges certain special circumstances, under which he uses the water without injury to the plaintiff. Finally it comes to this, that the Court has to decide whether freshets or flood-water, whether large or small in volume, must be treated as part of the perennial stream of the Brak River, and subject to all the rules applicable to perennial streams. There is very little direct authority deciding in express terms the definite issue here raised.

Indirectly, the point has been referred to in considering the law of water rights for other purposes. Much argument has been addressed to the principles of the decisions of our Courts on the subject of perennial streams, mainly, I take it, to discover in how far they throw any direct light upon the point in question, and indeed by that means we may be enabled to develop the doctrine bearing upon the nature of flood-water. But I do not think I am called upon to discuss at any length the cases which have firmly established the basis upon which the user of water of a perennial stream should be regulated. The Roman law has been referred to as showing how laws were enacted by means of the Pretor's edict, wherein strict and well-defined rules were laid down respecting the use of water, but it is evident that the Pretor himself—through the instrumentality of his equitable actions—allowed an extension of the established principles to analogous cases. In England and America, where the rules of the civil law in this respect have been adapted, we find the law developed and adapted to the needs of the country. Our Courts have done the same in dealing with the peculiar features, requirements, and circumstances of our country regarding the flow of water. It is quite true that flood water has at times been designated as a common enemy, and described as a wild beast, but such wide statements cannot be taken literally, because it is evident that flood-water can be tamed and made to render good service. And it is only necessary to refer to the good work it has already done, as shown by the witnesses in this case, to prove that it is a thing of great utility. Our thirsty land differs largely from countries possessing abundance of water, which becomes excessive the moment the rainy season begins. But it is contended that notwithstanding the fact that flood-water can be utilised, it is in its nature such that it is not amenable to the rules necessary for its common beneficial enjoyment. If it were quite true that it is wholly impossible to make arrangement for its reasonable division among riparian owners, that would be a good reason for the Court refusing to interfere by attempting to do the impossible, and thereby deprive one man of a benefit without any advantage to others. But if it be found upon reference to the legal authorities as a whole, that flood water must be regarded as part of the perennial stream in which it flows, then it follows that it becomes subject to the common interest of all the riparian owners, and any one derogating from their rights has the burden of proof thrown upon him that what he takes cannot be beneficially enjoyed by others. This the defendant has, in my opinion, failed to show, and there is evidence that

some of the witnesses who raised difficulties have themselves considered and suggested plans for the common enjoyment of flood water. Counsel for the defendant contended that only the usual average flow of the water in the channel should be regarded as the perennial stream, and anything over and above that produced by a surface flow after rain is to be taken as flood water, exempt from the rules applicable to perennial streams. If surface water, which goes to swell a stream after rain is to be taken as distinguishable and distinct from the perennial stream, it is difficult to see why percolation through the soil after rain should not be treated in the same way. But not the remotest suggestion was made or could be made that percolations through the soil finding their way into the channel could be treated otherwise than as part of the stream. And yet surface water running in no defined channel and percolations in the soil fall under similar legal rules, and while on land or in the soil are at the free disposal of the owner of the land. I can see no reason why the one should be identified with the stream when it finds its way into the channel and the other not. In considering this case it must be borne in mind that the defendant claims, not the surface water after rain which has fallen on his own land, but flood water which is already part of the stream when it enters his farm. There is no question here as to water which falls on his own ground. To elucidate the matter, I may take a passage from a judgment of Lord Cranworth in *Claremore v. Richards* (7 House of Lords, 379), based on the same principles as our law, and embracing several features appearing also in the present case. The passage is as follows: "The right to running water has always been properly described as a natural right, just like the right to the air we breathe. They are gifts of Nature, and no one has a right to appropriate them. There is no difficulty in enforcing that right, because running water is something visible, and no one can interrupt it without knowing whether he does or does not do injury to those who are above or below him, but if the doctrine were applied to water merely percolating, as it is said, through the soil and eventually reaching some stream, it would always be matter that would require the evidence of scientific men to state whether or not there has been interruption, and whether or not there had been injury. It is a process of Nature not apparent, and therefore such percolating water has not received the protection which water running in a natural channel on the surface has always received." The remarks will be applicable to that portion of this case which deals with the evidence given to prove that the springs in the river have been strengthened by percolation, but here I shall

only point out the distinction drawn between water while percolating through the soil, and the same water when it has eventually reached a perennial stream. And also that the law will not attempt to do what it is impossible to do. In this case, it would be impossible to decide in the case of streams which constantly vary in volume what portion of the stream is at any particular time attributable to surface flood water, or to percolations after rain, or to the usual but varying flow of the river. The stream when increased after rain is one entire thing, which cannot be analysed or separated into its component parts, and all the law can do is to treat it as a whole, possessing all the characteristics of the perennial flow, and subject to the same rules. I shall now refer to some passages in the authorities which have a more direct bearing on the point in issue. Lord (Helmsford said in *Claremor v. Richards*, when dealing with the difficulties attending percolating water: "There is no difficulty in determining the rights of the different proprietors to the usufruct of the water in a running stream; whether it has been increased by floods or diminished by drought, it flows on in the same ascertained course, and the use which every owner may claim is only of the water which has entered into and become part of the stream." In *Broadbent v. Ramsbottom* (11 Exch., 615), Alderson, B. said: "All the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook; but it does not prevent the owner of the land on which the water falls to deal with it as he may please, and appropriate it. He cannot, it is true, do so if the water has arrived at and is flowing in some natural channel already formed, but he has a perfect right to appropriate it before it arrives at such channel." In the *Encyclopædia of the Law of Scotland*, a passage, treating of non-navigable rivers, appears, which, after stating that the permanent diversion of water to the prejudice of a lower proprietor is not allowed, proceeds to say: "And this applies equally, although the diversion extends, and can extend, only to what is in excess of the usual flow of the stream." Further on, it reads: "If a heritor introduces a quantity of alien water into a stream, this will not entitle him to withdraw a quantity of river water equal in amount to that so introduced." The plain inference from all these authorities is that, whatever water finds its way into a perennial stream, becomes part and parcel of that stream. Chief Justice Kotze, in the High Court of the Transvaal, when dealing with a case under similar circumstances, was of opinion that the proprietor of a farm was entitled to catch

up the rain-water falling on his land, and deal with it as his own, but held that this right cannot be extended to rain-water which has found its way into the channel of a public stream. Although this conclusion could be readily deduced from the Roman law, where the floods of winter as well as the moderate flow of summer are regarded as forming the perennial stream, it is very satisfactory to find that judges of high authority have come to the same conclusion. I am, therefore, of opinion that water flowing in the channel of a river, between its banks, whether it is the moderate and usual stream, or the waters increased by freshets, or the more considerable floods after heavy rains, is part of the perennial stream, and subject to all the rules regulating the reasonable user of such water by the riparian owners. That being so, it is not difficult to determine upon the evidence that the quantity of water diverted by the defendant by means of his two weirs is very considerable, and constitutes an unreasonable user of the water. But then it is said even though a large quantity is taken out of the river by the defendant, a fair proportion of it is restored to the river by means of abundant percolations through the soil of the defendant's farm, which go to strengthen the springs used by the plaintiff. The burden of proof after disturbing the natural flow of the stream lies upon the defendant. It is for him to show that he has not deprived the lower proprietors of their reasonable use of the water of the river. We have had the evidence of witnesses who are intimately acquainted with the locality, and they differ widely as to the effect of the flooding of the fields by the springs in the river. Then we have had the evidence of experienced farmers, who speak of the probable or general effect of such flooding. As to the latter, I may say that their theories are such as any intelligent man can form an opinion upon, and their experience must necessarily be confined to the nature of the localities they have lived in. It is quite true that extensive flooding in narrow valleys must have the effect of creating steady and plentiful percolations back into the river. Where the valleys are wider, the beneficial effect on the river will be less, and where the water is taken to a distance on to extensive flats very little will find its way by means of percolation back into the stream. There is no satisfactory clear proof in this case that by the flooding of his own lands the defendant has strengthened the springs of the plaintiff. And in my opinion this is not a case in which the nature of the ground is such that the waters led by the defendant on to his lands must naturally and necessarily find their way back into the river to be available for Culmstock or Temple Farm. Moreover,

I am of opinion that when the authorities allow a reasonable use of the water of a stream to an upper proprietor, provided he allows the water, reduced reasonably by such use, to flow back into the stream, it is not intended that this should be by means of uncertain percolation, but rather by means of a visible flow. It has already been said that the percolations through the soil belong to the owner of the land, and when a man turns a running stream into invisible percolations, he destroys its proper character. And the very difficulty is created which is pointed out by Lord Cranworth in the case of *Claremore v. Richards*, when he says: "But if the doctrine is applied to water merely percolating, as it is said, and eventually reaching some stream, it would always be a matter that would require the evidence of scientific men to state whether or not there had been injury." In my opinion, it is not permissible to an upper proprietor to divert the water, and to tell the lower proprietor that he gets his reasonable share by means of percolation. And then again it is clearly established that the water must be returned to the river before it enters the land of the lower riparian owner, which was not done in this case. I am consequently of opinion that the defendant made an unreasonable use of the water, irrespective of the question whether he raised the beam on the east side of the river, but as a great deal of the evidence was directed to that point, I think the parties are entitled to a finding upon the facts bearing upon it. And I may say, if the case depended upon the question whether the beam was lifted to allow an escape of the water to the east, I should have given absolution from the instance. The Court is expected to infer that the water flows on to Grasbult flowed through the east furrow, when no witness ever saw that it actually did; while, on the other hand, the Court is expected to find that the water came from the Brak catchment, when no witness for the defence could say positively that that was the case, except on one or two occasions. Men of intelligence, experience, and local knowledge have said a prolonged flow can be produced by a rainfall on the Brak, and this Court cannot by a mere doctrinaire opinion of its own brush aside this evidence. The question is left open, and with it the question respecting the use of water on after-acquired non-riparian land by a riparian owner. The facts not having been established as to unreasonable user of Brak River water on Grasbult, it is unnecessary to apply the law, especially as no authorities have been cited which throw any light upon this part of the case. Having decided that the defendant made an unreasonable use of the water of the Brak River by means of

the western furrows out of weirs No. 2 and No. 3, to the injury of the plaintiff, the question arises, what damages were caused thereby? No strenuous effort was made to prove the actual amount of damages, and it was apparent that this was because the plaintiff was not eager to obtain any damage, his object being rather to have his legal rights settled. But the plaintiff, having necessarily suffered some damages, the Court will fix it at the nominal amount of £20. Before concluding, I should like to make some remarks upon a subject which has a strong bearing upon the case, and might even have been pertinent to its legal aspect. It is said that flood water is so unmanageable that it ought rather to be treated like a wild animal, that is to be feared rather than enticed. But it is clear that this wild animal has been tamed, and put to use by the defendant. Then, again, it is contended it is of such a nature that it will not allow of reasonable division. I am quite satisfied that any minute or measured division would be difficult, but that some rough and ready arrangement giving the different owners an approximately equal enjoyment of the water cannot be made, I cannot believe. It is said any such arrangement would be expensive. That is not unlikely, but the benefits expected to be reaped are large. Anyhow, the Court can only find that the plaintiff in this case is entitled to a reasonable share of the perennial stream called the Brak River, whether the water in the stream is the ordinary flow or the result of freshets large or small, and that the defendant, having deprived him of his reasonable use of the water, has caused damage in the sum of £20. Judgment will be given for the plaintiff for £20, with costs.

[Plaintiff's Attorneys: Van Zyl and Buissinné; Defendant's Attorneys: Fairbridge, Arderne and Lawton.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

ADMISSION.

{ 1905.
Nov. 7th.

Mr. Sutton moved, as a matter of urgency, for the admission of Johan Godfried Taute as an attorney, notary, and conveyancer. The urgency, counsel said, was that applicant wished to proceed up-country this (Tuesday) evening.

Application granted, and oaths administered.

SMORENBERG V. SMORENBERG.

This was an action brought by Johannes Hendrick Smorenberg, of the

Paarl, against his wife for restitution of conjugal rights, on the ground of her unlawful and malicious desertion, failing which a decree of divorce. Mr. Lewis was for plaintiff; defendant did not appear.

The declaration alleged that defendant had declined to return to and cohabit with plaintiff, who claimed a decree of restitution of conjugal rights, failing which a decree of divorce, with forfeiture of the benefits of the marriage and custody at once of the two elder children, and the two younger children on attaining a maturer age.

Johannes Hendrick Smorenberg (the plaintiff) said that he was married to the defendant at Parys, O.R.C., in 1892. He settled at Paarl about three or four years ago. About twelve months ago he went to Heilbron, O.R.C. He wrote to his wife to come to him, but she refused. Subsequently he returned to Paarl, and found that his wife had gone away from his home. He had since written to his wife, asking her to return to him, but she would not. They both lived at the Paarl.

By the Court: His wife was living with another man. He could not prove whether she was living with this other man as his wife. There were four children of the marriage. He desired to have custody of the elder children. Witness had formerly been a schoolmaster, and was now employed as a mattress-maker. He wanted custody of the younger children when they became old enough to leave their mother.

Witness (in further evidence) said that neither he nor his wife had any property.

By the Court: The other man used to be with a firm of architects, but he was at present out of work. He used to be a boarder at witness's house. Only four days ago his wife said that she would not return to him.

Decree of restitution granted, defendant to return to or receive the plaintiff on or before the 30th November, failing which to show cause on the 12th December why a decree of divorce should not be granted as prayed, with immediate custody of the two elder children, and also of the two younger children on attaining the age of seven years respectively, or such earlier date as he may, on due application to the Court and notice to the defendant, be entitled to by order of the Court.

Postea (December 13): Rule made absolute.

CHRISTIAN V. CHRISTIAN.

This was an action brought by Christina Mary Christian, of Albert-road, Salt River, against her husband, Joseph Wm. Christian, of Elsie's River Halt, for divorce on the ground of his adul-

tery with one Lydia Fortuin. Mr. Douglas Buchanan appeared for plaintiff; defendant appeared in person.

Mr. Buchanan submitted that defendant could not be heard, inasmuch as he had been duly barred from pleading.

Defendant (in reply to his lordship) said that he wished to enter appearance.

[Hopley, J.: How many witnesses have you got?]

Defendant: I have several, but the chief witness in the case is dead.

[Hopley, J.: I am afraid, then, that we cannot have his evidence. You know, you ought not to be heard at all now, because you took no notice of the summons.]

The declaration alleged that in May, 1903, defendant deserted plaintiff, and had since contributed nothing towards the maintenance or support of the child of the marriage or plaintiff. Plaintiff claimed a decree of divorce, with forfeiture of the benefits of the marriage, and an order for payment of £3 a month as and for maintenance of the said child.

Christina Mary Christian (the plaintiff) said that she was married at St. Paul's Church, Cape Town, in July, 1902. They lived together at her mother's until the 3rd May, 1903, when he deserted her. She continued to live with her mother until August of the same year, when she went to work again as a domestic servant. Witness saw defendant when she took out the summons, and he then admitted to her that he was living with Lydia Fortuin. Witness had been appointed sole heiress under her father's will. The estate consisted of land, and a house erected upon it.

By the Court: Witness received information of the fact that defendant was living with Lydia Fortuin from his sister.

Defendant said that he admitted the adultery, but he wanted to know whether it was right that a woman should drive a man into a thing of this kind and then bring him into court?

[Hopley, J.: You might be driven from home, but I don't see how you could be driven to commit adultery.]

Defendant rejoined that he was a poor orphan, and he should have somebody to support him. He meant that he wanted to work, and to have somebody to look after him.

Wm. Thomas Birch, clerk in charge of the marriage registers, gave evidence as to the registration of the marriage.

Elizabeth Paulson (sister of the defendant) said that she knew her brother and Lydia Fortuin were living together as man and wife.

Plaintiff (recalled) said that she did not press for an order for maintenance of the child.

Decree of divorce granted, with costs, with forfeiture of the benefits of the marriage in community, and custody of the child,

NILSEN V. NILSEN.

This was an action brought by Olaf Cornelis Nilsen, fisherman, Port Beaufort, district of Swellendam, against his wife, who was stated to be living at the Touw's River Location, district of Worcester, for divorce, on the ground of her adultery with one Carel Dourie. Dr. Greer appeared for plaintiff; defendant did not appear.

The declaration alleged that the parties were married in community at Kalk Bay in 1897, and that there was issue of the marriage one child. Defendant, it was alleged, had been living at the Touw's River Location in adultery with one Carel Dourie. Plaintiff claimed a dissolution of the bonds of marriage, with forfeiture of the benefits, and custody of the minor child.

Mr. Buchanan read a letter from defendant, in which she accused plaintiff of having been addicted to drink, and of having cruelly treated her while under the influence of drink. She also stated that she had three children, of which plaintiff was the father.

Wm. Thomas Birch, clerk in charge of the marriage register, gave evidence as to registration of the marriage.

Olaf Cornelis Nilsen (plaintiff) said that he was a Norwegian. He was married to defendant at the English Church, Kalk Bay, in 1897. They lived together at Kalk Bay until October, 1902, when witness went to Port Beaufort and his wife went to Touw's River.

By the Court: He used to drink a little, but he had not treated his wife cruelly. She had never complained that he had treated her badly. His wife went to Touw's River for a holiday, her father residing there.

Witness (continuing) said that in November, 1902, he sent her £4 to come to Port Beaufort and join him. She promised to come to Fort Beaufort after Christmas, and he subsequently wrote to her asking her to come, but she had not answered the letter, and had not returned to him. Witness was willing to take charge of the three children. He did not press for costs of the proceedings. He was making about £1 10s. a week.

Ernest Johannes du Toit said that he had seen defendant at Touw's River. She had lived with Carel Dourie as his wife until about three months ago. Defendant now lived alone, and supported herself by washing.

Hopley, J., said that in the declaration plaintiff said there was only one child of the marriage, and he now admitted that there were three.

Dr. Greer applied for a formal amendment of the declaration in accordance with the admissions of the plaintiff.

[Hopley J.: In view of the letter of the defendant, I do not see that any harm could be done by making the

amendment, and the declaration will be amended accordingly.]

Defendant, in answer to the Court, said that he proposed to put the children in a home when they came into his custody, but he was not quite prepared to receive them at present.

Hopley, J., said that a decree of divorce would be granted as prayed, and plaintiff would be given custody of the three children, in accordance with the request of defendant herself. He thought it was clear that if plaintiff took any of the children he must take them all, otherwise he would have to pay something to defendant for their maintenance, say, 10s. per month for each child.

Plaintiff said that he could not afford to pay 30s. a month.

Hopley, J., said that if the children remained with their mother and plaintiff did not make satisfactory arrangements with her with regard to their maintenance, she would have leave to apply to the Court for an order against plaintiff to pay so much per month.

SUPREME COURT

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

DAVIS V. McDONALD. } 1905.
 } Nov. 8th.

Employer and employee—Monthly notice.

D. had contracted to serve M. for a certain monthly salary, the engagement to be terminable on a month's notice on either side. D. asserted that it was understood between himself and one B. that the notice must expire on the last day of the month. M. had given D. notice on the 9th December, 1904, and tendered plaintiff's salary to January 9th, 1905. B. was not called for the defence, and it was admitted that D. was in the habit of rendering his accounts at the end of each month. D. now

claimed salary for the entire month of January.

Held, that judgment must be given for D., with costs.

This was an action brought by De Leon Davis, mechanical engineer, residing in Cape Town, against Charles Arthur MacDonald, manufacturer of refrigerating machinery, to recover £51 11s., alleged to be due by way of salary.

Plaintiff, in his declaration, said that in October, 1903, he was engaged at a salary of £25 15s. 6d. and expenses, from month to month, and subject to one month's notice, the salary to be payable at the end of each month. Plaintiff was subsequently engaged to superintend the Cape Town office of the defendant. Plaintiff duly fulfilled his part of the agreement, and the said employment was continued from month to month, until December 9, 1904, when the defendant, through his duly authorised agent, gave the plaintiff a month's notice to complete the said agreement. Plaintiff contended that the legal effect of the said agreement was that it should terminate on January 31, 1905. Plaintiff continued in the employment of the said MacDonald until January 9, 1905, and said that he was ready and willing to remain in the defendant's employment until January 31. He claimed payment of his salary for the months of December and January, viz., £51 11s.

Defendant, in his plea, said that under the agreement he was entitled to terminate the engagement of the plaintiff at 30 days' notice, reckoned from the date of giving such notice, and that the plaintiff was given and received 30 days' notice on December 9, 1904. Defendant had tendered to plaintiff the sum of £33 10s. 9d., being the salary to which he was entitled to January 9, 1905. Defendant said further that it was plaintiff's duty to supply lists of his expenses, supported by proper vouchers, and that plaintiff had failed to supply vouchers. Plaintiff had falsely and fraudulently claimed for amounts largely in excess of his board and lodging, and had been paid £91 16s. 9d. more than he was entitled to. In reconvention defendant claimed £58 6s., being the difference between the sum of £33 10s. 9d., to which he admitted that plaintiff was entitled for salary to January 9, and the sum of £91 16s. 9d., excess of charges made by the plaintiff for board and lodging.

Plaintiff, in his replication, said that defendant never requested him to render vouchers for his expenses, and that the claims for expenses were duly submitted to and paid by defendant. As a plea to the claim in reconvention, he denied the allegations of fraud and false pretences, and prayed that the de-

fendant's claim be dismissed, with costs.

Mr. J. E. R. de Villiers (with him Mr. Russell) was for plaintiff; Mr. W. Porter Buchanan (with him Mr. M. Bissett) was for defendant.

D. Leon Davis (plaintiff) said that he was a mechanical operating and supervising engineer. The defendant was a manufacturer of refrigerating machinery, and carried out contracts all over the world. Witness was engaged by defendant in May, 1902, to superintend the erection of certain refrigerating machinery in this colony, and entered into an agreement for one year at a salary of 1,500 dollars, and expenses. Witness first went to Port Elizabeth, and afterwards he was in Cape Town. He then went to Somerset West, and was employed on behalf of the respondent at De Beers Explosive Works. In regard to expenses, the defendant firm sometimes made inquiries, but the ordinary course of business was for him to make a report, and that report would be accepted by his employers, who would then render him a statement showing what was due to him, and make payment. No objection was raised to his charge for hotel expenses. The only item to which exception was taken was a subscription of £5 which he gave towards the entertainment of the officers and crews of the American Fleet, on the occasion of the visit to the Cape. Witness subscribed the money as coming from his office, but the firm declined to pay, and charged it back to him.

[Hopley, J.: They did not think it was an item you ought to commit the firm to at all.]

Yes, sir; they charged it back to me. Witness gave evidence as to the custom adopted by the defendant firm in regard to his expenses while engaged at Somerset West. Witness stayed on the property by an arrangement that he should come to town once a week, and be allowed expenses. His wife was at that time staying at Weston House, Sea Point. He spoke to the arrangement which obtained when he removed to Mr. Abegglen's hotel at Somerset Strand. He stayed with his wife at Mr. Abegglen's, and paid £13 or £13 10s. a month, having been unable to continue at the culinary department at De Beers Works on account of the food. The charge for himself alone, Mr. Abegglen told him, would have been £7 15s. a month. Witness had frequently to come to town in connection with the electrical machinery. In September or October, 1903, having completed his work at Somerset West, he came to town, and entered into a further contract with Mr. Beveridge, acting on behalf of the defendant, who had other large machinery to erect for the Imperial Cold Storage, and the Cape Cold Storage. The firm were using

every endeavour to induce him to stay, and to give up the notion of going back to America. Witness said: "I have made up my mind to conclude arrangements for another class of business of my own, and I won't make any contract with you definitely, but I will enter into an agreement with you month by month." The engagement was to be terminable upon one month's notice on either side, and ran from the first of each month. He was to receive £25 15s. 6d. and expenses, a special arrangement being made as he desired to take a house, so that his wife could do the cooking. Witness was suffering from indigestion. He took a furnished house at Green Point, and the firm agreed to pay half of his housekeeping expenses. He continued housekeeping until April, 1904, but he found the expenses to be very large, and as his general health did not seem to improve very much under his wife's cooking, and catering to his wants of appetite, he decided to give up the house. He afterwards went to a boarding-house, where he was accompanied by Mrs. Davies. The proprietor told him that the charge to him alone would have been eleven guineas. It was specially understood in the negotiations between Mr. Beveridge and himself that the notice should not break into a month, but that notice should terminate on the last day of the month. On the 9th December last he saw Mr. Davidson, a representative of the defendant firm, who told him that they were thinking of shutting down the Cape Town office. It was common in America in business matters to use the term "30 days." He did not think, however, that he used that term, because his intention had been to have all his arrangements running to the end of the month. On the 14th December he was sent by the firm to Kimberley, and he returned to Cape Town on the 7th January.

In cross-examination the witness admitted that he had whilst in defendant's employment looked after machinery for the Verster Cold Storage, but with the defendant's permission. He had ordered a boiler from a rival house, when it was found that defendant's did not suit. Witness did not hold himself out as consulting engineer to the Federal Cold Storage, although he was addressed as such.

Mr. Buchanan: Did you refute it?

Witness: No.

Witness was further cross-examined with regard to outside work he had done.

[Hopley, J. (to Mr. Buchanan): What do you wish to prove?—That he has been doing underhand work?]

Work that we knew nothing of.

In further cross-examination witness said he was surprised to hear that defendant had been selling boilers like the

one supplied to the Federal Cold Storage for a period of seven years. Witness denied that he had made commission or anything else for supplying machinery to the Federal Cold Storage for outside firms. Witness had received a fee from Mr. Verster for advice given.

By the Court: Witness was endeavouring to further the interests of his firm in advising the Federal Cold Storage.

Witness (further cross-examined) denied that the defendant's firm had to pay his wife's travelling expenses.

Mr. Buchanan: You apparently have a large scope for your expenses. I see you charge for hotels, theatres, cars, wines, etc.

Witness said he never had to present vouchers for expenses until the present case came on. He gave vouchers when he had them.

Hopley, J., said he considered that it was unnecessary to re-open the accounts which had been paid. Counsel would have to come almost to dishonesty and fraud before the Court would reopen these accounts. If the firm had just discovered the matter, the Court might listen to it, but they had got into trouble with him over a small amount, and they now wanted to re-open his accounts for the past three years, all of which had been paid, and should have been inquired into.

Mr. Buchanan contended that he was justified in reopening the matter, if he could prove that his clients had been charged more than they should have paid.

[Hopley, J.: You are trying to prove that he is absolutely and fraudulently charging items that he never spent?]

They are outside his own actual expenses.

[Hopley, J.: He has actually expended these amounts, and you have to prove that he did not do it on behalf of your firm.]

He has expended money on Mrs. Davis, which we should not be asked to pay.

The witness denied having charged the firm for Mrs. Davis's maintenance.

[Hopley, J.: If a man wishes for the company of his wife, he is entitled to it.]

But he has gone in for larger and better rooms because of the presence of his wife.

[Hopley, J.: But he does not charge for her.]

He has also had fires in his room.

Witness: I never charged MacDonald for coal or oil, although I should have done so.

By the Court: Any excess in the amount allowed was incurred on behalf of the firm.

Mr. Buchanan (to witness): I put it to you that you often went out for your own pleasure, and charged the company, especially so when you were stopping at Somerset West?

Witness: I am not so fond of sitting in the train for three hours at a time, and rising before daybreak to catch trains, especially in the winter time.

Mr. De Villiers closed his case.

Alexander Davidson, manager of the defendant's business in South Africa, said that when he spoke to plaintiff in December, 1904, about giving up the Cape Town branch, the latter said that he would want 30 days' notice. To this witness agreed. Plaintiff did not say that he had agreed with Mr. Beveridge that he was to have a complete calendar month's notice. Witness saw plaintiff on the 10th January, and tendered to him his salary, but this plaintiff refused to accept, and said that he must have 30 days' notice from the first day of the month. Witness went on Mr. Davis's own words on the 9th December that he was to have 30 days' notice.

Cross-examined by Mr. De Villiers: Witness knew nothing whatever as to what passed between plaintiff and Mr. Beveridge. Plaintiff said that he would want 30 days' notice, and witness gave him notice accordingly. If plaintiff had said that he would require a month's notice, witness would have understood that the notice should commence on the 1st of the month. Mr. Beveridge was in Durban in January, but in February he had gone away.

Mr. Bisset read the evidence of the defendant, taken on commission. Mr. Macdonald spoke to having had an interview with the plaintiff on the 10th January last, when the latter said he wanted 30 days' notice, which was one month.

Mr. Buchanan closed his case.

Counsel having been heard in argument on the question of the notice.

Hopley, J.: The sole matter that remains in dispute between the parties is whether or not the plaintiff is entitled to be paid salary to the end of January, 1905, i.e., £51 11s., for December and January, or whether the amount tendered by the defendant, £33 odd, was a sufficient sum. Other matters have been introduced in the defendant's plea and counter-claim, which they have dropped, I think wisely, but I must remark with none too good a grace. I think that they would have had exceeding difficulty in making any sort of case to try and upset the accounts which they had passed, and which they had paid out and considered settled for a long series of months. I think it would have been more graceful if, in dropping that counter-claim, they had at once said that they had no grounds for the allegations

which they had made, and made apparently without being able to call any witnesses, as they themselves admit, to support them to-day. What I have to decide is the simple matter of what was the contract at the time subsisting between plaintiff and defendant, plaintiff being at that time on a monthly engagement with the defendant at a fixed salary. The point is a simple one, but it does not by any means follow that there is not some difficulty about it in regard to the evidence which is to establish so simple a position. The plaintiff says that he agreed with Mr. Macdonald and his representative, Mr. Beveridge, to remain in the service of the former a little longer on condition that he was not tied down for anything longer than a month. He says that he stipulated, and it was then thoroughly understood, between him and Mr. Beveridge, that a month under that agreement should mean a calendar month, beginning on the first day of the month, and ending on the last day. I am inclined to believe the plaintiff's version of the contract with Mr. Beveridge, and I come to that conclusion for more than one reason. Plaintiff was in the habit of rendering his accounts to the defendant by the calendar month. Then again, he took a furnished house, and any one who knows anything about the matter knows that it is necessary to run such an establishment here from the first to the end of the month. I think that there is an *a priori* very good ground for supposing that plaintiff said to Beveridge that it should be a month, and that it should be a calendar month running from the first to the last day of the month. There is one way of disproving this, that has not been adopted by the defendant, and that is to call Beveridge to give his version of the agreement. It is not as if the defendant had had no opportunity of doing so, because Beveridge was still in South Africa when this point arose, and was discussed between the parties. As the whole contract was between Beveridge and the plaintiff, it seems absolutely elementary common sense and elementary law, and they must have known that Beveridge was the one person who should have come here with regard to the contract. I cannot help thinking that Mr. Beveridge should have been called in this matter. Judgment will be given for the plaintiff for the amount claimed, £51 11s., with costs of suit.

Mr. De Villiers applied for the expenses of the plaintiff as a necessary witness inasmuch as he had had to come to Cape Town from Johannesburg, where he had been on business.

Mr. Buchanan said that defendant had been thinking of applying for an order for security of costs against plaintiff, as he was an alien.

Hopley, J., allowed plaintiff his personal expenses, and also allowed him

costs of an application made in March last.

Plaintiff's Attorneys: Fairbridge, Arderne and Lawton; Defendant's Attorneys: Reid and Nephew.]

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

ADMISSIONS. { 1905.
Nov. 10th.

Mr. Roux moved for the admission of Josua Petrus Malherbe as an attorney and notary.

Application granted and oaths administered.

Mr. J. E. R. de Villiers moved for the admission of Daniel Cornelius de Villiers as an attorney and notary.

Applications granted and oaths administered.

Mr. J. E. R. de Villiers moved for the admission of Ockert Jacobus Oosthuizen as a conveyancer.

Application granted and oaths administered.

PROVISIONAL ROLL.

HOLMES AND CO. V. FRYER. { 1905.
Nov. 10th.

This was an application for provisional sentence on two promissory notes for £178 13s. 6d. and £31 7s. respectively.

The defendant's affidavit stated that he was a farmer, aged 63 years, and resided at Upington. Until November last he lived in German South-west Africa. During the war two of his sons were shot, and he had lost nearly all his stock. He had always been a hard drinker, but since the loss of his children and stock he had been very much upset. He had been drinking very heavily of late. He used to obtain brandy from Hirschson, but the brandy was not good, and it made him nearly half-mad. He did not remember having signed the notes in question.

The answering affidavit of Herman Hirschson, general dealer, stated that there was a transaction in mules, in which Marengo, the Hottentot leader,

had a hand. Deponent went on to say that he had known defendant was in the habit of drinking, but he had never known him unfit to transact business on account of drunkenness. On the day in question defendant was sober, and quite capable of transacting business. The notes were given to deponent's firm for goods sold and delivered, and were endorsed over to W. J. Holmes and Co. for valuable consideration. Affidavits by Joseph Hirschson and others were also read.

Mr. Benjamin for plaintiff; Mr. Burton for defendant.

Buchanan, A.C.J., said it seemed to him that the defendant denied the signature to the notes, and also alleged fraud.

Mr. Burton said that he did not take the point that defendant denied having signed the notes, but what defendant did say was that he had no recollection of the alleged transaction. Defendant's position was that his unfortunate condition was taken advantage of by these traders out in the country. Counsel read further affidavits by defendant and others, the former alleging that since his arrival in the district he had been supplied by the Hirschsons and others with as much bad brandy as he could drink, until his mind had become deranged. Mr. Burton, in argument, urged that this was essentially a case in which plaintiff should show what the consideration was for which the notes had been given by defendant. Was it all "sarsaparilla," the name by which brandy was known among traders dealing in illicit liquor? The Hirschsons were not licensed dealers in liquor, and there was nothing to show that defendant had had anything from them except liquor.

Mr. Benjamin said that the defence was not a denial of the signature, but it was alleged that the notes were obtained from defendant when under the influence of drink, and were not for just consideration. As to the condition of the defendant, counsel submitted that the balance of the testimony was in favour of the contention of the plaintiffs that Fryer, although admittedly a heavy drinker, was sober and fit to transact business. As to the alleged illegal consideration, it was merely suggested in the affidavits put in by the other side that the notes were given for liquor supplied to defendant, but no direct statement to that effect was made. The plaintiffs, he submitted, had taken the notes over from the Hirschsons for valuable consideration, and were entitled to provisional sentence.

Buchanan, A.C.J., said that if this had been a case brought by Hirschson, the two grounds which had been alleged by the defendant would have been sufficient to induce him to refuse provisional sentence. Unfortunately,

the notes were in the hands of a third person, an innocent holder, and under these circumstances, he (the learned judge) thought that if Fryer believed that he could succeed in an action against the holder, he should go into the principal case. Provisional sentence would be granted, with costs. If the parties went into the principal case, defendant would have an opportunity of recovering costs of the provisional sentence.

At a later stage, His Lordship pointed out to Mr. Burton that he thought it would be very desirable, if the defendant consented, that the case should be tried in the Magistrate's Court, instead of bringing it to Cape Town.

VAN LILL V. HOLM.

Mr. M. Bisset moved for provisional sentence for £14 14s. 6d., on a cheque, together with interest.

Order granted.

STUTTAFORD AND CO. V. MOORE.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £1,000, with interest, the bond having become due by reason of the non-payment of interest and notice given. Counsel also applied for the property specially hypothecated to be declared executable, and for the rents accruing from the said property to be attached.

Order granted.

SHAW V. AREND AND SOEKER.

Mr. De Waal moved for provisional sentence upon a promissory note for £104.

Order granted.

CLUVER V. CASSIEM.

Mr. Sutton moved for provisional sentence on a mortgage bond for £240, with interest, the bond having become due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

VAN DER MERWE V. DU PLESSIS.

Mr. Sutton moved for provisional sentence upon a mortgage bond for £300, with interest, the bond having become due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

STREET V. VAN REENEN.

Mr. P. T. Jones moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

BRUSSELL AND CO. V. KOTZE.

Mr. De Waal moved for a decree of civil imprisonment upon an unsatisfied judgment. Counsel read an affidavit by defendant, of Calvinia, admitting the debt. He said the debt was incurred before the war. He joined the rebel forces, and his property had been confiscated, with the result that he was without means, and could not discharge the debt. He was now working as a farm labourer, and had a wife and family dependent upon him. He offered to pay 5s. a month in discharge of the debt.

Decree granted, with costs, execution to be suspended upon payment of 5s. a month, leave being reserved to either party to move the Court again.

GUTHRIE AND THERON V. VISAGIE.

Mr. P. S. T. Jones moved for provisional sentence upon a mortgage bond for £300, with interest, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

ILLIQUID ROLL.

ZWARTKOPS VALLEY CO. V. JACOB. 1905.
Nov. 10th.

Mr. Wright moved for judgment in terms of consent paper for £40, balance of account.

Order granted.

ESTATE SCHOLTZ V. RADZIWILL.

Mr. Benjamin moved for judgment, under Rule 319, upon a declaration claiming the sum of £160, being moneys lent, and for an order declaring certain jewellery pledged by the Princess Radziwill with the plaintiff, to be executable in satisfaction of plaintiff's claim. Counsel read an affidavit by Mr. Kayser, attorney, who said that his firm acted on behalf of the plaintiff. He had received an offer from Johannesburg for the purchase of the property in question. He had had the property valued by a jeweller in Cape Town, who valued the diamonds at £75 (5 carats, at £15 each), and the gilt purse and pin, etc., at £5, making a total of £80. The amount

for which the property was pledged was £160, and authority was asked to sell it out of hand at the highest price obtainable above £80. Deponent anticipated being able to sell the property at 100 guineas or more, and annexed to his affidavit a memorandum in Princess Radziwill's handwriting, admitting the debt.

[Buchanan, A.C.J.: Ought not the property to be sold through the Sheriff?]

Mr. Benjamin: That is the usual way, but it is anticipated that if the plaintiff's attorney can sell it out of hand a better price may be realised.

[Buchanan, A.C.J.: It may be sold out of hand, but ought it not to be subject to the approval of the Sheriff?]

Mr. Benjamin said he did not see any objection to the adoption of such a course.

[Buchanan, A.C.J.: You will no doubt get a better price by selling out of hand, but I think the sale should go through an officer of the court. The Sheriff will have authority to sell out of hand.]

Mr. Benjamin: Of course, it will not be necessary for the Sheriff to advertise it?

[Buchanan, A.C.J.: Oh, no. But it had better be a judicial sale, and it should go through the officers of the Court. Judgment will be given as prayed, and the property declared executable, and authority will be given to sell the property to the best advantage, either by public or by private sale.]

Mr. Benjamin: Will that mean that the Sheriff will have to sell by public auction?

[Buchanan, A.C.J.: No; he can sell to the best advantage either way.]

BICCARD V. SMELLEKAMP.

Mr. Bailey moved for judgment under Rule 329d in terms of the summons for transfer of certain land at D'Urban-road, plaintiff tendering costs of transfer.

Order granted.

REHABILITATION.

Mr. Bailey moved for the discharge of J. T. P. de Villiers from insolvency.

Granted.

GENERAL MOTIONS.

BEVERN AND CO. V. ROYAL. 1905.
HOTEL CO. Nov. 10th.

This was an application on notice of motion calling on the respondents to show cause why certain articles of furniture should not be delivered up to

the applicants under the terms of an agreement entered into on 7th December, 1904. The furniture was valued at about £2,500. The applicants contended that the terms of the agreement had not been complied with, while the official liquidators of the respondent company set out that they found it against the interests of the creditors to give delivery to the applicants until they established their ownership in court. They had discovered that the rights of the applicants were not as clear as represented, but on the contrary they found on investigation that the furniture was originally purchased in a manner not as disclosed by the applicants. Counsel for respondents said the company wanted a little time to make further enquiries from Mr. McCarthy, who was at present in England.

Mr. Benjamin was for the applicants and Mr. Burton was for the respondents.

[Buchanan, A.C.J.: Why don't you pay the rent?]

Mr. Burton: The company is in liquidation.

[Buchanan, A.C.J.: That does not matter.]

Mr. Burton having been heard in argument, asked for a postponement until 12th December, in order to allow the liquidators to make further inquiries.

[Buchanan, A.C.J.: When a company is placed under liquidation, it is equivalent to placing a private estate under sequestration. If this had been a private estate, no doubt Mr. Bevern would have been entitled under the contract to have had his property returned. The liquidators have not shown to the Court anything why Bevern should not be allowed to remove the furniture, which he had leased to the company, and which the liquidators are using day by day, for the benefit of the liquidation. Bevern is suffering day by day the depreciation of his property, by its use by the liquidators. They cannot be allowed to continue to have the benefit of the contract unless they undertake to pay what is stipulated for therein. It will be ordered that the respondent forthwith deliver up to the applicant the furniture mentioned in the agreement, and this application will be granted with costs, unless the respondents undertake within three days to pay the purchase price specified.]

Ex parte THE ESTATE COETZER.

Mr. J. E. R. de Villiers moved for an order to raise a loan of £650, on certain property, which had been bequeathed by the deceased spouse to the petitioner, Anna Susannah de Klerk.

The matter was ordered to stand over for further inquiries by the Master.

MCKILLOP V. WOLFE AND MCKILLOP.

This was an application upon notice calling upon the curator bonis and applicant's wife to show cause why he should not be released and discharged from curatorship, under which he was placed on the ground of prodigality by order of the Court, dated the 3rd November, 1904, and why he should not be re-invested with his estate.

The applicant's affidavit stated that he had been almost a total abstainer since the order of Court was granted, and he asked to be re-invested with his estate. He desired to be rejoined by his wife. Affidavits by a medical man and the Rev. F. O. Watters, of Wynberg, were also read, speaking to the improved condition and habits of the applicant during the past six months or so.

The answering affidavit of Mrs. McKillop (to whom applicant is married in community) expressed the opinion that applicant's abstemious habits were due to the moderate amount allowed to him each month by the curator. She believed that if the applicant were re-invested with the estate the results to the estate would be disastrous, because it was at present in a critical condition, and in danger of being placed under sequestration. Applicant did not bring anything to the joint estate; he did nothing for a living, and he did not even attempt to obtain employment. Counsel also read an affidavit by the curator, Arthur K. Wolfe, who said that while he should like to see the applicant re-invested with his estate, he thought it was inadvisable at the present juncture.

The replying affidavit of the applicant denied the allegation that his improved habits were attributable to the restricted allowance on which he had been placed by the curator. He urged that he had advanced the value of the estate since his marriage to the respondent.

Mr. W. Porter Buchanan was for applicant, James Henry McKillop, of Newlands; Mr. Benjamin was for respondents.

Buchanan, A.C.J., asked what was the occupation of the applicant.

Mr. Buchanan (after consulting with his client) said that the applicant was formerly a salesman, and had a shop in Loop-street.

Buchanan, A.C.J., asked counsel whether it would not be better to let the estate continue under its present administration.

Mr. Buchanan said that his client would not object to the joint estate being continued for some little time, with Mr. Wolfe as financial adviser.

Mr. Benjamin said that his client merely desired to protect the interests of the estate.

Buchanan, A.C.J., granted an order releasing the applicant from personal

curatorship. Mr. Wolfe to remain administrator of the joint estate, pending a further order of Court. The order declaring the applicant to be a prodigal would be discharged, costs to come out of the joint estate. His lordship added that he was glad to notice the improvement in the applicant's condition, and he hoped that it would continue.

Ex parte THE ESTATE WATSON.

Mr. Gardiner moved for an order for the appointment of a *curator ad litem* in the estate of Georgo Petersen to be joined as defendant in an action relating to the lease of certain premises at Colesberg.

Mr. P. S. T. Jones appeared for the executor of the estate of Mrs. Petersen.

His Lordship said that the Court would appoint the executor as *curator ad litem* to the minors, *qua* executor, costs to abide the result.

Ex parte THE ESTATE ROBERTSON.

Mr. Wright moved for an order authorising the survey of certain property in the district of George, bequeathed by the late Alfred George Robertson, so as to determine the boundaries of adjacent farms, The Lakes and Oukraal, and define the rights of the legatees under the will.

Mr. Searle, K.C., appeared to oppose the application, and produced affidavits by Wm. Robertson, of Eastbrook, division of Knysna, and others.

[Buchanan, A.C.J., said he thought the only thing to be done was to direct the parties to proceed by an action, in which all persons interested in the estate should be joined. No order would be granted on the present application.

Ex parte LYONS.

Mr. Lewis moved, on the petition of Sarah Lyons, of Hanover-street, Cape Town, for leave to sue her husband Solomon Lyons, commonly known as Frank Lyons in *forma pauperis*. The parties were married in London, and applicant desired to sue for judicial separation.

The matter was referred to Mr. Lewis, who certified forthwith, and a rule was thereupon granted calling on the defendant to show cause on the 12th December.

Ex parte EDROOS.

Mr. Roux moved for the removal of certain conditions mentioned in the codicil of a will, so as to enable petitioner to raise a sum of £450 on a building at Wynberg, left by the testator to

be used as a mosque, in such manner as to give, as security for the advance of £450, the right to the persons to whom the mortgage was to be passed to sell the property in execution free from the conditions of the said codicil, should the property not realise sufficient to cover the bond and interest when put up to auction subject to the conditions of the codicil.

No order was granted.

Ex parte OLIVIER.

Mr. Sutton moved for an amendment of an order of Court authorising petitioner to pass a mortgage on certain property in the division of Uniondale.

Order granted.

Ex parte MOSTERT AND OTHERS.

Mr. De Waal moved for an order for the amendment of a deed of transfer. The transfer was made to a man stated to have married in community, whereas he was married out of community.

Order granted.

Ex parte STRUWIG.

Mr. Sutton moved for an order authorising transfer to be passed of a certain erf at Hanover.

No order was granted, His Lordship stating that the only course that could be adopted was to apply to a judge in chambers under the Derelict Lands Act.

Ex parte MARAIS AND ANOTHER.

Mr. W. Porter Buchanan moved for leave to sell certain property at Bedford.

Order granted.

Ex parte SADIE.

Mr. Van Zyl moved for cancellation of a bond on certain property in the district of Darling. The bond had been lost, but the amount due thereon had been paid.

Order granted.

Ex parte DOUNE.

Mr. Sutton moved for an order for the amendment of a bond by inserting the full name of petitioner, John Gilbert Venables Doune, in place of John Gilbert Doune.

The matter was referred to the Registrar of Deeds.

Ex parte SUSSMAN.

Mr. Roux moved for an order authorising the transfer of certain property at Port Elizabeth. The property had been bought with money given to petitioner by her son, and was registered in her name. Her husband was a lunatic, and had no property. She had sold her property, and now asked for an order to pass transfer.

Order granted.

Ex parte VIGNE AND ANOTHER.

Mr. Pyemont moved for an amendment of certain diagram.

Order granted in terms of Registrar's report.

Ex parte CARDINAL.

Mr. Wright moved for an order authorising the Master to pay out a sum of £64 from the funds in his hands, to which petitioner was entitled under the will of his father. The petitioner was unable to obtain a billet, and required the money for his support.

Order granted.

SUPREME COURT

[Before the Acting Chief Justice (the Hon. Sir JOHN BUCHANAN), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice HOPLEY.]

DUNCAN V. RESIDENT MAGIS- 1905.
TRATE OF MOSSEL BAY. { Nov. 13th.

Marriage of minor—Consent of parent.

Where a parent raises no objection to the marriage of a minor child, but refuses to give express consent, such lying by cannot be construed as tacit consent.

Should the parent unreasonably refuse or withhold consent, the minor may apply to the Chief Justice, in Chambers, to authorize the marriage.

Mr. Swift said that he wished to mention a matter which should have come

on for hearing on Friday last, an application for a mandamus against the Resident Magistrate of Mossel Bay.

[Buchanan, A.C.J.: Is it an opposed matter?]

Mr. Swift: No, but it is a matter of some urgency, as the applicant wishes to get married.

[Buchanan, A.C.J.: Oh, I am afraid, then, counsel must give way for that.]

Mr. Swift said that this was an application calling upon Mr. Robert Charles Ferris, in his capacity as Resident Magistrate of Mossel Bay, to show cause why a mandamus should not be issued against him to solemnise the marriage of John Robinson Duncan and Emmerentia Wilhelmina Pienaar, both of Mossel Bay, in accordance with notice dated the 6th October last. Counsel read an affidavit by the applicant (Duncan), who said that he was a bachelor, aged 21 years and upwards, and was engaged to be married to Miss Pienaar, with her full consent and approbation. Miss Pienaar was aged 20 years 4 months. Her mother and sole natural guardian resided at Mossel Bay. On the 6th October last deponent, in terms of Act 16, 1860, duly forwarded to Mr. Ferris notice of the marriage, to be solemnised within three months. The banns had been duly published. The mother and sole natural guardian of Miss Pienaar, as well as all persons whom it may concern, had had due notice of the said intended marriage, and no objections whatever had been lodged with Mr. Ferris. The said Ferris, in his capacity aforesaid, refused and declined to solemnise the said marriage, on the ground that the consent of the mother and sole natural guardian of Miss Pienaar has to be obtained. Mr. Swift, in answer to the Court, said that the mother had not consented, but his contention was that, as she had not raised any objection to the intended marriage, after due publication of the banns, her consent should be taken to have been given.

Hopley, J., put it to counsel whether it would not have been much better, seeing that the mother was in Mossel Bay, to have ascertained definitely whether she consented? That, it seemed to him, would have been the more common-sense course.

Mr. Swift said that due notice had been given, and the mother had not actively objected to the marriage.

[Buchanan, A.C.J.: Without the consent of parents or of the guardians of the minors, minors cannot marry in this country.]

Yes, but must she have the active consent? Will not the passive consent be sufficient?

[Maasdorp, J.: It is a very different thing giving a mandamus to an officer to do a thing which may be an irregularity, from overlooking an

irregularity after it has been committed. It seems to be taken for granted that this is an irregularity, but that no penalty should be imposed.]

Mr. Swift thought that that was rather a converse case.

[Hopley, J.: You cannot take it that she has given her consent, because she is a "passive resister."]

But may the mother sit by and raise no objection? If she raised an objection, then we could come to the Supreme Court and ask for a licence. But she simply sits by and adopts a passive attitude. She won't either agree to the marriage or object to it.

[Hopley, J.: Then you have the Chief Justice to come to.]

We have no objection on which we can ground a petition to the Chief Justice. We don't know why she objects.

[Hopley, J.: The more reason why you can come to the Chief Justice and say that she objects without reason.]

[Maasdorp, J.: You might have made the mother a party to this matter.]

Mr. Swift: Yes, my lord, I recognise that.

Buchanan, A.C.J.: According to the law of this country, minors are not entitled to marry without the consent of their parents, or natural guardians, or, failing such natural guardian or parent, of one of the judges of the Court. It is true that when a marriage takes place under certain circumstances of minors, the Court will not upset the marriage, but it is a very different thing, as Mr. Justice Maasdorp has observed, to order an official to commit an irregularity, and to condone an irregularity after it has been committed. This is an application to compel a Magistrate to commit an irregularity, viz., to marry a minor who does not produce the consent of her parent. On that simple ground, the application must be refused. The minor is not without redress. If without valid reason or without good cause the parent withholds her consent, applicant may under the new Act apply to the Chief Justice or to a judge in Chambers.

[Applicant's Attorneys: Dold and Van Breda.]

Ex parte THE ESTATE VAN REENEN.

Mr. Bailey moved as a matter of urgency for the appointment of Mr. Gother Mann as provisional trustee in the insolvent estate of Jan Frederick van Reenen, farmer, Oudo Kraal, Koeberg division.

Buchanan, A.C.J.: The matter came before me in Chambers, and I pointed out that under section 43 of the Insolvent Ordinance a Judge in Chambers had no power to appoint a provisional trustee. The Ordinance gives the power to the

Court, and it gives the power to a Judge on circuit either in court or out of court. In future, these cases should not be put in the Chamber book. You may take your order, Mr. Bailey, in terms of the petition.

SUPREME COURT

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

ADMISSIONS.

1905.
Nov. 14th.

Mr. Van Zyl moved for the admission of Pieter Andries Malan as an attorney and notary.

Application granted, oaths to be taken before the R.M. of Worcester.

Mr. Close moved for the admission of Stanislaus M. Joseph O'Farrell as an attorney.

Application granted and oaths administered.

PROVISIONAL ROLL.

WHITTALL V. BAILIE.

Mr. Roux moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

MURISON V. KELLY.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £220, with interest, the bond having become due by reason of the non-payment of interest; counsel also applied for £1 11s. 6d. insurance premium, for the property specially hypothecated to be declared executable, and for the High Sheriff to be authorised to collect rents accruing from the property.

Order granted.

ESTATE JOUBERT V. DAVISON.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £900, with interest, and for £16 8s. insurance premium, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

BOLUS AND CO. V. PATERSON AND SON.

Mr. Searle, K.C., was for plaintiffs; Mr. Burton was for defendant.

Mr. Searle moved for judgment for (1) £1,584 5s. 8d., owing by virtue of certain eight bills of exchange drawn by plaintiff upon defendant, together with interest, due and payable on demand in terms of clause 8 of certain agreement, entered into between plaintiffs and defendant in London on the 18th July, 1905, and (2) £4,000 money owing by defendant to plaintiffs for cash advances and commission, with interest. Counsel said that one of the bills had been retired, and the remaining bills would fall due at short dates.

Buchanan, A.C.J., asked counsel on what ground he sought for provisional sentence?

Mr. Searle: We say that in the absence of any breach of the agreement we can by notice call up the amounts due at any time. The agreement does not say that it is necessary that the defendant should commit a breach.

Buchanan, A.C.J., held that the plaintiffs were not entitled to provisional sentence, and directed them to go into the principal case, costs to abide the result, failing action, provisional sentence refused, with costs.

ESTATE KERR V. GOLOMBRICK.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £1,250, with interest, the bond having become due by reason of the non-payment of half-yearly interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

BRYANT AND HOOD V. BARTLETT.

Mr. W. Swift moved for provisional sentence upon an unsatisfied judgment of the Magistrate's Court for £15 odd and costs.

Ordered to stand over for further information, as to why the matter was brought to this court.

Later in the day, on an explanation by counsel, provisional sentence was granted.

ESTATE GOUSSARD V. BESTER.

Mr. Roux moved for provisional sentence on an acknowledgment of debt for £100, with interest.

Order granted.

BERNARD V. LE SUEUR.

Mr. Gardiner moved for provisional sentence on a judgment of the Magis-

trate's Court at Cape Town for £5 5s. 7d. and £2 1s. 7d. costs of suit, defendant having removed to the jurisdiction of Oudstroom R.M.'s Court, and for a decree of civil imprisonment.

Order granted.

CAROLLESSEN V. PAULSEN.

Mr. P. S. T. Jones moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court for £17 19s. 3d., less £15 4s. 1d. paid, with interest, and also for £13 9s. 1d., £8 12s. 10d., and £2 13s., being costs and charges.

Buchanan, A.C.J., said that the original debt was £17, of which £15 was paid, leaving something under £2 unpaid. The rest of the claim was for costs incurred by plaintiff against defendant.

Mr. Jones explained that an action had been pending, but the parties agreed to allow the matter to go to arbitration, subject to the award being made a rule of Court by either party. Before the award could be made a rule of Court the defendant left, and the costs would be the costs incurred therein. The matter came up before his Lordship before the award was made a rule of Court. The sum of £15 appeared to have been the result of an execution. There was no voluntary payment. Defendant was originally here, and before the award was made a rule of Court he left for Kimberley.

Buchanan, A.C.J., said that a telegram had been received from defendant offering £2 10s. a month, first payment on December 1. Defendant also said that he could not possibly pay more, as his wages were only £4 a week, and he had a wife and family to support.

Mr. Jones said that he would accept the offer.

Decree granted, execution to be suspended upon payment of £2 10s. a month, first payment on the 1st December.

BOSMAN V. FLETCHER.

Mr. Roux moved for provisional sentence on a mortgage bond for £133 4s. 8d., with interest, the bond having become due by reason of the non-payment of instalments; counsel also applied for the property specially hypothecated to be declared executable.

Defendant appeared, and complained that plaintiff had not allowed him the time agreed upon. He was willing to pay the interest that had become due.

Mr. Roux said that the bond provided for the payment of £10 a month in reduction of the capital.

Order granted, His Lordship remarking that if defendant wanted to set aside the bond he must take steps accordingly.

DE VILLIERS V. ESTATE BREDEVELET.

Mr. Watermeyer moved for provisional sentence on a mortgage bond for £255, with interest, the bond having become due by reason of notice having been given; counsel also applied for the property specially hypothecated to be declared executable.

The executor in the defendant estate appeared and consented to judgment.

Order granted.

BATTENHAUSEN V. VORSTER.

Mr. Wright moved for provisional sentence on a mortgage bond for £1,000, with interest, the bond having become due by reason of notice having been given; counsel also applied for the property specially hypothecated to be declared executable.

The matter was ordered to stand over for proof of notice.

BATTENHAUSEN V. VORSTER.

Mr. Wright moved for provisional sentence on a mortgage bond for £600, with interest, the bond having become due by reason of notice having been given.

Ordered to stand over for proof of notice.

THATCHER V. VORSTER.

Mr. Lewis moved for provisional sentence upon an unsatisfied judgment of the Magistrates' Court at Somerset East for £7 15s. 11d., with taxed costs, and messenger's charges, and for certain property at Pearston belonging to defendant to be declared executable.

Order granted.

KEWE V. WOODMAN.

Mr. Long moved for provisional sentence on a mortgage bond for £75, with interest: the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

CAPE TIMES, LTD. V. YEOMANS AND FERGUSON.

Mr. M. Bisset moved for provisional sentence on a promissory note for £44 19s. 9d., with interest and costs.

Order granted.

JACKMAN V. LAITE.

Mr. P. S. T. Jones moved for provisional sentence upon an agreement of

purchase of certain property in Bath-street, signed by both parties. It appeared that the parties entered into a settlement in regard to an action which was about to be heard. Plaintiff now moved for payment of £1,425, whereof the defendant had already paid £175, the balance to be paid in terms of the settlement, plaintiff tendering transfer and conveyance on payment of the balance of purchase price.

Mr. Searle, K.C. (for defendant), submitted that this was not a case for provisional sentence. He read an affidavit by defendant, in which he stated that it was agreed that he should pass a bond to plaintiff for the balance of £1,425. He went on to allege that he was not aware at the time he entered into the agreement that provisional sentence had been granted against Jackman on a mortgage bond for £1,100 and that the property he had purchased had been declared executable, or he would have entered into the agreement. Further negotiations took place, and he later on discovered that a second mortgage for £100 was registered against the property. He had been informed further that there was a sum of £70 due to the Corporation of Cape Town in respect of making up the roadway. Deponent submitted that plaintiff had throughout the transaction entered into undertakings that he could not perform.

Mr. Jones read a replying affidavit by plaintiff, who denied that he had made representations to defendant which were without foundation. He said that he was quite prepared to give defendant transfer as soon as the latter raised the balance of purchase price. Counsel also read an affidavit by Mr. Sylfret, attorney to one of the judgment creditors of Jackman.

Provisional sentence granted, with costs.

STEVENS V. ANDREWS.

Mr. Benjamin was for plaintiff; Mr. Burton was for defendant.

Mr. Benjamin said that this was an application for confirmation of a writ of arrest. He had to ask that the matter be allowed to stand over.

Buchanan, A.C.J., said that the writ of arrest would be confirmed *pro forma*, and the other questions raised in the case would stand over for further hearing.

FICK V. TANNER.

Mr. Roux moved for a provisional order of sequestration to be made final.

Mr. Benjamin read an affidavit by Mr. McLeod (who had acted as defendant's attorney) in opposition to the application.

Mr. Roux read a replying affidavit by a member of the firm of Van der Byl and De Villiers (plaintiff's attorneys).

Mr. Benjamin submitted that the sole object of this application was to force a cancellation of the sale of certain property in 1903 to defendant, of which, however, he had not yet taken transfer. Defendant had tendered the purchase price so long ago as January, 1904, but apparently the applicant was not prepared to pass transfer. The property had increased in value far beyond the expectation of the plaintiff.

Final adjudication granted as prayed, with costs.

ILLIQUID ROLL.

SMYTH AND ANOTHER V. { 1905.
MOORREES. { Nov. 14th.

Mr. Swift moved for judgment, under Rule 329d, for an account of moneys received and disbursements made by defendant in his capacity as agent of plaintiffs.

Order granted, account to be rendered within one month of date.

CAPE TOWN GAS CO. V. DOBSON.

Mr. Roux moved for judgment, under Rule 329d, for £21 15s. 6d., account for gas supplied, etc.

Order granted.

REHABILITATIONS.

Mr. Bailey moved for the discharge from insolvency of Coenraed Peter Hendrick Mocke.

Granted, subject to production of Master's certificate.

Mr. Bailey moved for the release from sequestration of the estate of Abraham Ezau.

Granted.

Mr. Gutsche moved for the rehabilitation of Petrus Jacobus Terblans.

Rehabilitation granted.

GENERAL MOTIONS.

Ex parte SMUTS.

Mr. Du Toit moved for a rule nisi under the Derelict Lands Act to be made absolute.

Rule made absolute.

Ex parte CANABIE.

Mr. M. Bisset made a similar application under the Derelict Lands Act.

Rule made absolute.

Ex parte ESTATE OOSTHUYZEN.

Mr. Searle, K.C., moved, on behalf of the executors testamentary of the estate of Johannes Jacobus Oosthuyzen, for confirmation of sale of property in the division of Cathcart for the sum of £8,250.

Order granted, subject to the children giving a joint indemnity for the amount received, the balance of purchase price to be retained by the executors, or paid into the Guardian's Fund.

Ex parte ESTATE DU TOIT.

Mr. McGregor moved to make absolute a rule for confirmation of sale.

Rule made absolute.

GOURLAY V. BAUMGARTEN AND GATES.

Dr. Rainsford moved to make absolute a rule *nisi* calling upon the respondents to show cause why certain partnership should not be placed under liquidation, and why Mr. J. E. P. Close should not be appointed receiver. Counsel asked that costs be costs in liquidation, except costs of postponement, which it was asked should be paid by Baumgarten.

Order granted accordingly.

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

LIS V. REX AND COLONIAL GOVERNMENT. 1905.
(Nov. 15th.)

This was an application upon notice to the Attorney-General for the release of the applicant from custody or, alternatively, for his admission to bail pending the trial and decision of any issues of law or fact that this Court may consider necessary.

Dr. Greer was for applicant; Mr. Nightingale appeared for the Crown and Colonial Government.

Dr. Greer said that he now desired to apply for a postponement of the hearing of the application until to-morrow, so as to enable applicant to file certain additional affidavits, but he asked that he

might in the meantime be released from custody. Counsel went on to explain that the applicant alleged that on Monday, the 13th inst., he was arrested at the instance of Mr. C. W. Cousins, the officer in charge of the Immigration Department, and he was at present detained in custody at the Roeland-street Gaol, and was threatened with deportation from this colony under the Immigration Act of 1903. He was informed that his arrest was wrongful and unlawful, and that the said Act did not apply to himself. He was a Russian by nationality, and came to this colony about five years ago with the firm intention of making South Africa his domicile, and permanent place of abode. He had never departed from South Africa since his first arrival, and he now claimed South Africa as his place of abode. His place of residence in this colony was Cape Town, and he resided there before the war with the late South African Republic. During the war he resided in Cape Town, and on the 24th January, 1901, he was enrolled in the Cape Town Guard of the Colonial Defence Force, and served therein, having got a good discharge.

Mr. Nightingale did not object to a postponement, but said that there was strong evidence that the alleged discharge was a forgery.

The application was postponed until to-morrow (Thursday), but applicant was admitted to bail, pending the hearing, bail to be given to the satisfaction of the Resident Magistrate of Cape Town, applicant in the sum of £100 and two sureties of £50 each, a condition of the bail bond to be that applicant will appear at all times when called upon, and will abide any order or judgment of the Court, and, when required, surrender himself to custody.

Postea (November 17th).

Mr. Nightingale said that he was not ready to proceed with the respondents' case, and he had to apply for the matter to be postponed. In the meantime he was prepared to consent to Jack Lis being admitted to such bail as he could find. He (counsel) understood that Lis had been unable to find the bail fixed by the Court at Wednesday's hearing, and he now consented to the applicant being released on his own recognisances, subject to the same conditions as were prescribed in the previous order.

Buchanan, A.C.J., said that the applicant would be admitted to bail on his own recognisances.

Mr. Nightingale said that there were one or two facts on the affidavits directly in issue, and he anticipated that it would be rather difficult on the affidavits to come to a conclusion as to the true facts. What he would ask was that the Court should order the attendance of Lis himself and two persons who had

made affidavits on his behalf on the day of hearing.

[Buchanan, A.C.J.: Well, subpoena them.] His Lordship added that he did not see when this matter was going to be heard within the next few days, and he suggested that the hearing should be postponed until the 12th December.

Counsel acquiesced, and the hearing was accordingly postponed until the 12th December.

Dr. Greer said that application had been made to the Government for leave to inspect the regimental records, but this had been refused.

Mr. Nightingale said that if a properly-authorized person went to the Colonial Secretary's Office, no objection would be raised to allowing an inspection of the records.

Dr. Greer: From the Attorney's Office?

Mr. Nightingale: Yes.

The matter was then ordered to stand over till the 12th December, applicant to be admitted to bail in such recognisances as he may be able to find, and subject to the conditions already laid down.

COWLING'S ESTATE v. { 1905.
COWLING. { Nov. 15th.

Estate of deceased spouse—Minor heirs — Executor — Advance by survivor to enable executors dative to bring an action against himself.

C. and his wife were married in community and had issue. At the time of Mrs. C.'s death these children were minors, but C. took no steps to protect their interests, and remained in possession of the entire joint estate. Subsequently, when about to re-marry, he made a declaration that the value of the joint estate was under £100. The executors dative to the estate of the deceased now applied for an order, calling upon C. to pay certain moneys to enable them to bring an action to have it declared to what sum the heirs of the deceased were entitled.

Held, that although in ordinary cases a plaintiff cannot compel a defendant to advance money to meet the costs of an action; yet, as these executors represented a wife married in com-

munity, an order must be granted as prayed.

This was an application brought by the executors dative in the estate of the late Charlotte Cowling upon notice calling upon her husband, John Frederick Cowling, hotelkeeper, Claremont, to show cause why he should not pay a certain sum of money to enable applicants to bring an action for the purpose of having it settled what is to be awarded to the heirs of Mrs. Cowling.

The affidavit of the applicants set out that the respondent and the late Mrs. Cowling were married in community, that in January, 1887, at her death, there were two children issue of the marriage, and that the respondent did not file a death notice or an inventory. The respondent subsequently re-married, having passed no kinderbewys in favour of the children by his first marriage. He had declared on oath that the value of the joint estate was less than £100. Deponents had reason to believe that this statement was not correct. Applicants desired to institute an action on behalf of the heirs to obtain an order against respondent, requiring him to render an account of the joint estate, but there were no funds available for that purpose. It was absolutely necessary for the due administration of the estate that the action now pending may be proceeded with in view of the fact that since 1887 the respondent had been in possession of the joint estate of his late wife and himself.

The respondent in his answering affidavit said that at the death of his wife the assets in the joint estate were not sufficient to meet liabilities. Respondent entered at some length into the position of the joint estate at his wife's death.

Mr. Searle, K.C., was for applicants, W. A. Currey and C. H. Wolfe; Mr. Burton was for respondent.

Further affidavits having been read,

Mr. Searle argued that the applicants were entitled to the payment of a sum by the respondent to enable them to institute an action. The respondent had the joint estate in his control and possession, and the heirs were without means to commence an action.

Buchanan, A. C. J., said that the executors might sue *in forma pauperis*.

Mr. Searle said that he did not think it would be quite the thing for gentlemen in the position of the applicants to sue *in forma pauperis*.

Mr. Burton: It would not be befitting their dignity.

Mr. Searle went on to urge that, although the applicants called upon the respondent to provide funds for an action against himself, if he had performed his duty in connection with the joint estate, the executors would not

have been placed in this awkward position.

Mr. Burton said that the respondent was quite prepared to render an account of the estate as it was in 1887.

Mr. Searle: He has been a long time about it.

Mr. Burton: Well, he has neglected it; but he has neglected it because there was nothing to be gained by filing an account, and he does not seem to have clearly understood his duty. The applicants now want, and they intend to claim, half of the estate as it is at present.

Buchanan, A. C. J.: Under ordinary circumstances, a plaintiff could not compel a defendant to make an advance towards the costs of an action which the plaintiff wishes to bring against the defendant. But this case is a peculiar one. The Court frequently, in case of a dispute between husband and wife, orders the husband to make an advance to the wife for the purpose of enabling her to bring an action, and that is more frequently done in cases of community of property than in cases where the wife has a separate estate. Where the parties are married in community of property, and the husband is in possession of the whole of the joint estate, very frequently the Court has ordered the husband to make an advance to the wife. The applicants in this case are the executors of the wife's estate, and they stand very much in the same position as the wife would have been in. Respondent and his late wife were married in community. The wife died in 1887, leaving two children, who are minors. No steps were taken to protect the minors' interests, when afterwards the husband was about to re-marry. He only made a declaration to the effect that the value of the estate was below £100. The affidavits now disclose that the husband is in possession of the joint estate, that there were minors, that the husband nephews to the wife's estate who neglected to get an executor appointed, that he omitted to file an account showing what the minors were entitled to. He has neglected this duty from 1887 to the present time. The affidavits also disclose grounds for believing that there are substantial assets in the estate. How far these assets must be brought up as part of the joint estate is a matter which cannot now be decided. Under these special circumstances, I think it is only fair that the husband should be compelled to make the advance to the applicants, who now represent the wife's estate. Whatever money is advanced by the husband will be brought up in the action. I think that £50 would be a reasonable amount to order to be advanced. The respondent will be ordered to advance £50 out of the joint estate to-

wards the costs of the action to be brought by the executors, costs to abide the result.

[Plaintiffs' Attorneys: Friedlander and Du Toit; Defendants': Van Zyl and Buissonne.]

REINECKE V. CIVIL COM- (1905.
MISSIONER OF CERES. (Nov. 15th.

Divisional Council—Election.

R. was one of two candidates for election as representative of a certain district of a Divisional Council. R. was unsuccessful. It was supposed that the district in question was entitled to return only one member, and nominations were invited for candidates to fill the one vacancy. After the election it transpired that the district was entitled to return two members, and R. claimed the second seat.

Held, that as there was only one seat contested, and that as R. had not been elected, he was not entitled to the seat which he claimed.

This was an application upon notice to the Civil Commissioner and Returning Officer of the Divisional Council of Ceres for an order declaring the applicant (Dr. Reinecke) to have been elected a member of the said Council.

From the affidavits, it appeared that in August, 1904, the respondent, by notice in the "Government Gazette," called for nominations for the election of Divisional Councillors for Ceres. Two nominations—applicant and one C. J. van der Merwe—were received for District No. 1, where, according to the notice issued by the returning officer, there was one vacancy to be filled. A poll was taken on the 18th October, and Mr. Van der Merwe was elected by a majority of twelve votes over Dr. Reinecke. Applicant said that on the 17th October (the day before the poll) official notification was given by the secretary of the Divisional Council to the Civil Commissioner of the fact that District No. 1, as the seat of magistracy, was entitled to be represented by two members, and applicant made a verbal request to the Civil Commissioner to be declared a member of the Council, but the latter ruled that a poll was necessary. The explanation of the respondent was that District No. 1 had hitherto returned only one member, and that

nominations were called for one vacancy entirely through a misapprehension.

Mr. Burton for applicant; Mr. Benjamin for respondent.

Mr. Burton argued that the applicant was entitled to be elected as a member for the ward. The whole difficulty, he said, was due to the mistake of the Civil Commissioner. It had been said that if it had been officially declared that there were two vacancies a third candidate (Mr. Smith) would have been nominated, and that, therefore, Dr. Reinecke would not have had an unopposed return. But the fact remained that an election was announced, nominations were called for, and the applicant was duly nominated, and as there were two vacancies he was entitled to be declared elected to the other vacancy.

Mr. Benjamin contended that if the application were granted the right of the voters to elect their representatives on the Council would be prejudiced. Dr. Reinecke now wanted to take a seat on the Divisional Council without going through the customary form of election. There must, counsel submitted, be a fresh election, giving the public an opportunity of exercising their rights and privileges. It would be most unfair that Dr. Reinecke should be elected when there perhaps was a more popular candidate in person of Mr. Smith, who, if he had known that there were two vacancies, would have offered himself for nomination at the election.

Mr. Burton in reply said that, as regarded prejudice, the balance of prejudice seemed to be rather against the applicant than the public. Dr. Reinecke would have had a better chance of being elected where there were three candidates for two seats than he would where there were two candidates for one seat.

Buchanan, A.J.C.: The question raised in this case has never arisen before, and it is one that is not likely to arise often, but it is an important question, and I should have liked to have had it argued before a full bench. I think the fundamental principle which underlies all elections to public offices is that holders of office, representatives of the people must be elected by the people. In this case the applicant does not seem to me to have been elected by the people to the Divisional Council. The election of members of the Divisional Council was treated as if there were only one vacancy in each district, and nominations were called for for candidates to fill the one vacancy in each district. The election took place for one councillor for each district. It so happened that between the last general election and the present election, district No. 1, which formerly returned only one member, was now entitled to return two members. The election, however, did not proceed as if there were two seats to be filled. The notice given by the

Civil Commissioner, in the first instance, calling for nominations, followed the words of the Act where only one member for each district is to be elected. Where more than one member for each district is to be elected, that fact is intimated in the notices calling for nominations. The notice called, in fact, for nominations for one seat in each district. The Divisional Council Act provides for an automatic increase in the number of members under certain circumstances. Where it transpires that the district in which the office of Civil Commissioner is situated contains ratable property to the value of two-sevenths of the whole of the property in the Division, that district may return a second member, if three-eighths of the ratable value of the property of the whole division, then three members, and so on. A valuation was taken in 1904, from which it would appear that this district was entitled to elect two members instead of one, but nobody had noticed this fact. The returning officer was unaware of the fact, the secretary of the Divisional Council was unaware of the fact, and the public were unaware of the fact, and, therefore, only one nomination was called for. It so happened that the day before the polling took place it was discovered that the district would be entitled to two members, but the election proceeded on the supposition that the district was only entitled to one member. Had there been time to stop the whole election and to call for fresh nominations, the Court might have directed such a course to be adopted. The applicant was nominated as a candidate for the one seat, and his election was contested. No protest was lodged by Dr. Reinecke against the poll, but he took part in it, and when he was defeated he came forward, and says that as this district could now elect two members, and as only two candidates were nominated he must be declared elected to the second seat. I think the fallacy underlying the thing is that there was only one seat contested, and for that seat the applicant was not returned. I think, under the circumstances, looking at the different sections of the Act, and the fact that the public are entitled to elect the persons who shall represent them, and that Dr. Reinecke has not been chosen to take a seat on the Divisional Council, the application must be refused. There will be no order as to costs.

[Applicant's Attorneys: Dampers and Van Ryneveld; Respondent's: Faure, Van Eyk, and Moore.]

BATTENHAUSEN V. VORSTER.

Mr. Wright said that proof of notice to the defendant had now been filed as

required by the rules of Court. He now moved for provisional sentence upon two mortgage bonds, and for the property specially hypothecated to be declared executable.

Order granted.

KING BROS. V. ESTATE WASSERFALL.

This was an application upon notice calling upon Mr. G. W. Steytler, in his capacity as secretary of the Colonial Orphan Chamber, to show cause why a writ should not be issued for costs in connection with a certain case of which he had charge, as executor in the estate of one Wasserfall. Mr. Searle, K.C., was for applicant; Mr. Burton was for respondent.

The matter, it appeared, arose out of an application brought by King Bros. for an order under the Derelict Lands Act, vesting them with certain lots of ground at Durbanville. Judgment was granted in favour of applicants, with costs. The applicants now moved for costs *de bonis propriis*.

His Lordship directed that the matter should go before Mr. Justice Hopley, who tried the original case, and ordered that the application stand over till the 12th December.

Ex parte VAN DER WALT AND DE JAGER.

Mr. Burton moved on the petition of the natural guardians of certain 17 minors for leave to execute a mortgage bond upon certain farm in the division of Aberdeen, in the estate of their late grandparents.

Order granted, expenditure of money raised to be to the satisfaction of the Master.

Ex parte FLAUM.

Dr. Greer moved to make absolute a rule *nisi* authorising the petitioner to sue a certain firm in St. Petersburg, Russia, in *forma pauperis*, and also for leave to sue by edictal citation.

Leave to sue by edictal citation granted, citation to be served personally and to be returnable on the 1st February. The applicant was also given leave to sue in *forma pauperis*. Dr. Greer to be counsel and Messrs. Friedlander and Du Toit to be attorneys to the applicant.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDOEP.]

LAZARUS AND OTHERS V. { 1905.
ESTATE LAZARUS AND { Nov. 15th.
OTHERS. " 20th.

Will—Interpretation—Substitution.

This was an action for a declaration of rights.

The declaration was as follows:

1. The plaintiffs are the major unmarried children of the late Lawrence Lazarus, and the curator of the minor child Marie Lazarus. Victoria Lazarus is the widow of the late Lawrence Lazarus, and is sued individually and also together with George William Steytler in their capacity as the executors testamentary of the said Lawrence Lazarus. Edwin Groome Rainsford is sued as *curator ad litem* of Vera, Hilda and Gerald Morris, minor grandchildren of the late Lawrence Lazarus.

2. On the 9th of February, 1887, the said Lawrence Lazarus duly executed the testamentary writings, copies of which are annexed hereto, and to the originals, of which the parties beg to refer; and he died on the 1st of May, 1889, leaving the said testamentary dispositions in full force and effect. His widow is alive and has not re-married.

3. At his death the said testator, Lawrence Lazarus, left eight children, to whom he was greatly attached, and with all of whom he was on the most affectionate terms. The eldest child was 17 years old and the youngest three months old at their father's death. One of the testator's daughters was married after his death to Moss Henry Morris, and died thereafter, leaving the three children Vera, Hilda, and Gerald aforementioned. The other daughters of the testator are unmarried and supported by their mother, who also supports the three minors Morris.

4. At the testator's death his estate was greatly indebted and heavily mortgaged, and it now consists of the landed properties specifically mentioned in the will, namely, those numbered 1, 3, 4, 5, and 6, the whole of the residue of the testator's estate and the property secondly numbered and described as occupied by Bowley having been sold and realised to pay off the indebtedness of the testator; and all the debts and mortgages have been paid.

5. £1,000 per annum has been paid to the said widow of the late Lawrence Lazarus.

6. The said widow has agreed to forego and waive any interest and rights she may have under and by virtue of the said testamentary writings over and above the right to receive the said sum of £1,000 per annum,

7. Under and by virtue of the said testamentary writings the plaintiffs contend: (a) That after payment to the said widow of £1,000 per annum, each of the children of the said late Lawrence Lazarus is entitled to be paid one-eighth share of the rents already derived, or still to be derived, from the said landed properties referred to in paragraph 4 hereof. (b) That the said widow Victoria Lazarus, is entitled to the sum of £1,000 per annum while living and unmarried. (c) That upon the death of the said widow, or upon the execution by her of the aforesaid surrender and waiver, the said properties referred to in paragraph 4 hereof become the absolute property of the testator's children. (d) Or, as an alternative to (c), that upon the death of the said widow, or upon the execution by her of the aforesaid surrender and waiver, the rents derived from the said properties referred to in paragraph 4 hereof are divisible among the testator's children.

Wherefore the plaintiffs claim: (1) A declaration of rights in terms of clauses (a), (b), (c), or as an alternative to (c) in terms of clause (d) of paragraph 7 hereof. (2) Alternative relief. (3) That all costs be paid out of the estate of the said late Lawrence Lazarus.

The defendants contended that the whole of the estate was to accumulate during the widow's lifetime with the exception of the £1,000, and after her death it was to go on accumulating until the last surviving child of the testator died, and then it was to be divided among such grandchildren as were living or their descendants, or alternatively, that even if the children were entitled to a share of rents during the mother's lifetime and their's, then after the death of the last surviving child, the rights in the property went to the grandchildren.

Sir H. Juta, K.C. (with him Mr. P. S. T. Jones) for the plaintiffs: Mr. Screiner, K.C. (with him Mr. Swift) for the defendants; Dr. Rainsford *curator ad litem*.

Abraham Lawrence Lazarus, eldest son of the late Lawrence Lazarus, and one of the plaintiffs in the case, stated that when his father made his will in 1887 there were seven children, and his father was on good terms with all his children. On coming of age witness and his two brothers received £750 each, and one of his sisters £500; saving that, nothing else was paid. The rent derived from the property was considerably over £1,000. There were other properties besides those mentioned in the will.

The original will was as follows:

1. I hereby appoint my wife and children my sole heirs of the whole of my estate and effects; it is my desire that the property corner of Longmarket and Plein streets, known as Victoria Chambers shall not be sold during the lifetime of my wife and children, but be let, and the rent divided among the heirs.

2. The property now occupied by Mr. Bowley is not to be sold for less than £1,200, failing such offer to be treated same as Victoria Chambers. The houses and three shops in Longmarket-street are not to be sold, but be managed in same way as Victoria Chambers. The shop next to De Vries in Longmarket-street is likewise to be administered as Victoria Chambers.

4. The property corner of Long and Shortmarket streets, unless claimed by present tenant under lease, is also to be managed as Victoria Chambers.

5. The property annexed to the above, now occupied by Boas, is also to be administered as Victoria Chambers.

6. The property opposite to the Royal Hotel in Plein-street, and Staffordshire House, opposite Stigants, and the property in Breda-street, are not to be sold, but be managed as Victoria Chambers.

7. The realisation of the rest of my estate I leave to the discretion of my executors; no child shall have the right to claim any portion of his or her inheritance during the lifetime of my wife and so long as she remains unmarried.

8. In the event of my daughters, or either of them, marrying before the death of my wife, they shall be entitled to the sum of five hundred pounds each by way of marriage settlement.

9. At the majority of either of my sons, should they, or either of them, feel disposed to enter into business, they shall be entitled to a sum of seven hundred and fifty pounds sterling, provided such business shall meet with the approval of my executors.

10. Should my wife re-marry she shall not be entitled to anything more out of my estate.

11. I desire my executors to pay my mother for life £20 sterling quarterly, being at the rate of £80 per annum.

12. I bequeath to my brother, Joseph Lazarus, the sum of two hundred and fifty pounds sterling, and to my brother Jacob one hundred pounds sterling.

13. I appoint as my executors and guardians of my minor heirs my wife and George William Steytler (secretary), or the secretary for the time being, of the Colonial Orphan Chamber Trust Company, with all powers allowed in law, especially that of substitution.

14. Should any of my children marry out of the Jewish religion they are all, or any of them, forthwith disinherited.

As Witnesses: Cape Town, 9th January, 1897.

—Alex. Chiappini. —L. Lazarus.
—C. F. Faure Juritz.

15. I desire that my wife shall during her life and so long as she shall remain unmarried, draw a sum not exceeding one thousand per annum for the maintenance and support of herself and all my children, excepting, of course, those that may be married, or shall have start-

ed in business. Any accumulation of rents or interest after payment of the above sum shall revert to my estate.

16. After the death of my children I appoint my grandchildren, if any, as my heirs, failing grandchildren my lawful descendants.

As witnesses: Cape Town, 9th January, 1887.

—Alex Chiapinni. —L. Lazarus.
—C. F. Faure Juritz.

George William Stoytler, Secretary of the Colonial Orphan Chamber, one of the defendants, as executor in the estate, stated the will produced was in his handwriting. Witness copied the will from a draft. When Lazarus died in '89 the property was involved in heavy liabilities, and the Chamber financed the estate. There was an accumulation of £1,779, and four daughters had yet to get £500 each on being married. The rent had almost doubled itself since the death of the testator.

By Dr. Rainsford: He was quite clear that the house in Longmarket-street was not covered by the house and three shops mentioned in the will.

By Sir H. Juta: If witness had made one copy of the will it would have been signed only once, yet there was a break in the will, and it was signed twice.

This was all the evidence in the case, and Counsel having been heard in argument,

Cur. Adr. Vult.

Postea (November 20).

Maasdorp, J.: The parties to this suit propose to effect a family arrangement in respect of the estate left by the testator Lawrence Lazarus, and the questions arise whether all the interested persons are represented in the matter, and whether there is anything in the will which precludes the proposed arrangement. After carefully considering all the provisions of the will, I have come to the conclusion that I shall be obliged to have recourse to a rule of construction which it is, fortunately, unnecessary to make frequent use of. The case mainly depends upon the question whether, by the last clause of the will, the testator intended to make a *fidei commissary* disposition of his property, or a direct substitution of heirs; and the rule of construction I refer to is to the effect that, in case of doubt, the will must be interpreted so as to favour a direct rather than a *fidei commissary* substitution. The will has, of course, to be construed as a whole, with the object of discovering the real intention of the testator, and as a general rule, this results in ascertaining such intention beyond any reasonable doubt; but the present will is so artistically drawn, that it is impossible for me to say that after everything has been considered, all doubts are entire-

ly removed. The last clause of the will reads as follows: After the death of my children, I appoint my grandchildren, if any, as my heirs, failing grandchildren, my lawful descendants. I am inclined to the opinion that the true construction of this clause, read by the light of the other portions of the will, reveal the intention of the testator merely to substitute the grandchildren or further descendants in the place of the children in case the children should be by death prevented from succeeding the testator as his heirs. The phraseology here used is not such as is generally employed to provide for the devolution of an estate from a fiduciary to a *fideicommissary* heir; and does not seem to express the idea that the children after enjoying the property for life shall pass it on to the grandchildren. But it rather conveys the idea of the grandchildren taking as heirs directly from the testator, in the event of the children not taking. I do not say that the use of the words: "After the death of my children I appoint my grandchildren my heirs," may not in a different context, and, when literally construed, express a *fideicommissary* disposition. It is certain that if the clause is literally construed it would lead to very curious results, and results inconsistent with the intention of the testator as expressed in other portions of the will. One result as contended in the argument would be that if any of the children died their children would not immediately succeed to their portions, but the grandchildren would have to wait until all the children were dead, and be in the meanwhile unprovided for. I am, therefore, of opinion that the mere literal interpretation of the clause cannot be adopted, and I come to the conclusion, with the aid of the rule of construction mentioned above that this clause merely provides, as is usually done in wills, that if any of the children should happen to die in the lifetime of the testator the descendants of such children shall come into their places by representation. It was contended that the prohibition against the sale of certain properties, in the first clause, during the lifetime of the wife and children, favours the construction that it was the intention of the testator that these properties should under the last clause pass to the descendants of the children. But upon reference to clause seven it appears that no such prohibition exists in respect of what was certainly at one time regarded as the great bulk of the estate. And it must be borne in mind that a prohibition against selling does not prevent certain other modes of alienation, as, for instance, by will. To my mind, the prohibition in clause one was not introduced in favour of descendants, but for the purpose of constituting a fund or investment for the joint benefit of the wife and children,

and such investment or fund is to be kept up during the lifetime of the wife and children. I cannot hold, as was contended, that the prohibition would come to an end upon the death of the wife, any more than upon the death of one of the children. But, on the other hand, I think that upon the consent being given of all parties in whose favour it was made, it can be terminated. I quite agree that if it were provided in the will that an heir shall not take until a certain event occurs, such heir will not be entitled to claim the property until the happening of the event. But in this case there is nothing to stand between the heirs and the property. They may take the property, but after doing so they may not sell during the lifetime of the wife and children. The prohibition in question operating only in favour of the wife and children and the representatives of such children as have died since the death of the testator, I am of opinion that by consent of all of them it can be terminated. In view of the proposed family settlement, no question arises under clause fifteen as to whether the rents under clause one contributed to the £1,000 provided for the wife. In order to ensure to her this provision, it was provided in the will that the residuary estate shall not be claimed by the heirs during her lifetime, or as long as she remains unmarried, and even the surplus in hand had for that purpose to go to swell the estate. Here again this provision was solely for her benefit, and she can renounce it. The estate vested in the children, although they could not claim it until her death, and there is nothing to prevent their disposing of their vested rights, even during her lifetime. The postponement of the rights of the children does not in this case create rights in favour of others at the time of the mother's death, as was the case in some of the cases cited at the bar. I am of opinion that there is nothing in the will to prevent the making of the family arrangement proposed by the parties, if all the interested parties consent. They are the mother, the children, and the legal representatives of the deceased daughter. Who the legal representatives of the daughter are has not been made clear. Whether it is her husband or her children must be ascertained. A declaration is made in terms of paragraph (a) and (b) of the plaintiffs' contentions, with this proviso that it is made wholly irrespective of the question of the widow's renunciation of her rights, and with the following amendments: Insert after the word children, "or his or her legal representatives," and alter one-eighth into one-ninth. As to contention (c), it is declared that upon the death of the widow the properties shall pass as absolute property to her heirs, and to

the children or their legal representatives. As to the further contention in paragraph (c), it seems to me the matter depends upon the terms of the waiver and the condition of the family settlement. The widow possesses, not merely a life interest which she can renounce, but is joint heir to the property, and that would have to be dealt with. It is not only a case of her standing aside and allowing the other heirs to take under the will, but she has adiated and possesses vested rights which must be specifically dealt with in the settlement. A declaration to the following effect may suffice for the purposes of the parties, that it is within the power of the widow, her children, and their legal representatives to enter into a settlement whereby the properties may now be transferred to the children or their legal representatives in full ownership, costs to be paid out of the estate. Mr. Lazarus declared a necessary witness; Mr. Percy Jones appointed to represent the minor in the settlement. The executors to continue their administration pending the settlement.

[Plaintiffs' Attorneys: Van Zyl and Buissinne; Defendants': Fairbridge, Arderne, and Lawton.]

LEVY V. WYNNESS.

Mr. Rcux was for the plaintiff, and the defendant was in default. Counsel moved under Rule 319 for judgment for £250, with interest and costs of suit. The defendant had leased an hotel from the plaintiff and failed to insure certain furniture, which was destroyed by fire. The defendant had been sued by edictal citation, and had promised to settle, which, however, he failed to do.

Maasdorp, J., considered, under the circumstances, the claim was not a liquidated one, and ordered the matter to stand over for consideration by counsel as to whether he should move to have the case removed to Dordrecht or apply for a commission to take the evidence of the plaintiff.

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

Ex parte INSOLVENT ESTATE { 1905.
GOLDING. { Nov. 16th.

Mr. Bailey moved to make absolute a rule nisi for the amendment of cer-

tain proceedings in the insolvent estate of Morris Golding, otherwise styled Moses Golding, and for an interdict restraining the respondent from selling, alienating, or encumbering certain property recently transferred to him.

Rule made absolute.

WILSNACH V. VAN DER WEST- } 1905.
HUIZEN AND ANOTHER. } Nov. 16th.

Spoilation—Compensation for improvements.

Certain land in the village of A. remained registered in the name of one D. (now deceased). Some 30 years ago D. sold the land to one K., who paid for the same but never took possession. He gave to one H. a right to occupy a house on the property. This house gradually fell into such a state of dilapidation as to become a public nuisance, and no Divisional Council rates had been paid on the property for 6 years. The Council, instead of attaching the property and selling for arrears of rates, gave W. leave to occupy the house. He did so, paid arrears of rates and made the place habitable. After he had been in undisturbed possession for some years, H. alleged that he had purchased the house from K., and in W.'s absence made forcible entry.

Held, that H. had committed an act of spoliation that he must give up possession to W. and might then (if so advised) bring an action of ejectment against him.

Semble, even in the event of H. succeeding in such action, he would be bound to compensate W. for his improvements and to refund to him the money paid for arrear rates.

This was an application upon notice calling upon the respondents, Van der Westhuizen and Haak to restore to applicant possession of a certain house and ground situate at Prince Albert.

From the numerous affidavits which were read it appeared that the applicant alleged that he had been wrongfully deprived of possession of a house standing

on Erf No. 30, which he had been given leave to occupy by the Divisional Council. The property at the time Wilsnach entered upon possession was in a most dilapidated condition, and was derelict. Applicant paid the arrear rates to the Council. Applicant expended money to put the property into a habitable state. He declared that the respondents had, either or both of them, obtained possession by spoliation. The position of the respondents was that the applicant had no right to enter upon possession of the property, and that it was registered in the name of another. It was emphatically denied that forcible possession had been taken of the premises.

[Mr. Van Zyl for Applicant. Mr. Upington for Respondents.]

Mr. Van Zyl, during the hearing of the case, was proposing to put in from the Bar certain replying affidavits, when Buchanan, A. C. J. asked why the affidavits had not been filed.

Mr. Van Zyl said that he was unable to say, as he had only just come into the case.

[Buchanan, A. C. J.: We find that the attorneys are always charging in their bills of costs for filing affidavits, and they never do file them. I think that the Taxing Master ought to look carefully into these matters.]

Mr. Van Zyl said it was clear that the petitioner was the *bona fide* occupier of the premises by arrangement entered into with the Divisional Council, which arrangement the respondent described as having been illegal. Under the 4th section of the Derelict Lands Act the Divisional Council had a right to attach properties on which the rates were in arrear for the last five years. On this property the petitioner stated that the secretary of the Divisional Council stated the rates were in arrear for the last six years.

[Buchanan, A. C. J.: The Council have no right to let other people's property; they have a right to attach and sell it. At this stage it is immaterial whether he is a *bona fide* or a *mala fide* possessor.]

Mr. Van Zyl said that the chief point was the circumstances under which the respondent obtained possession of the property. What the petitioner asked now was to be put back into the former position, on the ground that he had been ejected.

Mr. Upington said that the petitioner made application to the Court on the ground that respondents were spoliators, and that they had taken forcible possession of the property. If it were clear that the respondents had taken forcible possession, then, of course, there was no principle clearer in law than that the applicant must be replaced in possession. But what was the respondent's position? Two facts were undisputed, one that the registered owner

sold to Knight, and (2) that Knight sold to Haak. Counsel submitted that the applicant had the most precarious of all tenures. He had a mere licence from the Divisional Council, who did not pretend to be the owners, such a licence that when the rightful owner appeared the applicant was at once to give up possession. Such possession, he submitted, was not possession sufficient to found a possessory action of this kind. As to the question of spoliation, Mr. Upington contended that force was a necessary ingredient of spoliation, and that no force was used by Haak in taking possession.

Buchanan, A. C. J.: This is an application in which the petitioner prays for an order compelling the respondents to restore to applicant a certain house and premises which the respondents forcibly possessed themselves of, and for costs of this application. It appears that certain landed property in the village of Prince Albert stands registered in the name of the late John Dyason. Respondents now allege that over 30 years ago this property was sold by John Dyason in his lifetime to one Knight, and Knight has made an affidavit, in which he states that he paid Dyason by working for him. Knight never took possession, and some years ago he left Prince Albert, taking no further interest in it. It is alleged that Knight gave a person the right to occupy the house, but, if so, this person abandoned the property. For some six years before proceedings were taken the property, being derelict, had become a nuisance through rubbish being deposited thereon and the house became so dilapidated that only the four walls were standing. Under these circumstances the Divisional Council intended to have the property attached as derelict property, and sold for payment of arrear rates. On the application of the petitioner, however, they allowed him, so far as they were concerned, to take possession of the property. He paid the arrear rates, removed the nuisance, renovated the buildings, and, according to the affidavit of the mason, carried out such repairs as to make the house habitable. Some years after it had been in possession of the applicant the respondent Haak alleged he found out where Knight was, and secured an order from Knight to have the premises handed over to him, and in July last Knight is alleged to have sold the property to Haak. At this time applicant was in peaceable possession of the property, and had been for years. Haak wrote to the applicant to give up possession on the 29th November, and, as the applicant says, when he received this notice, and was going to the house, he found that Haak had placed his tenant in possession of the building. Applicant says he had locked up the house when he had stored

certain grain therein, that he had not unlocked the same again, that he had the key in his possession, and that, on receiving this notice from Haak on the 29th August, between the hours of seven and nine in the evening, he went to the house in question to see whether the same was still properly locked, and found Van der Weethuyzen in possession. He says admission must have been obtained either by forcing the door open, or by unlocking it with some other key. All this is denied by respondents, but this is a clear case of unlawfully taking possession of premises in the occupation of another person. It is said that the taking possession did not matter if the applicant had no right of retention. Assuming, for the sake of argument, even that the applicant was a *mala fide* possessor, he was entitled to compensation for any permanent improvements he had made to the property. As far as one can ascertain from the affidavit, the property has been considerably enhanced in value by the applicant's outlay, and, moreover, the applicant had saved it from being sold as derelict property by paying the arrear rates. The whole foundation of the rule for the restoration of property taken possession of in this way is, that a spoliator is not entitled to take the law into his own hands, and a person who takes the law into his own hands must restore the property and establish his right in a court of law. Respondent must restore this property forthwith to the applicant, and then, if he wishes to establish his title to the property, he must bring his action to eject the applicant, in which action the applicant can set up his right to any compensation for improvements. It is a matter of considerable importance to the applicant whether or not he remains in possession, because the very possession is the only right which affords him security for recovering his compensation. The application will be granted, and the respondents ordered forthwith to restore possession of the property, with costs. I may, for the sake of saving litigation, and seeing that the parties are, I think, poor persons, suggest to the applicant that, if reasonable compensation is paid to him, and the arrear rates are paid to him, he ought not to contest the respondents' claim further. The order will be granted as a writ of spoliation.

[Applicant's Attorneys: Dempers and Van Ryneveld; Respondent's: Not on record.]

Es parte MCKINNON.

Mr. Gutsche moved for the amendment of the entry of petitioner's name in the Debt Registry and Deeds Registry to John Monroe McKinnon, the con-

sent of the mortgagees having been obtained.

Order granted.

Ex parte SANDERS.

Mr. Watermeyer moved for leave to sue the Cape Town Tramways Co. *in forma pauperis*. Counsel presented the usual certificate.

Rule *nisi* granted, calling upon the respondents to show cause, rule to be served personally, and to be returnable on the 12th December.

VUSO V. VUSO.

Mr. Lewis moved, on the petition of Shadrach Vuso, for leave to sue his wife by edictal citation for restitution of conjugal rights, failing which, divorce. Counsel explained that petitioner originally sued his wife for divorce on the ground of adultery, but some difficulty was experienced in regard to serving process on defendant, and eventually an order was obtained to serve process at the house of her father in King William's Town. Defendant was believed to be in East London, but she could not be found. The matter was set down for the 24th October, but at the last moment petitioner could not find the witness on whom he relied for evidence as to the adultery, and he now wished to institute fresh proceedings for restitution of conjugal rights.

[Buchanan, A. C. J.: Defendant is still in the country?]

It is absolutely impossible to find her.

[Buchanan, A. C. J.: She is not supposed to be out of the country, is she?]

It is not known where she is; she is believed to be in East London. Counsel informed his lordship that petitioner was a native, resident at the location at Maitland.

Leave to sue by edictal citation granted, personal service to be effected, failing which, one publication in the "Government Gazette" and "Imvo," citation to be returnable on the 12th January.

Ex parte ESTATE BAUER.

Mr. Van Zyl moved for confirmation of certain sale of property situate at Claremont in the estate of the late Johan Bauer, petitioner being one of the executors.

Order granted.

Ex parte ESTATE CHAPMAN.

Mr. Bailey moved, on the petition of the executrix testamentary, for leave to raise a certain mortgage bond on property situate at Port Elizabeth.

Order granted.

Ex parte ESTATE WORDON.

Mr. Van Zyl said that this matter had previously been before his lordship, and was then referred to the Master for report. The Master had now reported very briefly as follows: "I have inquired into this application, and I find that the whole matter is so surrounded with difficulties that the compromise arrived at, now before the Court, appears to have been the best way out of it."

Order granted.

Ex parte MONTAGU D.R. CHURCH.

Mr. Van Zyl moved for an order authorising the Master to pay out certain sums in his possession in connection with bonds passed to the petitioners.

Order granted in terms of Master's report, costs to come out of fund.

COLONIAL GOVERNMENT V. LOTTER.

Mr. P. S. T. Jones moved for an award of arbitrators to be made a Rule of Court.

Award made a Rule of Court.

Ex parte DONNE.

Mr. Sutton again mentioned the matter of the petition of John Gilbert Venables Donne, who applied to have his name amended as it appears on a mortgage bond. His name was entered on the bond as John Gilbert Donne. The matter had been referred to the Registrar of Deeds, who now reported: "It is in very desirable that the transfer deed, mortgage bond, and Debt Register folio concerned should be amended. I beg to recommend that an order be granted authorising me, upon production of mortgagees' consent, to make the necessary alterations."

Order granted in terms of Registrar's report.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDOEP.]

REX V. SAMMY.

{ 1905.
Nov. 16th.

Articles unfit for human food—
Act 5 of 1890, Sec. 6.

A person cannot be convicted under Sec. 6 of Act 5 of 1890 of exposing for sale articles of

food unfit for human consumption.

Maasdorp, J. said that a case had come before him as Judge of the week, in which one Sammy was charged before the Assistant Resident Magistrate of Malmesbury with contravening section 6 of Act 5 of 1890 in having sold a quantity of fish, which was unfit for human consumption. He pleaded guilty, and was fined £50, or three months' imprisonment. It seemed, however, that the section under which the accused was charged did not apply to the circumstances of the case. It was quite possible that the conduct of the accused might be treated as an offence under some other law, but, as it did not fall under that section, the conviction and sentence must be quashed.

TRUSTEE OF THE RHENISH	{	1905.
MISSION SOCIETY V.		Nov. 16th.
BARRON AND OTHERS.		" 17th.
		" 18th.
		" 28th.

Mission station — Rules — Contract—Declaration of rights —Ejectment.

A certain Missionary Society had acquired the absolute dominium of a certain farm for the purpose of a mission station, and had established thereon a settlement for coloured people. Rules for the good government of the settlement were drawn up by the Missionaries, to which all persons who settled on the land were required to assent. These rules were read to the people from time to time, but were not printed for many years. In 1881, these rules (with a few unimportant modifications) were printed and circulated. The rules provided, inter alia, that any erf holder on the station could be ejected from his holding on a month's notice subject to his right on a fixed scale of compensation for his improvements. Three of the defendants who had persisted in breaking certain rules of the station received such notice, but refused to comply therewith. Other two had received no such notice but had transgressed the rules by refusal to

pay rent, on the ground that they had a quasi proprietary right in their holdings. The Society now claimed a declaration of rights as against the defendants, an order of ejectment and arrears of rent from those who had refused to pay, tendering at the same time compensation for improvements as fixed by the rules.

Held (1) that the rules, as printed, formed the basis of the contract between the Missionaries and the people; (2) that the Society was, therefore, entitled to an order of ejectment against the defendants; (3) that the defendants were entitled to compensation for their improvements, such compensation to be subject to set off for rent due, or other legal liabilities.

This was an action for a declaration of rights brought by Friedrich Eich, in his capacity as the trustee of the Rhenish Mission Society, against John Barron, Jury Muller, alias Jury Moller, Andreas Goedeman, and Philip Engelbrecht.

The declaration in respect of the first four clauses was the same in the case of all four defendants, and was as follows:

1. The plaintiff is the Reverend Friedrich Eich, of Worcester, in his capacity as the Trustee of the Rhenish Mission Society (an incorporated body established at Barmen in Germany for the advancement of religious work in foreign parts), and as such the duly authorised representative in this colony of the said society, vested in law with its property in the Colony, and the proper person to sue in this action.

2. The defendant resides on the said society's property known as Saron in the district of Tulbagh.

3. The said society are the registered owners in full and free property of certain landed estate in the last preceding paragraph hereof referred to. The said property was purchased by the society at various times, and the society subsequently established a mission station thereon under the local management of a "Leeraar" or minister, with a view to the religious and secular welfare of natives and other persons who should be allowed by the society to reside upon the said property.

4. With the above objects, the society framed a set of rules called the "Saron-sche Gemeentewetten" or Saron Church Laws, and no native or other person has

been allowed to come and live upon the said property without binding himself either verbally or in writing to pay a certain monthly rental for the ground occupied by him, and to observe strictly all the said rules (Gemeentewetten) for the time being in force as made by the society for the good of the residents.

The declaration in respect of the defendant Barron proceeded:

5. Amongst the persons so allowed to reside upon the said property was defendant, who, on or about April 16, 1900, was granted the occupation as a tenant at a rental of 1s. 6d. a month of a certain half-erf thereon in terms of a written agreement, whereby he bound himself, as a condition of his said occupation faithfully to observe the said "Gemeentewetten" on pain of forfeiting his privilege of residing at Saron aforesaid, and the defendant has continued since then to occupy the said half-erf upon the said terms, and has paid the said rent up to the end of the year 1904.

6. By rule 5 of the said "Gemeentewetten" the occupation of said half-erf by the defendant could be determined by a month's previous notice on either side.

7. By rule 6 thereof it was provided that "buildings which a lessee has erected on an erf may, when he receives notice to quit, be pulled down by him or he may sell them, at the valuation of the directors to the Rhenish Society." It was further provided, by an additional rule agreed to and signed by the defendant, that the highest sum which should be paid for a house in case a resident of Saron transgressed the rules and had to quit, the place should not exceed £25.

8. By rule 15 it is provided that no person may establish a butchery without the permission of the said "Leeraar" (minister).

9. By rule 21 it is provided that anyone who will not obey the rules of the institution must leave the place.

10. In or about November, 1904, the defendant, in direct opposition to and in defiance of the said rules, wrongfully and without the permission of the minister, opened a butchery, upon the half-erf occupied by him as aforesaid, and, in spite of repeated warnings and protests addressed to him by the minister, has refused to close the said butchery and continues to contravene the said rules in the above respect.

11. On or about April 26, 1905, the plaintiff, as he lawfully might, duly gave the defendant notice to quit the said estate within a month's time at the same time tendering to compensate him for his house in terms of the said agreement, but the defendant wrongfully and unlawfully refused, and still refuses, to regard the said notice or to quit the said estate, and claims that the said half-erf is his own property.

12. The said house of the defendant is valued by the plaintiff at £20, and the plaintiff is willing, and tenders upon the defendant quitting the said estate, to allow him to break down and remove from the said estate the said building, and any other buildings or improvements he may have acquired or built or made thereon, or in the alternative to pay him the said sum of £20, or the value of the said house, and of any other structures or improvements as aforesaid as may be assessed in terms of the said agreement or as may be fixed by an independent party or parties, or as may be decreed by this Honourable Court.

The plaintiff tendering as aforesaid, claims: (a) A declaration of rights as between himself and the defendant in respect of the defendant's said occupation in the premises; (b) a declaration that the said half-erf is the property of the said society, and that the plaintiff is entitled to eject the defendant therefrom and from the said estate of Saron either upon the defendant's refusal to be bound by or to obey any of the said rules or upon due notice given to him thereunder, upon payment of compensation as above tendered; (c) an order ejecting the defendant with his family and belongings from the said half-erf and from the said estate of Saron; (d) alternative relief; (e) costs of suit.

The declaration in respect of the defendant, Jury Muller, proceeded:

5. Amongst the persons so allowed to reside upon the said property was the defendant, who, on or about September 5, 1896, was granted the occupation as a tenant of a certain erf at a rental of 3s. per month in terms of a written agreement, whereby he was given the said occupation for such time as he observed the said rules and paid his rent at the stipulated time, and the defendant has continued since then to occupy the said erf upon the said terms (save that since 1901 the said rent has been reduced to 2s. 3d. a month), and has paid the rent thereunder up to the end of the year 1903.

6. By rule 21 of the said "Gemeentewetten" anyone who will not obey the laws of the institution is obliged to leave the place.

7. By rule 19 every lessee must have paid his rent by the end of the year. The defendant has contravened the said rule by failing to pay any rent since the end of the year 1903. There is still due and unpaid by him to the plaintiff the rent in respect of the said erf for the year 1904, to wit, the sum of £1 7s.

8. The plaintiff has demanded payment of the said sum from the defendant, who however refuses to pay the same, and claims that he and his heirs are entitled to the use and occupation of the said erf in perpetuity without payment of any rent to the plaintiff.

9. By rule 6 of the said "Gemeentewetten" it is provided that buildings which a lessee has erected on an erf may, in case he receives notice to discontinue the lease, be pulled down by him, or he may sell them according to the estimate of the directors to the Rhenish Society.

The plaintiff claims: (a) A declaration of rights as between himself and the defendant, in respect of the defendant's said occupation in the premises; (b) a declaration that the said erf is the property of the said society, and that the plaintiff is entitled to eject the defendant therefrom, and from the said estate of Saron upon the defendant's refusal to be bound by or to obey any of the said rules, and that the defendant's occupation of the said erf is limited by the terms of his said agreement and his observance of the said rules, including the rule as to payment of rent; (c) payment of the sum of £1 7s. as rent aforesaid; (d) an order ejecting the defendant, with his family and belongings, from the said erf and from the said estate of Saron, by reason of the defendant's contravention of the said rule respecting the payment of rent, the plaintiff tendering to allow the defendant to break down and remove from the said estate any buildings or other improvements he may have acquired, built, or made thereon, or in the alternative to pay him the value of such buildings and improvements as may be assessed under the said rules or as may be fixed by an independent party or parties, or as may be decreed by this Honourable Court; (e) alternative relief; (f) costs of suit.

The declaration in respect of the defendant Goedeman proceeded:

5. Amongst the persons so allowed to reside upon the property was the defendant, who, in or about 1881, was granted the occupation as a tenant of a certain erf thereon at a monthly rental of 3s., upon condition that he obeyed the said rules, and the defendant has continued since then to occupy the said erf upon the said terms and has paid the rent thereunder up to the end of the year 1903.

6. By Rule 21 of the said "Gemeentewetten" anyone who will not obey the laws of the institution is obliged to leave the place.

7. By Rule 11 thereof it was provided that every inhabitant of the institution must attend the religious services on Sunday as well as in the week regularly. The defendant has contravened the said rule in that during the last twelve months he has wholly failed to attend the said services.

8. By Rule 19 every lessee must have paid his rent by the end of the year. The defendant has contravened the said rule in that he has neglected to pay his rent, namely, the said sum of £1 16s. due at the end of 1904, and the said sum is still due and unpaid. The defendant,

moreover, claims that he is not bound to pay any rent whatsoever in respect of his occupation of the said erf, and has incited certain of the other tenants of the said society to refrain from paying their rent.

9. By Rule 3 the lessee of an erf may, with the permission of the "Loeraar" (minister), have the use of certain sowing land for which a small rental is to be paid. The defendant has contravened the said rule by entering upon and cultivating in the years 1903, 1904, and 1905, certain sowing land on the said estate without the permission of the said minister, and he has continued to cultivate the said land without such permission, and in spite of repeated warnings, and remonstrances addressed to him by or on behalf of the minister, and has refused, and still refuses, to pay any rental therefor.

10. By Rule 5 of the said "Gemeentewetten" the occupation of the said erf by the defendant could be determined by a month's notice on either side.

11. By Rule 6 it was provided that buildings which a lessee has erected on an erf may, in case he receives notice to discontinue the lease, be pulled down by him, or he may sell them, according to the estimate of the directors to the Rhenish Society.

12. On or about the 26th of May, 1905, the plaintiff, as he lawfully might, gave the defendant notice to quit the said erf and the said estate generally by the 1st of July, 1905, the plaintiff at the same time tendering to pay the value of a house erected on the said erf as ascertained in terms of the said rules or by arbitration or to allow the defendant to break down and remove the material thereof, but the defendant wrongfully and unlawfully refused, and still refuses, to regard the said notice or to quit the said erf and estate.

13. In addition to the said house, which is valued by the plaintiff at about £35, the defendant has also an interest by virtue of his marriage in community to his wife, Elizabeth Goedeman, in half of another erf occupied in the name of one Eva Balie, and the plaintiff is willing and tenders, upon the defendant quitting the said estate, to allow him to break down and remove therefrom the said house and any other structures or improvements he may have acquired or built or made thereon, or in the alternative to pay him the said sum of £35 and £1 the value of his interest in the other said erf or the value of the said house and of any other structures or improvements as aforesaid and of his interest in the other erf as may be assessed in terms of the said rules, or as may be fixed by an independent party or parties, or as may be decreed by this honourable Court.

The plaintiff, tendering as aforesaid, claims: (a) A declaration of rights as

between himself and the defendant in respect of the defendant's said occupation in the premises; (b) a declaration that the said erf is the property of the said society, and that the plaintiff is entitled to eject the defendant therefrom and from the said estate of Saron, either upon the defendant's refusal to be bound by or to obey any of the said rules, or upon due notice given to him thereunder, upon payment of compensation as above tendered; (c) Payment of the sum of £1 16s., as rent aforesaid; (d) the sum of £10 as damages sustained by reason of the defendant's wrongful cultivation of the said sowing land, his wrongful inciting of other tenants as aforesaid, and his contravention of the said rules in other respects; (e) an order ejecting the defendant, with his family and belongings, from the erf occupied by him and from the said estate of Saron; (f) alternative relief; (g) costs of suit.

The declaration in respect of the defendant Engelbrecht proceeded:

5. Among the persons so allowed to reside upon the said property was the defendant, who, in or about the month of May, 1887, was granted the occupation as a tenant of a certain erf thereon (being No. 241), at a rental of 3s. a month, on condition that he observed and was bound by the said rules, and the defendant has continued since then to occupy the said erf upon the said terms, and has paid the rent thereunder up to the end of the year 1903.

6. By Rule 21 of the said "Gemeentewetten," anyone who will not obey the laws of the institution is obliged to leave the place.

7. By Rule 19 thereof, every lessee must have paid his rent by the end of the year. The defendant has contravened the said rule by failing to pay any rent since the end of the year 1903. There is still due and unpaid by him to the plaintiff the rent in respect of the said erf for the twelve months to the end of the year 1904, to wit, the sum of £1 16s.

8. The plaintiff has demanded payment of the said sum from the defendant, who, however, refuses to pay the same, and claims that he and his heirs are entitled to the use and occupation of the said erf in perpetuity without payment of any rent to the plaintiff.

9. By Rule 6 of the said "Gemeentewetten," it is provided that buildings which a lessee has erected on an erf may, in case he receives notice to discontinue the lease, be pulled down by him or he may sell them, according to the estimate of the directors, to the Rhenish Society.

The plaintiff claims: (a) A declaration of rights as between himself and the defendant, in respect of the defendant's said occupation in the premises; (b) a declaration that the said

erf is the property of the said society, and that the plaintiff is entitled to eject the defendant therefrom, and from the said estate of Saron, upon the defendant's refusal to be bound by or to obey any of the said rules, and that the defendant's occupation of the said erf is dependent and conditional upon his observance of the said rules, including the rule as to payment of rent; (c) payment of the sum of £1 16s. as rent aforesaid; (d) an order ejecting the defendant with his family and belongings from the said erf and from the said estate of Saron, by reason of the defendant's contravention of the said rule respecting the payment of rent, the plaintiff tendering to allow the defendant to break down and remove from the said estate any buildings or other improvements he may have acquired, built, or made thereon, or in the alternative to pay him the value of such buildings and improvements as may be assessed under the said rules, or as may be fixed by an independent party or parties, or as may be decreed by this Honourable Court; (e) alternative relief; (f) costs of suit.

The plea of the defendant Barron was as follows:

1. Defendant admits paragraphs 1 and 2 of plaintiff's declaration.

2. Defendant admits paragraph 3 thereof, but says that, according to the laws to which the contract between the parties is subject, and which are hereinafter referred to, the "Leeraar" is bound to act according to the advice of a Raad or Council to be chosen (according to the said laws) by the inhabitants every year. Defendant says, further, that the last election of members of the said Raad took place about three years ago.

3. Defendant admits paragraph 4, but says that the laws therein referred to were framed by one Rev. Mr. Kulpman for and on behalf of the Rhenish Mission Society, at the time when Saron was originally laid out as a town, and were contained in a certain book, which was kept in the possession of the duly authorised representative of the Rhenish Mission Society for the time being at Saron. The rules set out in paragraphs 6, 7, 8, and 9 of plaintiff's declaration did not form part of the said laws.

4. With regard to paragraph 5, defendant says that he was born at Saron, and that he has lived there from the time of his birth, and that he is living there at the present time. Defendant denies that he bound himself by any written agreement, or that he authorised any person to so bind him. Defendant admits that he became a tenant at the said rental, and says, further, that the rent of the said half-erf for the year 1905 is not yet due and payable. Defendant admits, further,

that his tenancy was subject to certain laws, but says that these laws were those referred to in paragraph 3 hereof, and not those referred to in plaintiff's declaration.

5. With regard to paragraphs 6, 7, 8, and 9, defendant denies that the Rules 5, 6, 15, and 21 therein set forth formed part of the laws framed by Rev. Mr. Kulpman, and denies that he is bound by the said rules.

6. Defendant denies paragraph 10. He admits having opened a butchery at Saron in or about the month of November, 1904, but denies that he did so in direct opposition to and in defiance of the rules binding upon him. He says that the said butchery was opened with the full knowledge of the minister, who consented to the opening, and allowed defendant to complete all his preparations for such opening, but, he says further, that on the day before the opening the minister objected, all the preparations having in the meantime been completed. Defendant denies having been repeatedly warned by the minister to close the butchery, and denies that he has in any way contravened any of the rules binding upon him. Defendant says that, under the rules referred to in paragraph 3 hereof, the permission of the "Leeraar" was not necessary to enable him to establish a butchery, the said rules merely requiring notice to be given that the butchery was to be opened, which notice was duly given by defendant to the duly-authorised representative of the Rhenish Mission Society. Defendant says further that, save as hereinbefore set forth, the first notice received by him in connection with his having opened the butchery was given on or about the 26th of April, 1905, which notice was verbally repudiated by defendant.

7. With regard to paragraph 11, defendant admits having received the said notice, and admits that he refuses to regard the said notice or to quit the said estate. Defendant denies that his conduct in so doing is wrongful and unlawful, and defendant denies that he at any time claimed, or that he now claims, the said half-erf as his own property. Defendant maintains that he has faithfully carried out his part of the said contract, and that he is lawfully entitled to remain in undisturbed occupation of the said half-erf, in terms of the contract subsisting between the parties.

8. With regard to paragraph 12, defendant denies that £20 is a fair and reasonable valuation of his house and his other structures and improvements. Defendant further maintains that if this Honourable Court should decide that plaintiff is entitled to eject defendant (which defendant does not admit), defendant is lawfully entitled also to compensation for the loss of the grazing, planting, and other rights

secured to him by the said laws referred to in paragraph 3 hereof.

9. Save as above, defendant denies all and singular the allegations in plaintiff's declaration contained.

As a claim in reconvention, the defendant alleges that, by virtue of the contract subsisting between the parties, defendant is entitled to remain in undisturbed occupation of the said half-erf, so long as he faithfully carries out the provisions of the said contract, and is entitled under the said laws to transfer his right to his children, or, failing children, to any of defendant's relations by affinity or consanguinity. Wherefore defendant claims: (a) A declaration of rights as between himself and plaintiff in respect of the said contract; (b) a declaration that plaintiff is not entitled to eject defendant from the said half-erf, so long as defendant carries out the provisions of the contract; (c) alternative relief; and (d) costs of suit.

The defendant Muller, in his plea, stated that he had never received occupation of the full extent of land leased, and claimed an abatement of the rent to the extent of £3 2s., in respect of such want of occupation. He said that he had tendered the rent for 1904, which plaintiff had refused to accept until he signed certain new conditions which he refused to do. He stated that he was prepared to leave Saron, although not legally bound to do so, upon payment of £200, in respect of building and improvements, and of grazing rights. In reconvention, he claimed the sum of £3 2s. in respect of the want of occupation of certain land included in the contract between the parties.

The defendant, Goedeman, in his plea, stated that he had tendered the rent for 1904, which the plaintiff refused to accept until he signed certain new conditions. He stated that he had been prevented from attending the society's church by the duly authorised representatives of the society, and had consequently been compelled to attend Divine service elsewhere. With regard to the sowing lands, he denied that such permission was necessary. He admitted that he had had the use of certain sowing land, and that under the said laws one-half of the quantity sowed had to be paid to the society's duly authorised representative, and said further that he had tendered the said one-half to Mr. Hartwig, the duly authorised representative of the society, but the said Mr. Hartwig refused to accept the same. With regard to paragraph 12, defendant admitted that he received the said notice, and that he refused to regard the said notice or to quit the said estate. He denied that his conduct in so doing was wrongful or unlawful. With regard to paragraph 13, defendant admitted that he had the said interest in half of another erf, but denied that £35 and £1

was fair and reasonable valuations of his said house and his other structures and of improvements and of his said interest in half of another erf respectively. He claimed in reconvention a declaration of rights as between himself and plaintiff in respect of the said contract, and a declaration that plaintiff is not entitled to eject defendant from the said erf so long as defendant carries out the provisions of the said contract.

The defendant Engelbrecht, in his plea, stated that he had tendered the rent for 1904, which plaintiff refused to accept until he had signed certain new conditions. He maintained that, if plaintiff was entitled to eject defendant (which he did not admit), defendant was lawfully entitled to compensation for buildings, structures, and improvements, and also to compensation for the loss of grazing, planting, and other rights. In reconvention he claimed a declaration of rights as between himself and plaintiff, and a declaration that plaintiff is not entitled to eject defendant so long as he carried out the provisions of his contract.

Mr. Burton (with him Mr. J. E. R. de Villiers) for plaintiff. Dr. Greer (with him Mr. Alexander) for defendant.

Friedrich Eich, residing at Worcester, stated that he was the trustee and representative of the Rhenish Mission Society, and put in plans of the society's property at Saron in the division of Tulbagh. Witness proceeded to give evidence in support of the declaration in respect of the case of John Barron.

Cross-examined by Dr. Greer: The station at Saron was purely a missionary society. In former times he believed there had been trading enterprise conducted.

Johan Godlieb Christian Leipoldt, residing at Worcester, stated that he was the "Leeraar" of Saron in 1874, and there were then certain rules which were well understood by the congregation. There was no difference between the rules, produced in Court, and those in force in 1874. The rules were well understood by the people, and were read out in church from time to time.

Elias Schrenk gave evidence as to the rules being in existence, and as to these being read out to the people. In 1877 a conference was held, and the rules were then printed. The rules, as printed, were exactly the same as those existing in former times. He had never heard of any other rules at Saron, and had heard of no objections to the rules since 1875. He knew of two cases of men who had been expelled for disobeying the rules.

Cross-examined by Mr. Alexander: The two expulsions which had taken place there during his recollection were on account of drunkenness. The offenders would not

submit to punishment, and were, therefore, sent away. During the whole time he was there there was a Raad in existence, which was elected by the people. People charged with breaches of the regulations were brought before the minister and the Raad, sitting together.

Re-examined by Mr. Burton: The members of the Raad were chosen by the people subject to the approval of the minister.

Mrs. Elizabeth Kling, wife of the Rev. Mr. Kling, said that between 1889 and 1894, she lived at Saron with her husband. She recollected John Barron coming to sign a contract in connection with a certain erf. She witnessed his signature to a document (produced). She remembered Leander coming to see Mr. Kling, and threatening him.

The Rev. Jacob Weeber, of Stellenbosch, said he was a missionary of the Rhenish Society, and had been in the Colony for 23 years. He first went to Saron shortly after his arrival in the Colony, and had ever since had an intimate acquaintance with the place. He remembered seeing printed copies of the Gemeenewetten in the early days. He had never seen any other written or printed set of Congregational laws. He had never heard any objection to the printed rules. There were two raads at the mission—the Kerk Raad and the Gemeente Raad. The former were elected by themselves—they added to their number. The latter were nominated by the minister. In 1893 a meeting was held in order to revise the regulations so as to make them uniform. There were about thirty people present, and draft regulations, drawn up by witness, were submitted to the meeting. These did not contain any material alterations of the existing regulations; they only made the old laws clearer. Two of the people who signed these regulations afterwards came to Worcester and objected to a clause dealing with compensation. This clause was then altered and the visitors went away professing to be satisfied. Some 200 of the inhabitants had agreed to accept the new regulations, and the new regulations were applied to these. In the cases of the other the old regulations were applied.

Mr. Burton: What do you say is the cause of the disturbance there?

Witness: Well, my personal impression is that it is the so-called Ethiopian movement. These people had no right to come there, but they have started a church in opposition to ours.

[Maasdorp, J.: On your ground?]

Witness: Yes.

[Maasdorp, J.: And without your permission?]

Yes.

[Maasdorp, J.: They are erf-holders?]

Some of them are, but others have no right there.

[Maasdorp, J.: But could not you give them a month's notice?]

That is what we hold. That is what we have come to Court for.

Other witnesses gave evidence of a similar character.

The Rev. Mr. Harborg, in cross-examination by Mr. Alexander, stated that there was an impression among some of the people that rent was not to be paid after a number of years.

A member of the congregation identified a copy of the printed rules that had been read out from time to time. Evidence was given as to the value of the property, and Mr. Burton closed his case for the plaintiffs.

Mr. Alexander called Titus Valentine, and asked leave to have him accommodated with a chair on account of his age.

[Maasdorp, J.: What is his age?]

Mr. Alexander: Ninety-seven, my lord.

[Maasdorp, J.: Are you going back as far as that?]

Mr. Alexander: Yes, my lord.

The witness stated he had worked on the farm before it was purchased by the Mission Society. He remembered Mr. Kulpman sending round the circular. Witness went to see him, and Mr. Kulpman said he let witness have theerven at £1 16s. per year. Mr. Kulpman said the lease would be for witness's lifetime, and when he died it was to go to his children and his children's children. Witness and many others signed their names in the book. Mr. Kulpman read from the book, showing how the tenants were to behave themselves. The wages that witness and the others received for erecting the church and schools were 6d. and 9d. a day, the mission explaining that the church would stand for the workers and their children. Witness had been living there for 16 years at 3s. a month. Until Mr. Kling went to Germany everything was quiet at Sarron.

Cross-examined by Mr. Burton: He knew that the society would not turn a man away, except he did something deliberately wrong. The book was in the pulpit, and from that the Rev. Kulpman read the conditions of the tenancy.

The next witness was 76 years of age, and he stated that he went to Sarron about three months after Mr. Kulpman's time. Mr. Kulpman said witness could have the land on payment of 3s. a month. Mr. Kulpman told witness he could have the place, and that it would become his property when it was paid for. The cause of the unrest at Sarron was the action of Mr. Kling in making the people sign the new contract.

Andreas Vermuelen, 72 years of age, stated he went to Sarron in response to a notice issued by Mr. Kulpman. The

notice stated that Mr. Kulpman was going to start a school farm.

Further evidence was given as to the contract.

Johanna Huys (widow, aged 73 years) said that she went from Stellenbosch to Sarron in 1847 to assist in the school as a teacher. Some time afterwards she left for Stellenbosch, but upon her marriage she returned to Sarron, and had since been living there. She was aware of the conditions that were made with those who went to live at Sarron. Mr. Kuepman told them that when Sarron was paid for it would become their own property.

Maasdorp, J., pointed out to counsel that this was not a question of ancient rights, but a question of contract.

Witness (continuing) said that the arrangement was that they should get one piece of land, and if they got half a muid of seed, they had to give a muid of corn to the Leerar. They had to keep the water furrow clear at their own expense. There were other regulations to the effect that there should be no theft, no drinking, no murder, and so forth at the station. It was understood that if a man did nothing against the regulations he could not be sent away.

Frederick Franz, a former member of the Raad at Sarron, said that in January, 1903, they were informed that the inspector from Germany wanted to make a new contract, and that the place could not exist any longer as it had done. He said that if they refused to sign the contract, he had authority to sell the place. They went out to consult, and they came to the conclusion that unless certain rules were removed from the contract they would not sign.

Solomon Franz, also of Sarron, said that he obtained his erf from his father-in-law, and subsequently he was allotted another erf. He had a shop at Sarron during Mr. Weeber's time. He gave notice to Mr. Weeber. Witness used to be one of the churchwardens. Questions concerning the general welfare used to come before the Raad. Certain small cases of breaches of the regulations were dealt with by the Raad, but more serious cases went to the Magistrate's Court. At the second meeting, at which the new conditions were to be considered, it was found that one alteration had been made in regard to the rate on the land now. It had cost witness £150 to put up his house.

The defendant, Goedeman, caused a good deal of amusement by his replies, in cross-examination, to Mr. Burton. Goedeman repeatedly stated that he had told all he knew, and he could not say anything more without "telling lies." In reference to his non-attendance at church, he admitted that he was not intending permanently to stay away, and that he might yet return if he remained at Sarron.

Several other witnesses, coloured men living at the station, were called for the defence.

Johannes Vlotmans said that papers were taken round Saron to pay the rent of erf. The papers were given to the members of the congregation, who were in arrear.

Cross-examined by Mr. Burton: He did not know the laws of the congregation. He heard of them, but he did not carry them about with him.

Johannes Moller, auctioneer, said he valued each plot of land at £10. He thought that £60 would be a very fair valuation for Muller's house. Baron's house he valued at £40, and his plot at £4.

Cross-examined by Mr. Burton: He did not measure the ground; he stepped it out in his usual way.

This closed the case for the defendants.

Counsel having been heard in argument,

[Maasdorp. J.: In this case, the plaintiff in his capacity as trustee of the missionary society, sues five of the tenants of the society in order to obtain a declaration of rights, and also an order of ejectment of the defendants from the premises. It appears that the main question at issue between the parties in the different cases is so identical that it was considered advisable to consolidate the six cases, in order to save costs and time. The questions so raised, as I say, are in the main identical in all the cases, though there are some slight variations, which I shall have to refer to when it becomes necessary to make the orders for each particular case. It appears that the Rhenish Mission Society, which has its principal seat in Germany, determined some long time ago to establish the mission station in the neighbourhood of Tulbagh, for the amelioration of the condition of the coloured people in the neighbouring districts, and also for their religious instruction. In order to carry out their object they thought it advisable to set about establishing a village, in which the people could live in the neighbourhood of a church, which it was proposed to build out of the funds of the society, and also for the assistance of prospective inhabitants of the land. The inducements held out to the coloured people were the offer of an erf or plot of ground for them to occupy, upon which they had the right to build and have a garden and other cultivation for their own benefit. The rent which was charged was not very high. The inducements served their purpose, because a large number of the coloured people flocked to the place, and the village of Saron was ultimately established. After these people came to take up their erven they entered into an agreement with the Rhenish Mission Society as to what the conditions were upon which the ground was

occupied. When the village was started is not really at issue in the present case, because the contracts with which the Court has specifically to deal were only made in the year 1881, and the others were made subsequently. For the special purposes of this case it will only be necessary to ascertain what were the conditions upon which the five defendants entered into the other contracts. But a wider question has been raised, and it has been suggested that really these are test cases, and there is a wish on the part of the plaintiffs and the residents in this village to ascertain what are the conditions upon which the persons held their tenancies fixed at a date prior to the earliest contract here mentioned. A large number of witnesses were called, and, perhaps, it was necessary in this case to ascertain what the conditions were, as, in respect of four of these contracts, they are not set forth expressly in writing. I may mention in the case of one of the defendants the expressed conditions upon which he holds is contained in his contract. That is the case of Barron, which will be decided under the contract. Then there is the contract by Muller, in which certain conditions are referred to. It is necessary in his case and the three other cases to ascertain what terms the parties entered upon their tenancies. It is quite clear that since 1876 there have been printed conditions of contract in existence, and also printed rules of the society for the management of this village that came into existence about 1876 or 1877. Now, the question is when the contracts were entered into between these defendants and the society, were these printed conditions the terms upon which the contracts were made or were there others which the parties had in contemplation. I do not intend to go any length into this part of the case. I am satisfied if these printed conditions were in existence, it is impossible to understand why the parties should have entered into the agreement under any other conditions than those printed. It may be said it was the intention of the society to act upon these rules, but it does not follow it was the intention of those who entered into the agreement with them to do so. The suggestion is that these parties contemplated some other rules. As far as the defendants are concerned, I am satisfied that these rules were generally known, that the contract was entered into upon rules generally known, and that they became the terms of the contract between the parties. It is said there were other rules previously in existence, and the tenants had them in contemplation when they entered into their contracts. The evidence of the missionaries shows that the rules in the book are substantially the same as the present rules, and I am satisfied also on the evidence of the

defendants, they are the same rules of the contract. The main difference is upon this point. Had the society the power under the agreement to eject a tenant upon giving a month's notice? That condition appears in the printed rules, and I am satisfied when a tenancy is entered into that the first thing the parties would consider is the manner in which the contract should be terminated. The defendants say that there was a stipulation in the agreement made to the effect that they should not be ejected as long as they behaved themselves, and that the properties should pass to their legal successors. I feel satisfied that some assurance was given when the contracts were being made upon the fixed conditions, among others, a month's notice, that they would not be disturbed, and that their children would take over after them, and I think the assurances have been faithfully observed by the society, because we have no case in which a man, who has behaved himself, has not been able to get his property passed on to his relatives. I am of opinion that one of the terms of the contract was one month's notice to the tenants to quit. Three received notice to quit, and in my opinion that notice was sufficient. One starts a butchery business against the rules of the society, another used threatening language, and the third refused to attend the services of the church, and then he further breaks the rules by ploughing lands without doing it under the directions which he is bound to accept of the missionary in charge. As to the other two, notice to quit was not given, but I find it is one of the conditions that a tenant shall be allowed to remain upon the property, but he must have paid his rent by the end of the year, and that condition has not been observed by these two defendants, not only so, but they have set up a sort of proprietary right themselves. There are no proprietary rights in this case, and they have no rights except such as given them by the contract. Upon that point I give a general declaration that the contracts made by the defendants in this case are subject to the printed rules, a copy of which has been put in. The plaintiff society is therefore entitled to an order of ejectment. The plaintiffs are prepared, according to the rule, to make compensation to those who have made improvements upon their property. They are willing to make such compensation, and the question is as to the special order in respect of compensation in the case of Barron. The scale of maximum compensation is laid down, and, consequently, the Court will give judgment in his case that he is to quit the premises upon payment to him of £25. Of course, that payment is subject to any set-off which the society may have in respect of anything due to them as a

matter of costs or otherwise. If there should be a claim of costs against him, that, of course, will be set off. As far as the other four defendants are concerned, there is such a large margin between the value given by the witnesses for the plaintiffs and the defendants that I cannot safely act upon the evidence. The plaintiff has offered to pay such compensation as may be awarded as the result of any direction the Court may give, and I am of opinion that some disinterested person should be appointed to make the valuations. He is to value not only the house, but also other permanent improvements upon the erven, which go to enhance their value. That is, he is to consider what an erf would be worth without the improvements, and what it is worth with the improvements, and the defendants will be entitled to payment of the value so ascertained. The defendants will be ordered to leave the premises by the 31st December, and Mr. J. W. H. Meiring, of Worcester, appointed to value the improvements, which will be paid to the defendants, the defendants to pay the costs of the suit. Goedeman, Muller, Engelbrech, and Leander to pay the rent due by them.

Mr. Burton asked that the ejectment be ordered to take place before Christmas.

[Maasdorp, J.: Christmas is a time of peace, and good results may follow from their being there.]

[Plaintiff's Attorneys: Walker and Jacobsohn; Defendants' Attorney: J. Buirski.]

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

CAPE TOWN RATEPAYERS' ASSOCIATION AND OTHERS } 1905.
V. CAPE TOWN TOWN } Nov. 17th.
COUNCIL.

Town Council—Contract—Interdict.

The Court granted a rule nisi on the ex parte application of certain councillors and other ratepayers, calling upon the Town Council of C. T. to show

cause why they should not be restrained from entering into a certain contract.

This was an application for a rule *nisi* against the Town Council of Cape Town by the Cape Town Ratepayers' Association and Venning Thomas and Van Blerck, president and secretary respectively of the association, and Hyman Liberman (Mayor) and Councillors Abdurahman, Alexander, Friedlander, Harris, Jones, and Forsyth, representing the ratable property of the value of over £3,000,000.

[Buchanan, A.C.J.: It seems to be a house divided.]

Sir H. Juta: Yes, very much so.

[Buchanan, A.C.J.: Is the application *ex parte*?]

Yes.

[Buchanan, A.C.J.: Notice should have been given.]

Sir H. Juta explained that the matter had been hurriedly prepared.

The petition set out at length the proceedings leading up to the present application. Petitioners, *inter alia*, called attention to the notice of motion given by Dr. Abdurahman, and went on to say:

16. That this notice of motion was accepted by the Mayor as staying all proceedings in connection with the acceptance of the said tender of Nuttall and Co. until the next Council meeting on October 12.

17. That, nevertheless, in direct opposition to the effect of this motion and without either the knowledge or the authority of the Mayor or of the Council, the Town Clerk on the following day wrote to Messrs. Nuttall and Co. accepting their tender, and that his letter was as follows:

28th September, 1905.

Gentlemen,—I am instructed to inform you that the Council have decided to accept your tender for the paving of Darling, Adderley, St. George's, Parliament, Plein, and Long streets with the Hastings paving-block, at the schedule prices contained in your tender. A contract is now being drafted to give effect to the arrangement proposed, and will be submitted to you for signature in due course. In the meantime, will you be good enough to furnish me with parcel of £10,000 of Cape Town Municipal Stock, in accordance with the terms of your contract.—I am, etc.,

J. R. FINCH.

The petitioners proceeded to refer to subsequent developments, and went on:

35. That during the course of this week a report upon the probable cost of this contract has been obtained from the city treasurer in conjunction with the City Engineer, and that the pro-

bable cost has been placed by them at £100,000.

36. That certain of your petitioners are aware of their own knowledge that the "extras" in similar contracts with the said and with other firms has varied from 10 per cent. to 50 per cent. of the original tender, and that they are of opinion that the extras in the present case will show a very high proportion to the original tender.

37. That your petitioners of the first part strongly oppose the signing of this contract on the ground that a poll of the ratepayers having been demanded on the question of paving, it is necessary to apply to the ratepayers to sanction the expenditure of further funds in excess of what was actually granted by the ratepayers.

38. That your petitioners of the second part are equally opposed to the signing of the contract in question both on the ground above mentioned, and also on the ground that if any such contract be entered into they, as Councillors, will be rendered personally liable for the difference between the amount of the available funds sanctioned by the ratepayers and the ultimate cost of the said contract.

39. That petitioners further oppose the said contract on the ground that the paving material tendered for by Nuttall and Co., viz: 'The Patent Hastings Sanitary Block,' cannot be supplied by the said firm of Nuttall and Co., and that the facts in connection therewith are as follows:

40. That on or about the 31st of October the Mayor, in consequence, of information received from the United States, requested an interview with Nuttall and Co.'s manager in reference to their tender.

41. That at the said interview Mr. Trimmer, the manager of Nuttall and Co. admitted that his firm did not and had no right to represent the Hastings Sanitary Paving Block Co. in South Africa, thus bearing out the information received by the Mayor to the effect that no company in South Africa had the right to represent the Hastings Sanitary Paving Block Company.

42. That the Mayor thereupon caused a letter to be sent to the said firm of Nuttall and Co. in the following terms:

1st November, 1905.

In re Hastings Sanitary Paving Block.

Gentlemen,—His Worship the Mayor desires me to refer to the interview which he had with your Mr. Trimmer yesterday, with regard to the tender for the paving of certain streets of the city with the Hastings Sanitary Paving Block, and to state that His Worship understands that the firm of Edmund Nuttall and Co. do not represent the Hastings Sanitary Paving Block Co., in South Africa, and, further, that they hold no authority from such company

His Worship desires me to ask that you will be good enough to confirm this in writing.—I am, etc.,

J. R. FINCH.

E. Nuttall and Co., P.O. Box 1,597, Cape Town.

43. That the foregoing letter was sent on 1st November but that no reply or acknowledgment was received until 8th November, one week later, when the following communication appeared:
P.O. Box 1,597, Cape Town, November 7, 1905.

The Town Clerk, City Hall, Cape Town.

Sanitary Block Paving Contract.

Dear Sir,—We are in receipt of your letter of 1st instant, in which you refer to an interview between His Worship the Mayor and our Mr. Trimmer, and in which you ask us to confirm certain things. We have to remark that the interview was stated by His Worship the Mayor to be entirely informal, he pre-facing his questions with the remark, that he was inquiring for his own information. Mr. Trimmer was given no idea of the purpose of the interview previous to it, and had no opportunity of consulting any papers, or refreshing his memory in any way, and, consequently, we cannot be held to anything that transpired. We beg, however, for the information of the Mayor and Councillors to advise you that we have communicated by cable with our head office, and have received confirmation of the facts, mainly as stated at the interview in question. We have to inform you that the paving material for which we have tendered is what is known in some places as the "Hastings Sanitary Block," and in others as the "Sanitary Block Paving." The original proprietors of this material are the International Paving Company of Hartford, Connecticut, U.S.A. They are the parent company, and issue all licences. They have granted to the Hastings Company rights to manufacture blocks only, and the Hastings Co., consequently, could not give any authority to us. The parent company have granted rights to manufacture and to issue licences to manufacture to the Sanitary Block and Tile Company, Ltd., of London, which rights are for the United Kingdom, South Africa, Egypt, and India. We have acquired from the London Company their rights for Cape Colony, the Orange River Colony, and the Transvaal. When we first submitted samples of the sanitary block to the City Engineer in October, 1904, we were (in the absence of documents) under the impression that the parent company and the Hastings Company were one and the same, and we used the word "Hastings" when under this impression. We have since become aware of the facts set out above, and we append a copy of the preamble of our

agreement, which shows clearly that we hold our rights from the parent company and the London company. The London company having the rights in South Africa, it is clear that the Hastings Company could not have anything to do with Cape Town in any way. That the block we propose to supply is identical with the Hastings block is clearly proved by the facts that the International Company's testing laboratories are situated in the Hastings works, that the whole of our experiments and the designs of our plant have been under the advice of the Hastings Company, and that we have contracted with the Hastings Company for the supply of flux and for the necessary press plant. We append a copy of the cable received from our head office for your information. We beg to state that, as this question has been raised, we must ask that the whole of this statement be communicated to the Council.—We are, dear sir, yours faithfully.

Per pro Edmund Nuttall and Co.

(Signed) A. K. TRIMMER.

44. Petitioners beg leave to specially point out to the Court that the heading of Nuttall and Co.'s reply excludes the word "Hastings" and the word "Patent," whereas the tender and accompanying documents includes both; that, as indicated in the second paragraph of this letter, the company attempt to resile from the position taken up, and the conversation held by their representative at the interview with the Mayor on 31st October; and that in the sixth paragraph they state that "the block we propose to supply is identical with the Hastings block," etc., thereby admitting that the block to be supplied by them is not the Hastings Sanitary Block itself, but merely a colourable imitation, or something "just as good."

45. That the said Nuttall and Co., in the tender submitted by them, distinctly undertake to supply the Hastings Sanitary Block, and that they append to the said tender a "statement of claims to consideration" in favour of the said "Hastings Sanitary Block," in which is set forth the extent to which the said "Hastings Sanitary Block" is used in various cities and towns of the world.

46. That the said Hastings Sanitary Block paving (otherwise termed the Patent Hastings Sanitary Block paving) is a specific and patented article, and is apparently well known.

47. That a sample of this block was deposited with the Town Clerk, in whose possession it at present lies.

48. That petitioners have been unable to obtain copies of the original tender by Nuttall, together with the "statement of claims of consideration," and a letter from Nuttall and Co. which

accompanied their tender, and that, accordingly, they are not in a position to, particularly set before the Court certain material discrepancies therein, and that your petitioners beg leave to refer the Court to the accompanying affidavit by their attorney herein.

49. That the original resolution of 10th August, 1905, accepting the recommendation of the Public Works and Improvements Committee was adopted under certain representations which it now appears cannot be carried out, viz.: (1) That there were sufficient funds to proceed with the work, and (2) that Nuttall and Co. intended to provide the "Hastings Sanitary Block," and that they possessed the right to do so.

50. That your petitioners desire to point out that the said committee in the course of their report recommending the adoption of Nuttall and Co.'s tender, state that they "unanimously concur in the opinion of the City Engineer," which was that the most suitable tender was that for the Hastings Sanitary Block, whereas in point of fact the said committee were not unanimous—Councillor Bartlett stating that he had voted under a misapprehension, and the Mayor and Councillor Matthews (who were against the recommendation) having been absent.

51. That during the course of the present week communications have been received from the Hastings Paving Company of New York forwarding a sample block together with a quotation, or tender, to be submitted to the Town Council, and that the Hastings Paving Company, from whom the sample block has been received, is the same company of whom Nuttall and Co. allege that they hold the sole agency in South Africa.

52. That your petitioners annex hereto a copy of the specification, and form of tender for the contract under question, and also a copy of the contract which awaits signature.

53. That paragraph 19 of the conditions in the said specification and form of tender sets forth that the contractor is to maintain, uphold, and guarantee the stability of the works "for a certain period after completion, and that paragraph (c) under the heading "Tenders are Invited For"—on page 6 of the specification provides that the tenderer shall state the price at which he will be prepared to maintain the paving after the expiration of the period of guarantee.

54. That according to clause 5 of the Draft Contract the tenderers undertake merely to maintain the paving for three years, and that your petitioners hold that the tender binds the said Nuttall and Co. to guarantee the paving for a certain term, and thereafter to maintain the same either free of charge or at a certain cost.

55. That in support of this statement petitioners desire to refer the Court to

the clause occurring in the report of the Public Works and Improvement Committee, which report is embodied in paragraph 6 hereof, and which clause is as follows: "Messrs. Nuttall and Co. are willing after the period of maintenance has expired to guarantee the paving for a period of three years without charge.

56. That your petitioners hold that by "guaranteeing the paving" a successful tenderer undertakes to refund the whole price, and monies received by him if the paving should prove unsatisfactory.

57. That in view of the great and unabated interest taken by the ratepayers of Cape Town and by the public at large in the matter of the paving of the streets of the city, in tenders received for the same, in the debates in the Town Council as to the whole matter, and as to the acceptance of Nuttall and Co.'s contract; in view of the great difference of opinion among Councillors themselves, taking into consideration the fact that throughout the voting hereon in the Council has been so close and that on certain occasions the party against the acceptance of this tender have had a majority in actual votes; and, lastly, in view of the fact that the election held (under statutory rules), on September 11 last, turned entirely on this question of the paving contract, and that in the result four Councillors out of the six returned expressed themselves during the election as strongly against the acceptance of any tender until sample strips of all proposed paving had been laid by way of experiment, and in view of the fact that a poll has been repeatedly demanded. Your petitioners having taken all these matters into consideration, are of opinion that the only satisfactory method of elucidating the matter is to approach the ratepayers by way of taking a poll in the same manner as is done in the case of loans.

Wherefore your petitioners humbly pray that your lordship may be pleased: 1. To issue a rule nisi calling on respondents to show cause by December 12 next (a) Why respondents should not be interdicted from signing the said contract; (b) why respondents should not be ordered to take a poll of the ratepayers as to the paving of the streets; (c) why the respondents should not be restrained from signing the said contract on the ground that the necessary money therefor has not been authorised by the ratepayers; (d) why respondents should not be restrained from signing the said contract on the ground that the terms thereof differ materially from the tender and conditions; (e) for the costs of this application.

Counsel also read an affidavit by Mr. A. J. MacCallum, attorney to the applicants, in reference to communications he had had with the Town Clerk in regard to the inspection of certain documents,

Sir H. Juta, K.C., for applicants.
Buchanan, A.C.J., observed that the government of the City remained in the City Council, and it was not for this Court to decide its management.

Sir H. Juta said that the question was not one of management.

[Buchanan, A.C.J.: Your first application is that a poll of the ratepayers should be ordered to take place. Are you entitled to that?]

Yes; because the necessary amount of money is not there.

[Buchanan, A.C.J.: But that is under a different clause.]

We cannot demand that a poll of the ratepayers should be taken as to whether or not there should be this paving of the streets.

[Buchanan, A.C.J.: Then that falls away. Then there is paragraph (c): "Why respondents should not be restrained from signing the said contract on the ground that the necessary money therefor has not been authorised by the ratepayers." That, you say, you are entitled to ask for?]

Sir H. Juta said that that was so.

[Buchanan, A.C.J.: Then, there is paragraph (d): "Why respondents should not be restrained from signing the contract on the ground that the terms differ materially from the tender and conditions." That is not a matter for the Court to interfere with, but a matter of management.]

I submit that is a matter on which the Court could very well interfere. The Council is a public body authorised to do certain things. Counsel went on to say that he admitted that he could not support the demand for a poll of the ratepayers as to the paving of the streets, because he did not see any authority for it. The way, however, to look at the matter was this, that if the ratepayers did not agree to this paving they would agree to a loan. The first point was that the money was not there, and that it would be necessary, taking the estimate of the City Treasurer, in conjunction with the City Engineer, at £100,000, to make an application under the Act for a loan, and the only way in which a loan could be granted was by going to the ratepayers. The danger was that if the Mayor did not sign the contract somebody else must sign it. These Councillors and the Mayor, who were the persons to settle whether the money should be raised or not, wished that the contract should not be signed until they had had an opportunity of deciding whether they would grant the money or not. On what ground—

[Buchanan, A.C.J.: The only ground.]

Sir H. Juta: Well, take the next ground, my lord. A public body invites tenders, and a tender is sent in and it is accepted. It is now proposed by a majority of that public body that a

contract materially differing from that accepted tender shall be entered into.

[Buchanan, A.C.J.: Surely they have the power to make any alteration they may have agreed upon. If the Council choose to alter a contract, surely they can do so?]

Sir H. Juta submitted that they could not do so without calling for fresh tenders. Surely a public body which was authorised to call for tenders could not, after it had accepted one tender on certain conditions, then go and alter these conditions? A mere majority of the Council could, then, under those circumstances, make what contract they liked.

[Buchanan, A.C.J.: Of course they can; they can alter the conditions of the tenders as much as they like.]

Notwithstanding that they have called for tenders under certain conditions?

[Buchanan, A.C.J.: Surely they have the power to do that? That is a matter of administration for the Council. The Council acts through the majority; you cannot get a large body to agree unanimously to anything.]

But then it must act in a proper manner, and that proper manner is that, where the Council, *qua* Council, has accepted a certain tender, which has been submitted—

[Buchanan, A.C.J.: Of course, as this is an *ex parte* application, I don't wish to say anything as to the merits of the matter, but I wish you to show me *prima facie* grounds]

Sir H. Juta: I submit that the first ground is sufficient in itself. I rely on the second point as to the money, because there is no resolution of the Council to the effect that the original tender should be in any way modified. Your lordship says that the Town Council has the right to make any modifications it likes in regard to this contract. Then, my lord, as I said, it must be done in a proper manner, and the Town Council must then, as a Town Council, pass a resolution that they will agree that Nuttall and Co. should amend the original tender in certain particulars. My point to your lordship is that no such resolution has been passed by the Council, and that there is absolutely nothing passed by the Council in any way altering or amending Messrs. Nuttall and Co.'s original tender. Our point is that the contract, as drafted, differs materially from the tender. First of all there is maintenance, and there is a guarantee for two periods. The contract only deals with one period. Sir Henry went on to contend that the Town Council could not enter into a contract which differed from the original tender without a proper resolution of the Council to that effect. The contract, as drafted, did not embody the tender, and it was much more favourable to Messrs. Nuttall than the tender was,

been allowed to come and live upon the said property without binding himself either verbally or in writing to pay a certain monthly rental for the ground occupied by him, and to observe strictly all the said rules (Gemeentewetten) for the time being in force as made by the society for the good of the residents.

The declaration in respect of the defendant Barron proceeded:

5. Amongst the persons so allowed to reside upon the said property was defendant, who, on or about April 16, 1900, was granted the occupation as a tenant at a rental of 1s. 6d. a month of a certain half-erf thereon in terms of a written agreement, whereby he bound himself, as a condition of his said occupation faithfully to observe the said "Gemeentewetten" on pain of forfeiting his privilege of residing at Saron aforesaid, and the defendant has continued since then to occupy the said half-erf upon the said terms, and has paid the said rent up to the end of the year 1904.

6. By rule 5 of the said "Gemeentewetten" the occupation of said half-erf by the defendant could be determined by a month's previous notice on either side.

7. By rule 6 thereof it was provided that "buildings which a lessee has erected on an erf may, when he receives notice to quit, be pulled down by him or he may sell them, at the valuation of the directors to the Rhenish Society." It was further provided, by an additional rule agreed to and signed by the defendant, that the highest sum which should be paid for a house in case a resident of Saron transgressed the rules and had to quit, the place should not exceed £25.

8. By rule 15 it is provided that no person may establish a butchery without the permission of the said "Leeraar" (minister).

9. By rule 21 it is provided that anyone who will not obey the rules of the institution must leave the place.

10. In or about November, 1904, the defendant, in direct opposition to and in defiance of the said rules, wrongfully and without the permission of the minister, opened a butchery, upon the half-erf occupied by him as aforesaid, and, in spite of repeated warnings and protests addressed to him by the minister, has refused to close the said butchery and continues to contravene the said rules in the above respect.

11. On or about April 26, 1905, the plaintiff, as he lawfully might, duly gave the defendant notice to quit the said estate within a month's time at the same time tendering to compensate him for his house in terms of the said agreement, but the defendant wrongfully and unlawfully refused, and still refuses, to regard the said notice or to quit the said estate, and claims that the said half-erf is his own property.

12. The said house of the defendant is valued by the plaintiff at £20, and the plaintiff is willing, and tenders upon the defendant quitting the said estate, to allow him to break down and remove from the said estate the said building, and any other buildings or improvements he may have acquired or built or made thereon, or in the alternative to pay him the said sum of £20, or the value of the said house, and of any other structures or improvements as aforesaid as may be assessed in terms of the said agreement or as may be fixed by an independent party or parties, or as may be decreed by this Honourable Court.

The plaintiff tendering as aforesaid, claims: (a) A declaration of rights as between himself and the defendant in respect of the defendant's said occupation in the premises; (b) a declaration that the said half-erf is the property of the said society, and that the plaintiff is entitled to eject the defendant therefrom and from the said estate of Saron either upon the defendant's refusal to be bound by or to obey any of the said rules or upon due notice given to him thereunder, upon payment of compensation as above tendered; (c) an order ejecting the defendant with his family and belongings from the said half-erf and from the said estate of Saron; (d) alternative relief; (e) costs of suit.

The declaration in respect of the defendant, Jury Muller, proceeded:

5. Amongst the persons so allowed to reside upon the said property was the defendant, who, on or about September 5, 1896, was granted the occupation as a tenant of a certain erf at a rental of 3s. per month in terms of a written agreement, whereby he was given the said occupation for such time as he observed the said rules and paid his rent at the stipulated time, and the defendant has continued since then to occupy the said erf upon the said terms (save that since 1901 the said rent has been reduced to 2s. 3d. a month), and has paid the rent thereunder up to the end of the year 1903.

6. By rule 21 of the said "Gemeentewetten" anyone who will not obey the laws of the institution is obliged to leave the place.

7. By rule 19 every lessee must have paid his rent by the end of the year. The defendant has contravened the said rule by failing to pay any rent since the end of the year 1903. There is still due and unpaid by him to the plaintiff the rent in respect of the said erf for the year 1904, to wit, the sum of £1 7s.

8. The plaintiff has demanded payment of the said sum from the defendant, who however refuses to pay the same, and claims that he and his heirs are entitled to the use and occupation of the said erf in perpetuity without payment of any rent to the plaintiff.

9. By rule 6 of the said "Gemeentewetten" it is provided that buildings which a lessee has erected on an erf may, in case he receives notice to discontinue the lease, be pulled down by him, or he may sell them according to the estimate of the directors to the Rhenish Society.

The plaintiff claims: (a) A declaration of rights as between himself and the defendant, in respect of the defendant's said occupation in the premises; (b) a declaration that the said erf is the property of the said society, and that the plaintiff is entitled to eject the defendant therefrom, and from the said estate of Saron upon the defendant's refusal to be bound by or to obey any of the said rules, and that the defendant's occupation of the said erf is limited by the terms of his said agreement and his observance of the said rules, including the rule as to payment of rent; (c) payment of the sum of £1 7s. as rent aforesaid; (d) an order ejecting the defendant, with his family and belongings, from the said erf and from the said estate of Saron, by reason of the defendant's contravention of the said rule respecting the payment of rent, the plaintiff tendering to allow the defendant to break down and remove from the said estate any buildings or other improvements he may have acquired, built, or made thereon, or in the alternative to pay him the value of such buildings and improvements as may be assessed under the said rules or as may be fixed by an independent party or parties, or as may be decreed by this Honourable Court; (e) alternative relief; (f) costs of suit.

The declaration in respect of the defendant Goedeman proceeded:

5. Amongst the persons so allowed to reside upon the property was the defendant, who, in or about 1881, was granted the occupation as a tenant of a certain erf thereon at a monthly rental of 3s., upon condition that he obeyed the said rules, and the defendant has continued since then to occupy the said erf upon the said terms and has paid the rent thereunder up to the end of the year 1903.

6. By Rule 21 of the said "Gemeentewetten" anyone who will not obey the laws of the institution is obliged to leave the place.

7. By Rule 11 thereof it was provided that every inhabitant of the institution must attend the religious services on Sunday as well as in the week regularly. The defendant has contravened the said rule in that during the last twelve months he has wholly failed to attend the said services.

8. By Rule 19 every lessee must have paid his rent by the end of the year. The defendant has contravened the said rule in that he has neglected to pay his rent, namely, the said sum of £1 16s. due at the end of 1904, and the said sum is still due and unpaid. The defendant,

moreover, claims that he is not bound to pay any rent whatsoever in respect of his occupation of the said erf, and has incited certain of the other tenants of the said society to refrain from paying their rent.

9. By Rule 3 the lessee of an erf may, with the permission of the "Leeraar" (minister), have the use of certain sowing land for which a small rental is to be paid. The defendant has contravened the said rule by entering upon and cultivating in the years 1903, 1904, and 1905, certain sowing land on the said estate without the permission of the said minister, and he has continued to cultivate the said land without such permission, and in spite of repeated warnings, and remonstrances addressed to him by or on behalf of the minister, and has refused, and still refuses, to pay any rental therefor.

10. By Rule 5 of the said "Gemeentewetten" the occupation of the said erf by the defendant could be determined by a month's notice on either side.

11. By Rule 6 it was provided that buildings which a lessee has erected on an erf may, in case he receives notice to discontinue the lease, be pulled down by him, or he may sell them, according to the estimate of the directors to the Rhenish Society.

12. On or about the 26th of May, 1905, the plaintiff, as he lawfully might, gave the defendant notice to quit the said erf and the said estate generally by the 1st of July, 1905, the plaintiff at the same time tendering to pay the value of a house erected on the said erf as ascertained in terms of the said rules or by arbitration or to allow the defendant to break down and remove the material thereof, but the defendant wrongfully and unlawfully refused, and still refuses, to regard the said notice or to quit the said erf and estate.

13. In addition to the said house, which is valued by the plaintiff at about £35, the defendant has also an interest by virtue of his marriage in community to his wife, Elizabeth Goedeman, in half of another erf occupied in the name of one Eva Balie, and the plaintiff is willing and tenders, upon the defendant quitting the said estate, to allow him to break down and remove therefrom the said house and any other structures or improvements he may have acquired or built or made thereon, or in the alternative to pay him the said sum of £35 and £1 the value of his interest in the other said erf or the value of the said house and of any other structures or improvements as aforesaid and of his interest in the other erf as may be assessed in terms of the said rules, or as may be fixed by an independent party or parties, or as may be decreed by this honourable Court.

The plaintiff, tendering as aforesaid, claims: (a) A declaration of rights as

between himself and the defendant in respect of the defendant's said occupation in the premises; (b) a declaration that the said erf is the property of the said society, and that the plaintiff is entitled to eject the defendant therefrom and from the said estate of Saron, either upon the defendant's refusal to be bound by or to obey any of the said rules, or upon due notice given to him thereunder, upon payment of compensation as above tendered; (c) Payment of the sum of £1 16s., as rent aforesaid; (d) the sum of £10 as damages sustained by reason of the defendant's wrongful cultivation of the said sowing land, his wrongful inciting of other tenants as aforesaid, and his contravention of the said rules in other respects; (e) an order ejecting the defendant, with his family and belongings, from the erf occupied by him and from the said estate of Saron; (f) alternative relief; (g) costs of suit.

The declaration in respect of the defendant Engelbrecht proceeded:

5. Among the persons so allowed to reside upon the said property was the defendant, who, in or about the month of May, 1887, was granted the occupation as a tenant of a certain erf thereon (being No. 241), at a rental of 3s. a month, on condition that he observed and was bound by the said rules, and the defendant has continued since then to occupy the said erf upon the said terms, and has paid the rent thereunder up to the end of the year 1903.

6. By Rule 21 of the said "Gemeentewetten," anyone who will not obey the laws of the institution is obliged to leave the place.

7. By Rule 19 thereof, every lessee must have paid his rent by the end of the year. The defendant has contravened the said rule by failing to pay any rent since the end of the year 1903. There is still due and unpaid by him to the plaintiff the rent in respect of the said erf for the twelve months to the end of the year 1904, to wit, the sum of £1 16s.

8. The plaintiff has demanded payment of the said sum from the defendant, who, however, refuses to pay the same, and claims that he and his heirs are entitled to the use and occupation of the said erf in perpetuity without payment of any rent to the plaintiff.

9. By Rule 6 of the said "Gemeentewetten," it is provided that buildings which a lessee has erected on an erf may, in case he receives notice to discontinue the lease, be pulled down by him or he may sell them, according to the estimate of the directors, to the Rhenish Society.

The plaintiff claims: (a) A declaration of rights as between himself and the defendant, in respect of the defendant's said occupation in the premises; (b) a declaration that the said

erf is the property of the said society, and that the plaintiff is entitled to eject the defendant therefrom, and from the said estate of Saron, upon the defendant's refusal to be bound by or to obey any of the said rules, and that the defendant's occupation of the said erf is dependent and conditional upon his observance of the said rules, including the rule as to payment of rent; (c) payment of the sum of £1 16s. as rent aforesaid; (d) an order ejecting the defendant with his family and belongings from the said erf and from the said estate of Saron, by reason of the defendant's contravention of the said rule respecting the payment of rent, the plaintiff tendering to allow the defendant to break down and remove from the said estate any buildings or other improvements he may have acquired, built, or made thereon, or in the alternative to pay him the value of such buildings and improvements as may be assessed under the said rules, or as may be fixed by an independent party or parties, or as may be decreed by this Honourable Court; (e) alternative relief; (f) costs of suit.

The plea of the defendant Barron was as follows:

1. Defendant admits paragraphs 1 and 2 of plaintiff's declaration.

2. Defendant admits paragraph 3 thereof, but says that, according to the laws to which the contract between the parties is subject, and which are hereinafter referred to, the "Leeraar" is bound to act according to the advice of a Raad or Council to be chosen (according to the said laws) by the inhabitants every year. Defendant says, further, that the last election of members of the said Raad took place about three years ago.

3. Defendant admits paragraph 4, but says that the laws therein referred to were framed by one Rev. Mr. Kulpman for and on behalf of the Rhenish Mission Society, at the time when Saron was originally laid out as a town, and were contained in a certain book, which was kept in the possession of the duly authorised representative of the Rhenish Mission Society for the time being at Saron. The rules set out in paragraphs 6, 7, 8, and 9 of plaintiff's declaration did not form part of the said laws.

4. With regard to paragraph 5, defendant says that he was born at Saron, and that he has lived there from the time of his birth, and that he is living there at the present time. Defendant denies that he bound himself by any written agreement, or that he authorised any person to so bind him. Defendant admits that he became a tenant at the said rental, and says, further, that the rent of the said half-erf for the year 1905 is not yet due and payable. Defendant admits, further,

that his tenancy was subject to certain laws, but says that these laws were those referred to in paragraph 3 hereof, and not those referred to in plaintiff's declaration.

5. With regard to paragraphs 6, 7, 8, and 9, defendant denies that the Rules 5, 6, 15, and 21 therein set forth formed part of the laws framed by Rev. Mr. Kulpman, and denies that he is bound by the said rules.

6. Defendant denies paragraph 10. He admits having opened a butchery at Saron in or about the month of November, 1904, but denies that he did so in direct opposition to and in defiance of the rules binding upon him. He says that the said butchery was opened with the full knowledge of the minister, who consented to the opening, and allowed defendant to complete all his preparations for such opening, but, he says further, that on the day before the opening the minister objected, all the preparations having in the meantime been completed. Defendant denies having been repeatedly warned by the minister to close the butchery, and denies that he has in any way contravened any of the rules binding upon him. Defendant says that, under the rules referred to in paragraph 3 hereof, the permission of the "Leeraar" was not necessary to enable him to establish a butchery, the said rules merely requiring notice to be given that the butchery was to be opened, which notice was duly given by defendant to the duly-authorised representative of the Rhenish Mission Society. Defendant says further that, save as hereinbefore set forth, the first notice received by him in connection with his having opened the butchery was given on or about the 26th of April, 1905, which notice was verbally repudiated by defendant.

7. With regard to paragraph 11, defendant admits having received the said notice, and admits that he refuses to regard the said notice or to quit the said estate. Defendant denies that his conduct in so doing is wrongful and unlawful, and defendant denies that he at any time claimed, or that he now claims, the said half-erf as his own property. Defendant maintains that he has faithfully carried out his part of the said contract, and that he is lawfully entitled to remain in undisturbed occupation of the said half-erf, in terms of the contract subsisting between the parties.

8. With regard to paragraph 12, defendant denies that £20 is a fair and reasonable valuation of his house and his other structures and improvements. Defendant further maintains that if this Honourable Court should decide that plaintiff is entitled to eject defendant (which defendant does not admit), defendant is lawfully entitled also to compensation for the loss of the grazing, planting, and other rights

secured to him by the said laws referred to in paragraph 3 hereof.

9. Save as above, defendant denies all and singular the allegations in plaintiff's declaration contained.

As a claim in reconvention, the defendant alleges that, by virtue of the contract subsisting between the parties, defendant is entitled to remain in undisturbed occupation of the said half-erf, so long as he faithfully carries out the provisions of the said contract, and is entitled under the said laws to transfer his right to his children, or, failing children, to any of defendant's relations by affinity or consanguinity. Wherefore defendant claims: (a) A declaration of rights as between himself and plaintiff in respect of the said contract; (b) a declaration that plaintiff is not entitled to eject defendant from the said half-erf, so long as defendant carries out the provisions of the contract; (c) alternative relief; and (d) costs of suit.

The defendant Muller, in his plea, stated that he had never received occupation of the full extent of land leased, and claimed an abatement of the rent to the extent of £3 2s., in respect of such want of occupation. He said that he had tendered the rent for 1904, which plaintiff had refused to accept until he signed certain new conditions which he refused to do. He stated that he was prepared to leave Saron, although not legally bound to do so, upon payment of £200, in respect of building and improvements, and of grazing rights. In reconvention, he claimed the sum of £3 2s. in respect of the want of occupation of certain land included in the contract between the parties.

The defendant, Goedeman, in his plea, stated that he had tendered the rent for 1904, which the plaintiff refused to accept until he signed certain new conditions. He stated that he had been prevented from attending the society's church by the duly authorised representatives of the society, and had consequently been compelled to attend Divine service elsewhere. With regard to the sowing lands, he denied that such permission was necessary. He admitted that he had had the use of certain sowing land, and that under the said laws one-half of the quantity sowed had to be paid to the society's duly authorised representative, and said further that he had tendered the said one-half to Mr. Hartwig, the duly authorised representative of the society, but the said Mr. Hartwig refused to accept the same. With regard to paragraph 12, defendant admitted that he received the said notice, and that he refused to regard the said notice or to quit the said estate. He denied that his conduct in so doing was wrongful or unlawful. With regard to paragraph 13, defendant admitted that he had the said interest in half of another erf, but denied that £35 and £1

in this colony, and the respondent has never resided in this colony. The question of domicile will have to be fought out at the trial. You must not take it as settled by this case. It is quite possible that the Court may refuse your order. Leave to sue will be granted, citation to be returnable on the 1st February, personal service to be effected.

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

Ex parte DE VILLIERS. { 1905.
Nov. 20th.

Mr. Van Zyl moved as a matter of urgency, on the petition of Rocco Catorzia de Villiers, for an order of ejectment against Wm. John Price from certain licensed house and premises in Main-street, Paarl, known as Freeman's Hotel. Petitioner said that he entered into a contract of lease with the respondent on the 23rd August last, and on the 1st September placed him in possession of the said house and premises. From that time till now Price had remained in undisturbed possession, but he had failed during the entire period to pay the rent due or any fraction thereof. The rent was £20 per month. Under clause 9 of the lease, if the lessee became two months in arrear with his rent, the lessor should have the right to terminate the lease and enter upon possession. Petitioner had been subjected to loss, damage, and inconvenience on account of the non-payment of the rent by the said Price, and had contracted to relet the said house and premises.

[Buchanan, A. J. C.: Where is the urgency?]

Mr. Van Zyl: A new contract has been entered into with another client, and applicant wishes to put the new lessee into possession, and it is impossible to get Price out of possession. The contract has been broken for some months.

[Buchanan, A. C. J.: The set-down must not be interfered with by a plea of urgency, unless there be some urgency.]

Mr. Van Zyl: I can only say I was instructed by my client that there was some urgency.

[Buchanan, A. C. J.: I do not see where the urgency arises. Unless there is urgency, these applications will not be heard. The petitioner has had plenty of time, and he might have put the matter down for the last motion day.]

Mr. Van Zyl: He is anxious to put the other lessee in possession by the 1st December. He did not move the Court before, because he wanted to give the present lessee some time.

[Buchanan, A. C. J.: Well, he could give the present lessee a little more time. There is no urgency in this matter. However, it will only be waste of time to go over the case again, and we will dispose of it now.]

Mr. Van Zyl (in answer to the Court) said that the prayer was for an ejectment, and to compel Price to act in terms of the said contract of lease.

Buchanan, A. C. J., granted an order directing respondent to give up possession of the premises, and to re-transfer the liquor licence within seven days from the service of the order of the Court.

MYBURGH V. DECKER. { 1905.
Nov. 20th.
" 21st.
" 22nd.

Servitus fluminis recipiendi.

Although a lower proprietor is bound to receive on his land much water as finds its way there from the land of an upper proprietor by natural flow: he is not bound to receive water which the upper proprietor has collected by artificial drainage at any point of his land at which the upper proprietor may elect to discharge it.

This was an action brought by Willem Hendrick Myburgh, tailor, Paarl, against Gustav Adolph Albert Decker, aerated water manufacturer and dealer, also of Paarl, for a declaration of rights as to the boundary line between their properties, for the restoration of three drainage furrows, and for damages.

Plaintiff, in his declaration, said that for a period far exceeding 30 years the southern portion of his property had been drained by a furrow running along the edge of the plaintiff's, and over that of the defendant's property. Recently the defendant had wrongfully and unlawfully, and without the consent of the plaintiff, closed up the furrow from a point marked "o" to "b," and constructed a deviation from "c" to "d." The eastern portion had likewise been drained for more than 30 years by similar furrows running over defendant's

property, and marked "j" and "i g." These furrows had also been wrongfully and unlawfully closed by the defendant. By reason of the said acts, the southern and eastern portions of the plaintiff's property had been reduced to a state of stagnation and marsh, which rendered cultivation impossible. Plaintiff said that he had sustained damages in the sum of £100. Further, plaintiff said that the boundary between his and defendant's property on the southern side was a line running along the side of the said furrow marked "a" and "b," and that the plaintiff's property had been encroached upon by the defendant by constructing a fence running in a straight line from the point "a" to where it crossed the plaintiff's boundary at a point marked "k," two feet within the plaintiff's property. Plaintiff claimed a declaration of rights as to the true boundary line between his and defendant's property, an order that the defendant be required to reopen and restore the said furrows to their former state, £100 damages, alternative relief, and costs of suit.

Defendant, in his plea, admitted that a furrow ran along the northern boundary of the defendant's property, but denied that the southern and eastern portions of the plaintiff's property had been drained for a period of thirty years, as alleged. He denied that the plaintiff was entitled to the use of the said furrow to drain his property, either by right acquired as prescriptive user or right acquired in any other way. He said that in or about June, 1905, plaintiff or his servants or agents dug a trench from or about the point "f" over his (plaintiff's) property, with the object wrongfully and unlawfully of draining his land into his (defendant's) aforesaid furrow. In or about 1901 a certain person or persons wrongfully and unlawfully cut a trench at or about the spot marked "o" on the plan. Defendant admitted having closed up the furrow "o" to "b" and the furrow "i," and constructed the deviation, and said that he had acted lawfully and as of right. He said that the true boundary line was on the plaintiff's side of the fence referred to in paragraph 6 of the declaration. He further said that he and his predecessors-in-title had for 30 years and upwards occupied his (defendant's) property up to the said fence, and that he was entitled to such property up to such fence by reason of the fact that it was within the boundary line, as well as by prescriptive user. He prayed that the plaintiff's claim might be dismissed with costs.

Mr. Van Zyl (with him Mr. Gutsche) for plaintiff; Mr. Benjamin (with him Mr. W. P. Buchanan) for defendant.

Frederick Moller, surveyor, Paarl, gave evidence in support of the plaintiff's claim as to the correct boundary line between the parties, as, he con-

sidered, it was disclosed by a diagram of 1858.

John L. de Villiers, engineer, residing at the Paarl, stated he was engaged by plaintiff to take certain levels of the property, which was now in dispute. The plans (produced) were arranged by witness. Taking the property running from west to east (from the main street towards the river), it sloped in that direction.

Cross-examined by Mr. Benjamin: Witness qualified in London and Birmingham.

The plaintiff stated the property in dispute was purchased by him in July, 1903. The furrow was then in existence, and there was a fence running alongside it. He did not live on the property. Last year he planted trees on the farm. When he began to do so, the defendant told him the ground was very wet for tree planting, and witness explained that it was through want of draining, and asked him to open the trench. Defendant refused to do so. Witness opened the furrow, and on going back found it closed. The closing up of the furrow had flooded his land, and had killed the trees that he had planted.

In cross-examination, witness said he had recently purchased the property next to the farm in question. There was another furrow on the farm, but it was no good. Witness denied having been told by the vendor of the property that it was impossible to cultivate the ground. Witness had seen a nice garden there six years ago.

R. Boyes, surveyor, having given evidence in reference to the 1858 diagram,

Abraham Cornelius de Villiers, son of a former owner of plaintiff's ground, said that the furrow "a b" had been in existence as long as he could remember. The furrow used to be kept clean both by witness's father and the neighbouring owner. The properties could not do without the furrow. The entire length of the sluice from the street to the river was about 400 yards. At the part "h" and "i," the furrow was blocked, in consequence of Mr. Decker having planted willows. The furrows "i" and "ig" had been in existence over thirty years, up to the time of the estate being sold after his mother's death in 1902. He remembered having cleaned the furrows about six years ago. Up to 1902 neither Decker nor his predecessor-in-title Mostert disputed the right of witness's people to the use of the furrows. Witness had always regarded the middle of the sluice as the boundary between the properties. There was formerly a little wire fence nearer the sluice than the present fence, but it completely disappeared in 1902. At the present time plaintiff's ground was in such a marshy state that it was impossible to grow anything on it. "Formerly," said witness, "I had the prettiest and the most valuable there and the prettiest

flower garden in the whole of the Paarl. It is no moral use to attempt to grow anything there unless the sluit is opened.

Cross-examined: Witness was not on very unfriendly or unbrotherly terms with Mr. Decker.

Mr. Benjamin: Are you not on friendly terms with Mr. Decker?

Witness (after some hesitation): I am not.

Mr. Benjamin: Why didn't you say so at first?

Witness: That's my business.

Further cross-examined, witness admitted that he quarrelled with Mr. Decker about 3½ years ago, when Mr. Decker objected to witness cutting down a pomegranate hedge running along the western boundary of the latter's property. There was some question about a furrow from "i" to "g." Witness proposed to deepen the furrow, and Decker consented. The fence was not on the ground in 1902, but the old oak post was there at that time.

Godlieb Wilhelm A. de Villiers, of Stellenbosch, a former owner of the property in question, said he considered that the ground had been seriously depreciated in value by reason of the acts of the defendant. The only way to drain the property was over Mr. Decker's land, unless they were going to carry the water uphill.

Antonie Spaanenberg (aged 74 years) and Isaac Jacobus de Villiers, both of the Paarl, also gave evidence.

Michiel Christian Vos, examiner of diagrams, Surveyor-General's Department, said that his duties were to investigate all diagrams of grants or transfers. He had inspected the diagram of 1858 showing a sub-division of the property in question. In applying the diagram he should start from the southern side, because there were established beacons there.

Mr. Van Zyl: But, say you were to start from the northern side from this wall, and you did not allow for the spaces?

Witness: But you have to do.

Mr. Van Zyl: Now look at Mr. Bisset's diagram (prepared in support of the defendant's case), can you say whether he has allowed any spaces at all?

Witness: His line there is directly up to the edge of the wall.

In cross-examination, witness said that the diagram of 1856 from which the 1858 diagram had been deduced did not show any space between the wall. The one showed a clear gap up to the wall, and the other did not. The sub-divisional surveyor had put the boundary up to the wall. In preparing the diagrams they had to be guided very largely by what they found on the ground.

Mr. Benjamin put it to witness that the sub-divisional surveyor had made an error in preparing the diagram?

Witness: That is not for me to say.

By Buchanan, A. C. J.: Witness was prepared to draw two parallel lines showing a distance of two feet to the scale shown in the diagram of 1858.

Arend Adams (54), labourer, a lifelong resident at the Paarl, spoke to the furrows which were in existence while he was employed by Mr. De Villiers, a farmer of plaintiff's land, before he had attained the age of 21 years. The ground was now very different from what it formerly was, being very wet and unfit for cultivation, because of the absence of drainage. The ground was formerly the site of a vineyard.

Jacob Petersen (66), caretaker of the park and sporting grounds at the Paarl, also gave evidence on behalf of the plaintiff.

Mr. Van Zyl closed his case.

Bassett Gerald Bisset, surveyor, said that he found on the ground an old beacon, and an old oak post. There was also a quince and willow hedge. He thought there had been an error of draughtsmanship in the diagram of 1856, from which the sub-divisional diagram was framed. Witness went on to explain the details of a plan which he had prepared of the property, and the pegs which he had found on the plaintiff's ground.

Cross-examined by Mr. Van Zyl: He did not think it necessary in preparing the survey to go to the neighbouring proprietors to ascertain where the pegs were. The pegs were pointed out to him by Mr. Decker. It was customary for surveyors to go to the neighbouring proprietors if they were unable to locate the pegs themselves, or if there was no one at hand to do so. He made the survey of the ground in a period of about three hours. He only took a few of the levels at that time. It was part of the surveyor's business to take levels. He would distinctly put his levels against those of an engineer, even with the short time he had been on the ground. He did not think it necessary to go into the very wet portions of the plaintiff's ground; he went to the corners, and he saw the ground.

Buchanan, A. C. J., remarked that there was an absolute similarity between the surveys of Mr. Bisset and Mr. Moller, the only difference being in the plotting of the ground.

Mr. Van Zyl: Yes, Mr. Bisset has made an error of judgment in plotting the ground.

Arthur George Baker, surveyor, in the employ of Mr. J. Bisset, spoke to having prepared the plan on which the levels were marked.

The defendant said that when he bought the property in 1876, there was a furrow running alongside the fence from "a" to "b," his property. The furrow was then 6 in. deep, but in 1903 it was deepened, and was now about 3½ ft., the alteration having been

made so as to deal with the water from the springs in the Market-square. When he purchased the property, there was no cross-furrow running in connection with "a b." In May, 1902, witness found that Abm. C. de Villiers had cut a cross-furrow to "i," and another at the south. Mr. De Villiers said that he hoped or supposed witness would not have any objection to his having cut the furrow. Witness said to him: "How do you dare to do such a thing without obtaining my consent?" and told him that he would fill up the opening at "i," and cover up the sluic as well. About fourteen days afterwards he found Mr. Abm. C. de Villiers again trespassing on the ground. Mr. De Villiers was trimming the pomegranate hedge, which was on witness's ground. Witness protested against his conduct, and told him that if he (Mr. De Villiers) persisted in trespassing, he would have to bring him to a court of law. Witness covered the furrow, and it had remained covered ever since. There had been very little cultivation on Myburgh's land, which was simply a waste piece, where cattle, horses, and mules were grazing. He had been nearly thirty years at the Paarl, and he had not known Myburgh's ground used as garden ground.

Cross-examined: Witness repaired the fence on the ground in 1902, but it was not a new fence that he then put down. There were three furrows that he had to keep open. The first was from the Market-square, running through his yard. The second received the water from Mr. Gribble's place. The third was the old original furrow which they found on their title-deeds of 1813, and which took the water from the spring. The water from Mr. Gribble's property went through "a b," but witness denied that plaintiff was entitled to send the water from his land down that furrow. He denied that the water was standing stagnant on the southern part of the plaintiff's property at the present time. It formerly stood stagnant, because plaintiff did not keep open the furrow. The slope was from south to north, and Mr. Myburgh could have drained to the willow-tree furrow. Witness was not a difficult person to get on with. He admitted having had some dispute with Mr. Gribble, but it was because the latter had sent his dirty water down the furrow.

Mr. Van Zyl: In what way would you have been prejudiced if you had allowed the water from Mr. Myburgh's land to go into "a b"?

Witness: He has no right to it.

Further cross-examined: Witness had offered £100 to Mr. Myburgh for his ground. It was after he had made the offer that he closed the furrow "c b." He had not tried to get a street through Mr. Gribble's or plaintiff's land to his property.

Re-examined: The plaintiff made the furrow after witness had made the offer to purchase the ground.

Gustav Adolph George Decker (brother of the defendant) and two coloured men also gave evidence.

Mr. Benjamin closed his case.

Mr. Van Zyl said that there were really four points at issue in this case. One, and the principal, was the opening of the furrow "a b" from the point "c" to "b," because, unless this furrow were opened, the drains "i" and "i g" would be of no use, and the rectification of the boundary could be of no use to the plaintiff's property. Counsel went on to argue that the evidence called for his client clearly showed that this furrow had been in existence for a period of more than thirty years, and that plaintiff was entitled by prescription to use it. Defendant admitted that this furrow "a b" had been in existence from time immemorial, and he further admitted that he had to keep open three furrows, but he said that this furrow "a b" had only been 9 inches deep, and that it had to be kept open for Gribble's property. The point in dispute was the right of the plaintiff to use this furrow as a drainage furrow for his ground. Upon this point, there was a direct conflict of evidence. What the plaintiff's witnesses had said had been absolutely denied point for point by the witnesses for the defence. Now, there could be no mistake in this case. It was a case where there must be deliberate and wilful lying on the one side or the other, and it was his (counsel's) unpleasant duty to ask his lordship, sitting as a jury, to say which of the two sets of witnesses had committed perjury in this case. Counsel proceeded to deal with the evidence called on both sides, and said that, while the plaintiff had called men who had no possible interest in the result, the defendant had not got a single disinterested witness, he had not got a single predecessor-in-title, and he had not got a single neighbour to give evidence. He went on to argue that, taking all the probabilities into consideration, the witnesses called for the plaintiff were entitled to credence. Mr. Van Zyl also discussed at some length other aspects of the case in relation to the claim for a declaration as to the boundary, and the restoration of the furrows "i" and "i g."

Without calling upon Mr. Benjamin.

Buchanan. A. C. J.: The property of plaintiff and defendant formerly belonged to one proprietor. In 1858 a portion of the property was cut off, and has been now called lots "a" and "b." This subdivision was apparently made because one part was freehold and the other was quitrent property, and was placed in one diagram. That diagram was at-

tached to a deed of transfer dated July, 1858. On the land so cut off, marked "a" and "b," a certain spring arises towards the northern part of the property. This spring, upon a survey by Mr. Bisset, appears to drain into a marsh, and below the marsh on the northern property was a furrow conveying the water of the spring and marsh down over the defendant's property towards the Berg River. That furrow is still open, and it is not in question in this case. In 1903 the lot "a" and "b" is for the first time sub-divided, and the southern portion is cut off, and now belongs to the plaintiff. The defendant's boundary line runs along a portion of the southern boundary, and the defendant's property is also the boundary on the eastern side of the plaintiff's property. The plaintiff claims a declaration as to the boundary fence on the southern side of his property between himself and defendant, and he claims a right to use a drain on the defendant's property on the southern side, and he also claims a right to use a drain on the eastward side, also on the defendant's property. The first question raised in the declaration is as to the true boundary line between plaintiff and defendant. Learned counsel has referred to the fact that there is a direct conflict of testimony between the parties, and he has said that the Court cannot decide this question without attributing perjury to the one side or the other. The Court has no such wish to impute perjury as that. If we look at the facts, we find that what the plaintiff's witnesses are speaking about is a state of affairs which existed some time ago, and which does not exist at the present moment. It is not as though they were speaking of what is the fact now, but what was the fact some years before, and it is quite easy for persons to be mistaken as to what they believed existed in former years. Take the old gentleman, Mr. Spannenberg, who is said to have one leg in the grave. Well, he is a hearty old gentleman, and I hope he may live for years yet, but still he is an illustration of the point. He said that he was once in his garden some twelve years ago, and he looked over the hedge, and he compared what he says he saw then with what exists now. It would be ridiculous to impute perjury to Mr. Spannenberg, in what he states. He spoke what he believed to be the truth, but he was speaking of something he saw some years ago, and comparing it with what he saw recently. That explains the discrepancy in the evidence, without imputing perjury to the one side or the other. In this case we have the actual existing state of facts to start with, and this existing state of facts is against the plaintiff on all the claims that he makes in this case. Take, first, the question

of boundary. The boundary is defined on the southern side, between plaintiff and defendant, by an existing fence. The defendant, who has been in possession of the property for 29 years, says that he came on to the property, and has been there ever since. There has been no survey between 1858, and the sub-division made to give transfer to the plaintiff, but it must be borne in mind that this sub-division diagram, which was then made by a surveyor, was made not at the instance of the defendant, but at the instance of the plaintiff and his predecessor-in-title, and in that diagram it is clearly laid down what the figure as represented by the old diagram is, and also clearly laid down what the beacons on the ground are. The beacons on the ground the surveyors agree coincide with the fence which is there existing at the present time. Now, to say that the old original diagram must be accepted in face of this occupation, of this recognised position of beacons which were recognised at the time plaintiff bought—to say that this occupation, which has lasted for nearly thirty years, can now be upset, I think no court could in justice do. Mr. Decker says he has been there all the time since he bought, and this evidence is corroborated strongly by the diagram made when plaintiff bought. I am bound to say that the fence was selected as the boundary between the two parties. With regard to the paragraph of the declaration, therefore, as to the boundaries between the plaintiff and defendant, the evidence convinces me that the boundary is according to the red line shown on the diagram attached to plaintiff's title. That I take it on Mr. Moller's plan is "a.k." Then, dealing with the furrow outside the plaintiff's boundary, which is the next claim, the plaintiff claims access to this furrow. He has never had access to it. He says that, as proprietor of the ground, his freehold entitles him to access. I think that the defendant's statement is correct that this furrow was originally a very small furrow, a few inches in depth, and that it carried the water down in defendant's land to the river. I am not convinced on the evidence that the plaintiff has any right by prescription to the user of this furrow. There may have been occasional access to this furrow, but that there has been constant user of this furrow for the drainage of plaintiff's land I am not convinced. There is no doubt that when one piece of ground lies naturally below the other the lower lying proprietor is bound to receive any water that goes to him. But that is a different thing from saying that the upper proprietor has a right to collect all the drainage on his ground and discharge it on the lower lying ground at any specific point. Looking at the levels taken, I am not satis-

sed that any drainage would naturally go to the property of the plaintiff on to the defendant's land on the southern boundary. The levels show a fall from the west to the east, but the levels do not show that there is a fall or a marked fall from the north to the south. Taking the cross sections of the levels given by Surveyor Bisset, higher up the ground, the ground is almost level, or, if anything, slightly sloping towards the centre of the plaintiff's ground, certainly not from plaintiff's ground to the defendant's ground. There is a fall from the west to the east, but not from the north to the south. Plaintiff's engineer, who has taken the levels on the southern boundary, discovers the fall between plaintiff's northern and southern boundary to be .04 of a foot, something less than half an inch. The defendant's levels taken by Mr. Bisset and Mr. Baker on the other hand are not taken at exactly the same point where Mr. De Villiers has taken his levels. There is no natural drainage from Myburgh's property from the north to the south. There is a distinct fall from the west to the east, and Decker's property to the east of Mr. Myburgh's property certainly lies at a lower level, and has to receive any water which may naturally come down there. Then plaintiff claims that a drain, which he says previously existed on Decker's property, should be re-opened, and Decker should be forced to receive at a point marked "i" any water which may be collected on plaintiff's property, and sent down on this property. This claim also is founded upon a mistake. No such drain has existed as long as plaintiff has occupied the property. The defendant says that some years previously, in 1891, there was a ditch cut by a previous owner on the defendant's property, but that after he had allowed this to remain a fortnight, further disputes arose, and this sluic was closed up, and has never been used since. The previous owner of plaintiff's property did not attempt to assert a right to the sluic. The sluic did not exist at the time plaintiff bought the property. Learned counsel for the plaintiff says that the property is useless to the plaintiff unless he can get drainage. As I said before, the lower proprietor must receive the drainage, which comes naturally to it, but that is a different thing from saying that the plaintiff has a right at common law to send the drainage from his property on to the defendant's land at any point where he may choose. Here again, I think that the plaintiff has failed to establish any prescriptive right such as he claims. To the unprofessional mind, it seems that the drainage is from the marsh along the willow furrow, where a drain still exists. That drain was not sold in the property originally sold to the plaintiff. I see no reason why that drain should not carry all the

water which collects on the plaintiff's property. There is no objection to that drain being used. I think, therefore, that it has been established that the true boundary between the plaintiff and defendant is the line "a.k." on Mr. Moller's plan. The plaintiff has failed to acquire a right by prescription to a servitude over the defendant's property to the drain "a.b.," or a proposed drain running over the southern side. Under these circumstances, there must be judgment for the defendant, with costs. A declaration will be made that the true boundary between the plaintiff and defendant on the southern side is the line "a.k." on the plan prepared by Mr. Surveyor Moller (Exhibit No. 1), which coincides with the line "c.d.," on the diagram annexed to plaintiff's transfer.

On the application of Mr. Benjamin, his lordship allowed defendant's expenses as a necessary witness, and the qualifying costs of Mr. Bisset and Mr. Baker.

[Plaintiff's Attorneys: Faure, Van Eyk, and Moore; Defendant's Attorney: J. Buirski.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

MCKAY AND CO. V. HODGSON. { 1905.
Nov. 22nd.

Dr. Greer moved, as a matter of urgency, for leave to remove interdicted stock from certain premises, which had become untenable since the interdict was granted, as the stock was at present deteriorating. The stock consisted of music and musical instruments.

Mr. Close, who appeared to oppose on behalf of the respondents, said his client, the landlord, had an interdict granted on the goods of the applicant, as a considerable sum of money was owing to the respondent. The deterioration had only been discovered since the interdict was granted. Whatever was wrong with the premises they were being put right at the present moment.

[Maasdorp, J.: I don't think we can deal with this matter now. It should come on in the ordinary course.]

Dr. Greer pointed out that the damage was continuing from day to day.

Maasdorp, J.: You can give notice in the ordinary way—that is 48 hours, I believe—then I will take it myself, if it can't be heard elsewhere. In the meantime the parties should consider whether they cannot come to a settlement.

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the
Hon. Sir JOHN BUCHANAN.]

REX V. KOBOSSE AND MKEBO. { 1905.
Nov. 23rd.

**Summons—Arrest—Particulars of
charge—R.M. Court.**

K. was charged with stock theft. The evidence of the first witness for the prosecution implicated also M. (K.'s son). M. was thereupon arrested without summons and placed in the dock. He did not except to the want of summons and did not appear to be prejudiced thereby. That portion of the evidence which had been taken was read over to him, and he was convicted.

**Held on appeal, that the appeal
must be dismissed.**

This was an appeal from a judgment of the Resident Magistrate of Lusikisiki, Western Pondoland, who had convicted the accused under Act No. 35 of 1893, as amended by Proclamation No. 109 of 1900, with the crime of theft. In that, on the 3rd September last, they did wrongfully and unlawfully kill a certain he-goat, the property and in the lawful possession of Mganji, of Dulile's Location. Kobosse was found guilty of receiving stolen property, knowing the same to have been stolen, and was sentenced to three months' imprisonment with hard labour; Mkebo was found guilty of the theft, and sentenced to six months' imprisonment with hard labour.

The Magistrate, in his reasons for judgment, said that the evidence for the Crown was absolutely conclusive. No defence of any kind had been set up by the prisoners. The Court consequently had come to the conclusion that they had no defence to make. Mkebo was brought into the case and charged after the proceedings had been commenced against Kobosse. He was arrested outside the Court, and offered no objection to being tried on the charge of receiving stolen property.

Mr. Sutton appeared for the appellants; Mr. Pyemont appeared for the Crown.

Mr. Sutton contended that the charge was not set out with sufficient particu-

larly against the second accused. The record merely was: "At this stage of the proceedings Mbeko also is placed in the dock and charged also with the theft of Mganji's goat. Counsel relied on the case of *Rex v. Albert and Others* (3 High Court Reports, 487). Prejudice had, he submitted, accrued to the accused in consequence of the irregularity in the proceedings. The second point taken by counsel was that no summons was served on Mkebo, according to Rule 68 of the Resident Magistrate's Court Act. In support of this contention, he relied on the section and also the case of *Queen v. Cooper* (1879, Buchanan, 152). He argued that the accused had not waived his right to take any point of objection which he might have taken in the Court below.

Buchanan, A.C.J., said that the case of *Queen v. Sampson* (8 Juta, 229), where an hotelkeeper at Durbanville had been convicted of selling liquor to a native, seemed to him very much in point.

Mr. Sutton went on to contend that another point in favour of the accused Mbeko was that the proceedings were irregular and informal. The evidence which had already been taken against the first accused was read over to the second accused, and was not taken in his presence. The whole case against the second accused depended upon a confession made by the other accused. Such a confession, counsel submitted, was not admissible as against the second accused. As to the first accused, counsel said all that appeared was that Kobosse had eaten some of the goat. On that ground he submitted that Kobosse could not be found guilty of stealing the whole goat.

Without calling upon Mr. Pyemont,

Buchanan, A.C.J.: The Magistrate was called upon to try a charge of theft of a goat stolen from a native location in his district. The prisoner who was first charged was Kobosse. During the hearing of the case, on the evidence of the first witness, it became apparent that the son (Mbeko) was also implicated in the theft. Mbeko was thereupon arrested and brought into court, and placed in the dock by the side of his father. Both father and son were defended by an attorney. On the charge-sheet the charge against Kobosse, "stealing a goat, the property of Mganji," was set out with every necessary particular. When the son was arrested he was also charged with stealing this goat, the property of Mganji, and he pleaded not guilty. The attorney who defended the accused took no exception to the proceedings. It is now alleged on behalf of the son that the conviction should be set aside on the ground, firstly, that the charge, in his case, was not set out with sufficient particularity. I think the record shows that the charge was set out with sufficient particularity to let him know what he was being tried for. The next point is

that no summons was served upon the accused. There is no doubt that by the rules of Court an accused can require a charge made against him to be specified in a summons or warrant before he is tried. But then the appellant did not take this objection at the trial, and require a summons or warrant to be served upon him. If he does not take this objection, it has been held in many cases that it is a common practice in the Magistrates' Courts not to issue summonses in cases of this kind. If there was any prejudice accruing to the accused, in consequence of the absence of a summons, the objection might have been considered, but it has not been shown that accused was prejudiced. The third ground of appeal is one of some importance, viz., that evidence had been given at the trial which was not taken in any way in the presence of the prisoner. It is the rule of a criminal trial that evidence must be given in the presence of the accused. In this case the father had been tried, and one witness had deposed against the father before the second accused was put into the dock. This first witness was still under examination, and the evidence he had given was read over to the second accused, and he was asked if he had any questions to put. The attorney who appeared for the prisoners did not put any question, and the case was allowed to go. A case has been referred to in which the Court quashed a conviction where evidence had been given in the absence of the prisoner, but in that case the whole of the evidence for the prosecution had been given in the absence of the prisoner, and the witnesses were not present to enable the prisoner to cross-examine them. In that case there was no evidence given in his presence to connect the prisoner with the crime. But in this case not only had the prisoner an opportunity of cross-examining the witness, but subsequently there was ample evidence called in his presence, making it clear that the Magistrate was justified in convicting him. Another technical objection taken on behalf of the first accused is that he was convicted of receiving the goat, knowing it to have been stolen. Well, perhaps, strictly speaking, he ought to have been convicted of receiving a portion only of the stolen property, but that is no ground for upsetting the conviction. The evidence is that when the search party found the prisoners they were actually consuming the stolen meat. The appeal must be dismissed.

REX V. SIJOVU.

This was an appeal from a judgment of the Resident Magistrate of Tsomo, convicting the appellant Sijovu,

of Mbulu, of contravening section 26 of Proclamation 104, 1903, by selling brandy and other intoxicating liquor to a native without having obtained the licence required in that behalf. The appellant had been fined £30, or in default, three months' imprisonment with hard labour.

The Magistrate's reasons for judgment were as follows: Sijovu is charged with selling to one Buyapi a bottle of brandy, and from a careful consideration of the evidence, there is no doubt that brandy was in the hut on the day in question, and that not alone Buyapi purchased some of it, but Mantshanghasi, and on the same day and in the same hut. The defence objects to the evidence of Mantshanghasi, but I fail to see that it should have been rejected on the ground of remoteness by want of reasonable connection between the principal and evidentiary fact. Diamond was an unsatisfactory witness, and one who apparently wished to bark with the hounds and run with the hare, and gave one an impression that there was a good deal of *suppression veri*; but even he admits that brandy was being consumed in the hut. The defence raised, taking in consideration the trend of native opinion on the subject, is little short of impertinence, and the suggested righteous indignation of Sijovu on being asked to sell brandy is Gilbertian. Then, again, each witness admits the existence of brandy in the hut, but the accused denies it, and adds: "We drank nothing, not even tea, on the day in question." It need hardly be added that the greatest difficulty is experienced in procuring the support of natives to prosecutions of this nature. The liquor traffic is terribly rife, and is supported by practically the whole of the native community. In the assault case which preceded this case, I did not call upon the defence, merely because, from the evidence, it was impossible to say who commenced the affair, but that an assault was committed there is no room for doubt. Generally, I found that, taking the evidence as a whole, there were strong indications that Sijovu was carrying on illicit liquor traffic.

Mr. Benjamin for appellant; Mr. Py-mont for the Crown.

Mr. Benjamin said that the notice of appeal was given on the ground that the conviction was not supported by the evidence. Practically the only evidence against the accused was that of Buyapi. They must find, either that he was employed as a trap or that he was influenced by spite. If he were a trap, then the Court would require very strong corroboration of his evidence before convicting. He however, denied that he was employed as a trap. Then he must have been influenced by spite or ill-will, probably arising out of a quarrel he had

had with accused. Then they must have the very strongest corroboration before convicting the accused. Referring to the reasons for judgment, counsel commented on the picturesque terms which the Magistrate had employed, and remarked that the Magistrate might have taken into consideration that there was a certain "Mr. Justice Shallow." "Certainly," added counsel, "in some of his reasons he does not seem to have differed very much from Mr. Justice Shallow." Proceeding, Mr. Benjamin commented on the evidence admitted by the Magistrate, and said that the Court below had admitted evidence which might very well have been admitted in a similar case by "Mr. Justice Shallow." At the very least, there was so much doubt in the case, that the accused should have had the benefit of it.

Without calling upon Mr. Pyemont, Buchanan, A.C.J.: In this case the accused is charged with selling liquor to a native, accused, not having a licence to sell. The accused is also a native, living in a location where liquor is not allowed. The main evidence of the sale is that of a native named Buyapi. He says he went to the hut of the accused, and when there he bought a half bottle of brandy for 2s. 6d., which he paid, but that, after some drinking, a row took place, the accused committed an assault upon him, and ejected him from the hut. Accused was charged with assault, but was acquitted. Had it been clear that this was a case which depended entirely upon the evidence of a native who was animated by motives of revenge, I do not think the Magistrate would have been justified in convicting the accused, but the question in this case is whether or not the evidence of Buyapi has been sufficiently corroborated to justify the Magistrate in coming to the conclusion that his story is to be believed, and not that of the accused. The accused was the only witness called for the defence, and he positively denied that he had brandy in this hut at all. He says that no drinking took place, and that they did not even drink tea on the day in question. Now, the accused had the brandy after he left the hut, and he went to the hut of a man named Mbanga, and showed him the brandy, and also told him that he had been assaulted by the accused. Mbanga tasted it, and found that it was brandy. Then we have the evidence of one Diamond, who says that there was brandy in the hut on that occasion, and there was drinking going on in the hut, and that the prisoner was there. Then a woman is called, who on the same day was in the hut, and bought some brandy there. Counsel is quite correct in saying that this is not evidence of the sale with which the accused was charged, no notice having been given him of the

fact, but it is very strong corroborative evidence to show that there was liquor in the hut, and that liquor was to be had by people who wished to buy it. I am not, therefore, prepared to say that the evidence was so well-balanced that the accused ought to have had the benefit of the doubt. There is sufficient corroborative evidence, I think, to justify the Magistrate in convicting the accused, and to show that the Court of Appeal, not having the witnesses before it should not interfere. The impression made on my mind from reading the record is that there was liquor sold in the hut. The appeal will be dismissed.

REX V. YOYO AND RADASI.

This was an appeal from a judgment of the Assistant R.M. of the Cape, sitting at Uitvlugt. The accused, Isaac Yoyo, and Arthur Radasi, had been convicted of selling Kafir beer to two natives at Radasi's Buildings, Ndabeni Location. Yoyo, who was alleged to have served the beer, was fined £20, or three months' imprisonment, with hard labour; Radasi was fined £100, or six months' imprisonment, with hard labour. The appeal was brought by Radasi on the ground that the evidence given in the court below did not support the conviction, and that certain evidence had been accepted, and received by the Magistrate as admissible, which was in law wholly inadmissible.

Dr. Greer was for the appellant (Radasi); Mr. Pyemont was for the Crown.

Dr. Greer said that as regarded the first point of the appeal, there was a considerable conflict in the evidence. In regard to the second point, the only evidence to connect the appellant with the crime was that of the Corporal David Ngxiki, and a considerable portion of that evidence was inadmissible so far as the appellant was concerned. Unless the Court should find that Maria Sturman were employed as a cover, there was no evidence that Radasi had an interest in the occupation of the premises.

Mr. Pyemont submitted that under the very suspicious circumstances surrounding the whole case, the Magistrate was justified in presuming that the first accused sold for, and at the instance of the second accused. The evidence showed that the second accused was about the premises, and that this woman Maria, was known as Mrs. Radasi. Radasi owned the buildings, and he retained an interest in the occupancy by reason of the rooms occupied by Maria.

Dr. Greer having been heard in reply, Buchanan, A.C.J., said the two accused, Yoyo and Radasi, were charged before the Magistrate of the district of the Cape with contravening the Liquor Licensing Act, in

selling liquor without a licence. They were both convicted, and Yoyo has not appealed against his conviction, but Radasi has. The evidence for the Crown is that, on the Sunday in question, the 12th September last, a raid was made of certain premises known as Radasi's Buildings; that a number of natives were there drinking Kafir beer, which, by the Act of Parliament, is prohibited for sale without a licence; and that one man was arrested coming out of the place with a tin of beer in his possession, and he has also been prosecuted and punished for having beer without a licence. The evidence is clear that prisoner No. 1 (Yoyo) was the active agent in selling the beer and taking the money, and it is also shown that he did not live on the premises, that he worked at the Government Goods Station, and that he was only at that place on that evening for the sale of that beer. The evidence shows that the accused, Radasi, let the buildings, and I think that sufficient evidence was given to support the Magistrate's finding that he was present on the occasion in question. The premises belonged to the defendant, who let rooms to a number of people. The compartments let to Maria Sturman are the rooms in which the beer was sold. The defendant says that he had nothing to do with Maria Sturman or her compartments, but that the next compartment was occupied by his sweetheart, Lena. The evidence shows that he was on Maria Sturman's premises on the evening in question, that he was the owner of the house, and that he was in and out while the beer was being sold in his own premises, and that he must have seen the transaction taking place. The native constable says that he knows that Radasi lives in the house out of which the man came who was in possession of the beer. He related a statement which was made by prisoner No. 1 that the beer was sold by him (Yoyo) on Radasi's instructions, but I think Dr. Greer is correct when he contends that that statement made by prisoner No. 1 is not evidence against No. 2, seeing that it was not made in his presence. In considering this appeal, that part of the evidence will be dismissed from consideration. The constable goes on to say that, after Radasi had been arrested, Maria Sturman came to see him, and that a conversation then took place between the accused and the woman Maria. That is admitted by the defence, but the evidence as to the nature of the conversation differs. I think it curious, if the defendant's version is correct, that Maria Sturman should have gone at all to see Radasi on the subject. Then, again, we have the evidence of a shopkeeper in the neighbourhood, and he says that he has a pass-book

for goods sold to Maria Stuurman, this woman Maria, and that he supplied goods to the woman under the name of Mrs. Radasi, and that shortly before the affair took place, he altered the name to Mrs. Sturman. Then certain receipts are produced of rent alleged to have been paid to Radasi by the woman, but these receipts have evidently been manufactured for the case. Under the circumstances, the Magistrate has come to the conclusion that the two accused were acting in concert. He had the witnesses before him, and no doubt there is a conflict of testimony; but it is not like a case in which there is no corroboration of evidence given by the police, or by a trap, or by a person who is actuated by spite. There is no reason given why the constable should have been actuated by spite, and there is corroboration of his evidence. I do not see my way clear to say that the Magistrate, on the evidence laid before him, having seen the witnesses, is wrong in his finding. I think, under all these circumstances, the Court cannot interfere in this case. The appeal will be dismissed.

REX V. JOSLING.

Cruelty to animals—Emasculation
—Act 18 of 1888, Sec. 2.

Under Sec. 2 of Act 18 of 1888, a person may not be prosecuted for emasculating an animal provided he has reasonable cause for so doing.

This was an appeal from a judgment of the Resident Magistrate of Kenhardt, who had convicted the appellant of a contravention of Section 2, Act 18 of 1888, by inflicting wanton cruelty upon a certain domestic animal, viz., a cat, by emasculating it. The appellant was sentenced to pay a fine of £1, or in default, seven days' imprisonment, with hard labour.

Dr. Greer was for the appellant.

Mr. Pyemont (for the Crown) said that the Attorney-General did not support the conviction.

Dr. Greer said that the appellant had performed an operation upon a cat which he submitted was a proper one.

Buchanan, A.C.J., said that the appeal would be allowed, and the conviction quashed.

REX V. GALL.

This was an appeal from a judgment of the Resident Magistrate of Elliot, who had convicted appellant of the crime of assault. The accused was charged with assaulting a Hottentot

named Johannes, with intent to inflict upon him grievous bodily harm. He was found guilty of common assault, and sentenced to 21 days' imprisonment, with hard labour.

The allegation was that accused, formerly a member of the C.M.R., struck the Hottentot on the head, and threw him on a fire, causing him divers wounds, burns, and injuries.

The accused denied having assaulted the complainant.

Mr. Struben was for appellant; Mr. Pyemont was for the Crown.

Mr. Struben said that the ground of appeal was that the conviction was not supported by the evidence given before the Court below, and was contrary to law. The evidence of the two white men called for the defence was plain and straightforward, and the witnesses supported each other, but the evidence given by the witnesses for the Crown, who seemed to be very much interested in each other, was very greatly at variance. The witnesses for the prosecution contradicted each other on most material points. The Magistrate's judgment ought to have stated whether he found the accused guilty of assaulting the Hottentot with his fist or throwing him upon the fire. He urged that the facts all tended to show that the accused closed with the Hottentot, but that it was in order to protect himself from an attack. Counsel also urged that the sentence passed upon the accused was needlessly severe.

Without calling upon Mr. Pyemont,

Buchanan, A.C.J.: The appellant was charged with assault with intent to do grievous bodily harm, and it is alleged that he threw the complainant upon a fire, thereby causing him divers injuries and burns. That the complainant was burned in consequence of this assault is clear, but the Magistrate seems to have taken the view that the burning had been unintentional, and not intentional. The evidence of an assault, however, is all one way. Even the prisoner's own evidence fully justifies the Magistrate in convicting of assault. There is no conflict of evidence which would justify any Court in setting aside this conviction. The admissions made by the prisoner himself justified the Magistrate in finding him guilty. The Magistrate has sentenced the accused to imprisonment for 21 days with hard labour. He has not given the accused the option of a fine. That is a matter entirely within the jurisdiction of the Magistrate. This Court cannot alter the sentence. I see no ground whatever for interfering with the Magistrate's decision. The appeal will, therefore, be dismissed.

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

MCKAY AND CO. V. HODGSON { 1905.
Nov. 24th.

Dr. Greer moved as a matter of urgency for an order authorising the applicants to remove certain goods now under interdict at 6 and 8, Church-street, Cape Town, to such premises as they may decide upon, the said goods to remain under attachment at the new premises. Mr. Benjamin appeared for the respondent.

The petitioners stated that they were music warehousemen, carrying on business at 6 and 8, Church-street, and had been restrained from removing their goods from 6, Church-street, pending an action to be brought by the respondent for arrear rent. The said premises were not in a fit and tenable state of repair, and by reason of this the goods were being damaged. They would at the proper time claim for the unlawful attachment of their goods, and damage to their goods and fittings. An affidavit by Neil Holmes, of Woodstock, a contractor, stated that damage would be done to the stock unless the alterations were carried out, and the goods removed. It would be necessary to take up the floor and excavate to a depth of about three feet, in order to provide proper ventilation.

An answering affidavit by respondent (Charles Hodgson) said that the applicants had been tenants of the said premises for a large number of years, and were at present indebted to him exclusive of the month of November, in a sum of £355 for arrear rent. He had been compelled to apply for an interdict restraining the respondents from removing the goods pending an action to be brought for rent. He had taken out a summons for £355. Applicants had repeatedly acknowledged their indebtedness to him in the amount claimed, but continually asked for time in which to discharge the amount. The result of his leniency would be that at the end of this month they would be indebted to him in a sum of £400. They had made this application purely and simply to gain time. As to the alleged bad state of the premises, the matter was only recently brought under his notice by the applicants, and he was quite prepared to give them beneficial occupation of the premises so long as applicants remained there. He had instructed his architect to have such repairs carried out as may be necessary. He had no wish to continue the appli-

cants in the premises, and he would consent to their goods being removed provided that they deposited with the Registrar of the Court sufficient security to cover the amount of his claim. An affidavit by Mr. Rowe Rowe stated that he had been entrusted with the supervision of such works as may be necessary, and the execution of the works had already been commenced.

[Buchanan, A.C.J.: What is the value of the stock, Mr. Greer?]

I am instructed that it amounts to about £6,000 in value and consists of pianos, organs, and music generally.

A replying affidavit by Mr. Bischoff, a member of the applicant firm, denied that the sum of £355, or any portion thereof, was due to the respondent. It was arranged that the arrear rent, £355, should be paid off in monthly instalments, and the applicants had paid the instalments as they had become due. He denied that there was any undue haste on the part of the applicants in this application, or that there was any intention to deprive the respondent of his landlord's lien. It was impossible for the respondent to give them beneficial occupation of the premises. The more the floor was torn up the more was it found to be in bad state. The place was rotten with fungus, and the stench was unbearable, and the applicants had had to pile their stock on the pianos and on the floor next door. The whole of the flooring was being torn up.

Dr. Greer: We are willing that the lien should still continue.

[Buchanan, A.C.J.: The new landlord would have the first lien.]

Not if he lets us in with notice of a previous lien.

[Buchanan, J.: Oh, yes.]

We discovered the state of the premises only in October. The whole floor has been taken up. We have no beneficial occupation, and are not told when we shall get it. The stock is being seriously depreciated.

Mr. Benjamin (replying to the Court) said that the respondent had instituted his action.

Buchanan, A.C.J.: The applicants in this case occupy premises belonging to the respondent, the rent for which has been allowed to run into arrear to a considerable amount. The rent being in arrear, the landlord, to secure his lien, obtained an attachment of the tenant's goods in his premises. That attachment still exists. The tenant now alleges that, although he has been in possession of the premises a considerable time, the premises are in such a state of disrepair that the goods are being damaged. It is curious that this fact was not discovered before the attachment took place. However, the landlord is entitled to his lien. To prevent the possibility of any loss being suffered, the Court will order the attachment to be set aside upon applicants

paying a sum of £400 into court, or providing security in that amount to the satisfaction of the Registrar, costs of motion to abide the result of the action.

CIVIL APPEALS.

VAN SCHOOR V. VAN REENEN. { 1905.
Nov. 24th.

This was an appeal from a judgment of the Assistant Resident Magistrate of the Cape, sitting at Durbanville, in an action brought by the present appellant for payment of £100 on a promissory note made by Johannes Albertus Vink, and signed by the respondent as surety.

It appeared that the maker of the note had become insolvent, and the plaintiff sued the surety, because he thought it was useless proceeding against the maker. At the hearing in the Court below, an exception was taken by defendant to the summons, on the ground that the principal should first have been excused. The Magistrate upheld the exception, and granted absolution from the instance, with costs.

Dr. Greer was for appellant, Willem van Schoor; the respondent, John van Reenen, did not appear.

Dr. Greer argued that insolvency was in itself excusation.

Buchanan, A.C.J.: You are entitled to have your appeal allowed, with costs. The exception will be overruled, and the case remitted to the Resident Magistrate's Court for further hearing and determination.

MOLEMOHI V. TEMPLE.

This was an appeal from a judgment of the Resident Magistrate of Matatiele in an action brought by the present appellant, Anthony Molemohi, against the respondent, Henry Francis Temple, to recover a sum of £35. The decision of the Court below was judgment for the defendant, with costs.

The plaintiff—a native—brought an action against respondent to recover £35, under somewhat peculiar circumstances. The Magistrate found for defendant, and from that judgment plaintiff now appealed. In his summons, plaintiff said defendant was an attorney, and about four or five years ago plaintiff instructed him to defend him in a certain action brought by John Molemohi. Judgment was entered for John Molemohi. A writ was issued against the plaintiff in satisfaction of the judgment, and 32 head of cattle were attached, and two were sold by the messenger of the Court, and realised £35. An appeal was noted, and the Magistrate's judgment was reversed, and absolution from the instance given, and thirty head of cattle were returned to plaintiff. The defendant, when asked for the return

of £35 which had been paid to him as proceeds of the sale of the cattle, refused to do so. A second action was subsequently brought, and on this occasion Anthony Molemohi won. An appeal was taken, but it was dismissed.

The defendant pleaded that plaintiff agreed, and paid to defendant proceeds of the two oxen as and for his fees in connection with the second case, disbursements to be borne by plaintiff. Defendant accepted the two oxen in full settlement of all his fees in the action to be brought. Alternatively, he counter-claimed for £35, by way of a set-off.

The Magistrate, in his reasons for judgment, said he considered that the probabilities of the case were in favour of defendant, and that the agreement alleged was actually made. It was not likely that defendant would have conducted a case for several years without arranging for his fees, especially when he had plenty of opportunities of doing so.

Mr. Swift was for the appellant; Mr. Benjamin was for the respondent.

During this reading of the record, Buchanan, A.C.J., remarked that these natives were at the mercy of the legal practitioners.

Mr. Benjamin: Mr. Temple is an attorney of good standing in the Territories.

Mr. Swift said that the real point in this case was whether the agreement to pay £35 was actually made. The Magistrate appeared to have relied on the probabilities. Probabilities, counsel submitted, were not sufficient; they must have proof. On the one hand they had an attorney trained in the conduct and management of business and financial matters, and on the other they had a native unsophisticated and, as the Magistrate said, "untutored." Respondent seemed to have kept his books in a most irregular and, for an attorney, improper manner. He had failed to produce proper documentary evidence. Counsel asked his lordship to mark his disapproval of Mr. Temple's conduct by reversing the judgment of the Court below.

Mr. Benjamin said he thought it was unfortunate that appellant was not advised to sue for his bill of costs in the Court below. The present matter arose out of the second action, which was apparently of a most intricate character, and involved questions of native succession. An agreement was made to pay respondent £35, and defendant was entitled to that amount whether appellant had been successful or not in the suit brought against him. It must be borne in mind that defendant had made no charge against plaintiff in respect of his services in the criminal case. One could understand that Mr. Temple did not put down in his book the various items

simply because of the agreement that he was to receive the £35.

Buchanan, A.C.J.: The record is very voluminous, and there is a great deal of confusion in the evidence as taken, but I think one can winnow out the essential points in this action. The plaintiff sued the defendant for £35, which the defendant admits he received on account of the plaintiff. The way that £35 was recovered was this: One John Molemohi brought an action against appellant in the Magistrate's Court, and succeeded in obtaining judgment, whereupon an appeal was noted by the present appellant, and he succeeded in that appeal. In the meantime, for some unexplained reason, the Magistrate's Messenger sold two head of cattle belonging to the present plaintiff, part of the proceeds of which, as far as one can ascertain, went to the plaintiff's adviser in the action, Mr. Danes, and the other part to the present defendant, who was the adviser of the defendant in the action. Afterwards, on the appeal proving successful, the rest of this sum of £35 was paid to defendant (Temple). Temple also recovered from John Molemohi his costs of the previous action. He had as well received certain amounts as advances from the plaintiff, part of which was repaid. After the first case had been heard and the appeal had been allowed, John Molemohi intimated his intention of bringing a second action against the present plaintiff, and, according to the defendant's plea, this £35 was to be left by plaintiff in settlement of defendant's fees in the action which was about to be brought—that was that this £35 was to be kept as a deposit to secure the attorney's costs in case further proceedings should be taken. On this point we have the defendant's own statement, in which he says the agreement between himself and plaintiff was that he was to pay him £35 as an amount stated as his fee in the second action, exclusive of disbursements. Against this we have the positive denial of the plaintiff, and we have also the evidence of Temple's own interpreter, who apparently acts on behalf of the defendant, and whose evidence, I think, is very important and conclusive on this point. He says what took place is that Temple asked plaintiff to be allowed to keep the £35 for the two oxen to work up the second case. Now, what is the meaning of that, but a deposit to pay outlay and costs which the agent might incur in the second case? The interpreter says that the plaintiff agreed to this. The second case came on, and John Molemohi failed, and an appeal was taken, and he failed also in the appeal, and it is common cause that Temple recovered all his costs to which he was entitled in both the second action and the second appeal from the other side. The Magistrate had an extraordinary state-

ment in his judgment, in which he seems to imply that when a client deposits money with an attorney for the purpose of conducting or defending an action, even though the attorney recovers his costs, the client is not entitled to get back his deposit unless at the time a specific agreement to that effect is made between the attorney and the client. This remarkable statement in his judgment cannot be sustained on any ground. The Magistrate says: "Plaintiff probably expected to get back his costs, having got judgment for them in both cases, and, as a refund of these appears to be entirely a matter of arrangement between attorney and client, not having made it, the plaintiff, an untutored native, naturally would be dissatisfied when he ultimately discovered that judgment for such costs made no difference to him when he had won his case." One cannot understand a Magistrate making such a statement as that. It clearly does not require any previous agreement. It is clear that the Magistrate has gone altogether wrong in his judgment. The appeal will be allowed, with costs, and judgment given on the claim in convention for £35, which the defendant himself admits he has had. The defendant claims alternatively for a bill of costs which he has made up to £35, the amount of the plaintiff's claim. He sets out certain items and then in order to reach the amount of the plaintiff's claim he puts down a lump sum of £2 2s. 6d. When we look at the bill of costs there are two items referring to a criminal charge. The present plaintiff, when the cattle were seized and taken away by the messenger—why, I really cannot understand—while the appeal was pending, resisted the seizure of his cattle, a thing which he had no right to do, and he was taken before the Magistrate and fined. The attorney charges him £1 1s. for receiving instructions and £6 6s. for defending him against the criminal charge. Well, it may be an exorbitant charge to make, but, still, this was a criminal offence, and the Court is not in a position to tax the charge. The plaintiff admits that he did not pay the defendant for defending him, and probably something is due to Mr. Temple on that account. Mr. Temple had charged him seven guineas and the Court will allow that amount, but as to the other items of the bill, will grant absolution from the instance. They seem all to refer to the second action brought by John Molemohi against the defendant. *Prima facie*, the defendant is not entitled to get his costs from both the plaintiff and the defendant in the action. The appeal will be allowed with costs, and judgment will be given for the plaintiff on the claim in convention for £35 and for the plaintiff (Temple) on the claim in reconvention

for £7 7s., and absolution from the instance on the remainder of the claim in reconvention. The £7 7s. bill will be set off against the amount awarded in convention, and the defendant must pay the costs in the Court below.

BENJAMIN V. SHORE.

This was an appeal from a judgment of the Resident Magistrate of Montagu in an interpleader suit which had been brought to determine the executability of certain horses, cart, and harness.

An action had been brought by Mr. Benjamin against Mr. Steyn for £60, the purchase price of certain two horses, and interest and costs. Judgment was given for the plaintiff, Benjamin, against Steyn on the 14th September. A writ of execution was issued and two horses, a cart, and a set of harness were attached by the messenger. A letter of protest was written by the agent of a man named Shore, the present respondent. Subsequently a summons was issued and an interpleader case came on for hearing before the R.M. The Magistrate gave judgment that the horses, cart, and harness belonged to Shore, and that they were not executable. Against that decision the present appeal was brought.

Mr. W. Porter Buchanan was for appellant; Mr. Alexander was for respondent.

Counsel having been heard in argument,

Buchanan, A.C.J.: One Benjamin obtained judgment in the Magistrate's Court against one Steyn, and took out a writ of execution upon this judgment. Under this writ the messenger attached a cart, a set of harness, and two horses in the possession of Steyn, whereupon Shore interpleaded and claimed the cart, harness, and horses as being his property. In this case there is no question of the credibility of witnesses; the only question is one of law arising under the following circumstances. Shore originally hired a cart, harness, and pair of horses to Steyn, for which Steyn was to pay £5 a month. This hiring was in terms of a written document, and the agreement was to last for a period of five months. After the expiration of the five months Steyn was allowed to continue in possession of the property, and he says he received permission—and in this Shore agrees with him—to barter the horses at his pleasure on the understanding that at any time when called upon by him he was to deliver to Shore two horses, or their value. Thereupon Steyn first bartered one of the horses, and then the other. These horses he again bartered, making a considerable profit for himself on these transactions. In one case he received £20, in another £13, and in a third in-

stance he received two horses for one. All the transactions were for the benefit of Steyn. He did not act as agent for Shore; on the contrary, he acted for himself, and has received all the benefits. Had the horses which were seized been the original horses hired by Steyn, they could not have been taken in execution, but when once Shore allowed the property to be used for another person's business and for another's profit he lost his ownership. As a pure question of law, independently altogether of the evidence, I think the magistrate was wrong in holding that these horses belonged to Shore. They were clearly Steyn's property, and acquired by him, though obtained, no doubt, out of the original property leased to him by Shore. The appeal will, therefore, be allowed, with costs, and judgment in the Magistrate's court altered to a declaration that the horses are liable to seizure in execution of the writ obtained by the appellant. As to the costs, in the Magistrate's court, the plaintiff has succeeded in recovering part of his property, and he is entitled to costs. The appeal will be allowed with costs, and the Magistrate's court judgment altered to one declaring the horses executable, but the cart and harness not executable.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

HERMAN V. TYFIELD. { 1905,
Nov. 24th.

Mr. P. S. T. Jones moved for an interdict restraining the respondent, F. Tyfield, from trespassing on the property of the petitioner, at Huddingh Avenue, Mill-street. The respondent had received leave to plaster a certain wall, but now he was tarring it, to which the petitioner objected.

Interdict granted, with leave to the respondent to move to set it aside.

SUPREME COURT

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

NANNUCCI, LTD. V. { 1905,
Nov. 28th.
KEATING. { .. 29th.

This was an action brought by Nannucci, Ltd., of Cape Town, against

Douglas James Keating, of Cape Town, to recover the sum of £189 2s. 9d., alleged to be due as a result of certain transactions between the parties.

The plaintiff's declaration was as follows:

1. The plaintiff is a company duly registered with limited liability under Act 25 of 1892 in this colony, and it carries on business in Cape Town and elsewhere; the defendant resides and carries on business in Cape Town.

2. In or about March, 1904, the defendant, who was then in partnership with certain persons named Isodore Sangiorgio and Locurzio, took over in his own name and interest the business of the partnership, including certain liabilities to the plaintiff company who had financed the said partnership.

3. The plaintiff company, subject to the stipulations in paragraph 4 hereof, agreed to this arrangement, and agreed at the request and for the accommodation of the defendant to advance further moneys to the defendant in accordance with the requirements of his business (and otherwise), and more particularly in connection with a certain contract whereunder defendant had to erect buildings in connection with the Nazareth House for the Sisters of Nazareth in Cape Town.

4. The plaintiff company further, subject to the said stipulations, leased to the defendant certain premises at 98, Long-street, Cape Town, and provided clerical assistance for the purposes of defendant's business at a weekly charge of £2.

5. The said company stipulated that the moneys which should become due to defendant under the said building contract should be paid direct to the plaintiff company in part payment of advances made by the plaintiff company under the aforesaid arrangement, and of any other moneys which the defendant might from time to time owe plaintiff: and the plaintiff further stipulated that the defendant should pay interest at the rate of one per centum per mensem on the amount of the balance of his indebtedness from time to time.

6. The defendant on the 10th March, 1904, by letter, gave the necessary authority to the Mother Superior (acting for and on behalf of the Sisters of Nazareth), to pay all moneys due under the building contract to Oreste Nannucci who was then the managing director of the plaintiff company. The said Nannucci as such managing director received the said moneys till payment thereafter was stopped as hereinafter set forth.

7. Thereafter for a period of 35 weeks till the 31st October, 1904, the defendant occupied the office and received the clerical assistance aforesaid.

8. The plaintiff company further prior to the said date supplied sand for the defendant's business, and rendered ser-

vice in cartage of the sand, all at defendant's special instance and request, for the sum of £58 3s. 6d., the price specially agreed to between the parties.

9. On the 31st October, 1904, the defendant had incurred liability to plaintiff in the sum of £3,494 11s. 1d. for liabilities outstanding at the date of the agreement aforesaid, and for moneys which plaintiff, from time to time, advanced under the agreement aforesaid, and at defendant's special instance and request, and for rental and clerical assistance and for sand and cartage, and for interest due all as aforesaid. At the said date the plaintiff had received on account of defendant sums amounting in all to £3,211 11s. 10d. Accounts showing full particulars of the matters in this paragraph referred to have been duly rendered to defendant.

10. On or about the 31st October, 1904, the parties hereto agreed that in lieu of the charge of £2 per week for rent and clerical assistance the defendant should pay £5 a month as and for rent of the office alone. This arrangement remained until terminated by defendant in February, 1905.

11. On the 31st October, 1904, the defendant owed the sum of £282 18s. 3d. to plaintiff, for which plaintiff held a promissory note, signed by defendant, for £213 8s. 2d. in respect of certain amounts due originally to Nannucci and Gaslioli, which amount has since been paid by defendant under judgment of this Court.

12. Since the 31st October, 1904, the defendant has become further indebted to plaintiff for advances made similar to those made prior to the said date. Particulars of his said further indebtedness are set forth in annexure B hereto.

13. The defendant is indebted to the plaintiff in the sum of £189 2s. 9d., as balance by reason of the premises.

14. On the 14th February, 1905, the defendant wrongly and unlawfully directed the Mother Superior aforesaid to make no further payments to plaintiff, under and by virtue of the letter in annexure A set forth. The defendant was at that date still largely indebted to plaintiff under the agreement aforesaid.

15. On the 16th March, 1905, the Mother Superior aforesaid was ordered to pay into Court the sum of £200, being the balance due to the said building contract with the defendant, the said payment in Court to abide the further order of this honourable Court.

16. The plaintiff company has in its possession 42 barrels of cement belonging to defendant, which it hereby tenders to deliver to defendant as against payment of the balance herein claimed.

17. All things have happened, all conditions have been fulfilled, and all times have elapsed necessary to enable the plaintiff to claim the said sum of £189 2s. 9d., but the defendant wrongfully and

unlawfully fails and neglects to pay any part thereof, though repeatedly requested so to do.

Wherefore the plaintiff claims: (a) Payment of the sum of £189 2s. 9d., balance due as aforesaid, plaintiff tendering delivery of 42 barrels of cement as aforesaid; (b) an order directing that the said sum of £200 in the hands of the Registrar of this Court be paid out to plaintiff in satisfaction *pro tanto* of the aforesaid sum and the costs of this action, and of proceedings in this honourable Court relative to the said sum of £200; (c) interest *a tempore morae*; (d) alternative relief; (e) costs of suit.

The defendant's plea was as follows:

1. Defendant admits the allegations in paragraphs 1, 2, 3, 4, 5, and 6 of the declaration, save and except that he says that the words, "in accordance with the requirements of his business (and otherwise) and more particularly," in paragraph 3 should be deleted, and further, that the following words should be added at the end of the last line of the 5th paragraph, to wit: "Arising out of or in connection with the said contract referred to in paragraph 3 of the declaration."

2. In reference to the allegations in paragraph 7, he says that he agreed to pay £2 per week in respect of the office and the clerical assistance therein referred to only during the time his contract with the Sisters of Nazareth was continuing, which contract terminated on 30th September, 1904, up to which date he admits he is liable for the sum of £2 per week, amounting in all to £62 in respect of 31 weeks; otherwise, he denies the allegations in the said paragraph.

3. He says that he agreed to accept sand, and the cartage thereof from and by plaintiff company at the same price at which he was receiving supplies and delivery from other persons, at which rate plaintiff company is entitled to the sum of £37 6s., in respect of sand actually carted and delivered, otherwise he denies the allegations in paragraph 8.

4. On 31st October, 1904, he says he admits that he was indebted to plaintiff company in the sum of £3,232 5s. 5d., and further sum of £213 8s. 2d., in respect of certain indebtedness of Nannucci and Gaslioli, assumed by defendant and secured by the promissory note referred to in paragraph 11 of the declaration, the details of which former sum will appear from the annexure hereto, to which defendant craves leave to refer. At the said date plaintiff company had received on account of defendant sums amounting to £3,211 12s. 10d., save as is herein stated defendant denies the allegation in paragraph 9.

5. He admits that he occupied the office during January and February, 1905, under an agreement whereby he under-

took to pay £5 per month as and for rent, but otherwise denies paragraph 10.

6. He admits that he paid the promissory note under judgment of this Court, but as to the other allegations in paragraph 11 he refers to the allegations in paragraph 4 hereof.

7. He says that he admits that he became indebted to plaintiff subsequently to 31st October in the sums shown in detail in the annexure hereto; but otherwise he denies the allegations in paragraph 12, and craves leave to refer to the annexure hereto, but in especial in respect of the items, £75 6s. 3d. and £23 14s. 7d., appearing in the said account; he says he does not admit the correctness of the amounts, and further says they are claimed in respect of certain flour, which said flour, however, was imported by O. Z. Nannucci, and not by plaintiff company, and was so imported on behalf of O. Z. Nannucci and defendant as partners, and that plaintiff company is not entitled to claim in respect thereof in this action, and even if plaintiff company is so entitled to claim (which he denies), he says that he (defendant) is not personally and solely liable therefor.

8. He says that prior to the issue of summons he tendered to pay the sum of £62 14s., which is in excess of the amount to which plaintiff company is entitled, as shown by the account hereunto annexed, but notwithstanding, he is willing and herein again tenders to pay the aforesaid sum of £62 14s.

9. He admits the allegations in paragraphs 14 and 15, save that he denies that he acted wrongfully and unlawfully, but says that he was compelled to act as in the former paragraph 14 stated, in order to prevent plaintiff obtaining wrongfully and unlawfully a larger amount than he was entitled to out of the defendant's moneys.

10. He says that he purchased certain barrels of cement from plaintiff, but in or about December, 1904, plaintiff wrongfully and unlawfully refused to deliver them to him, and thereby he became entitled to and did treat the contract of purchase and sale as rescinded; he denies that plaintiff is in possession of 42 barrels of cement belonging to him.

11. He admits that he refuses to pay the sum of £189 2s. 9d., or any other sum than that hereinbefore tendered, but otherwise denies the allegations in paragraph 17. Wherefore, save as is herein tendered, he prays that plaintiff's claim may be dismissed, with costs.

Mr. Close (with him Mr. Swift) for plaintiffs; Mr. Benjamin (with him Mr. Struben) for defendant.

Some argument took place as to whether the accounts should be referred to a referee for report, but eventually it was decided to proceed with the case.

Oreste Zachariah Nannucci, managing director of Nannucci Ltd., said that

in March, 1904, Keating came in as a partner with two Italians, whom witness was supporting in carrying out a contract at Nazareth House. Keating afterwards paid out the other partners, and witness agreed to support him, it being arranged that all moneys were to be paid to witness. The firm continued to make advances, and to do all his clerical work, and he was also given a room as an office, for which a sum of £2 a week was charged. They bought a large plant for building, including a portable railway, two brick kilns, and other materials. The firm advanced money in connection with the building of a house for Mr. Fillis, and a number of personal advances were made to the defendant. These were outside the Nazareth House contract. The secretary of the company devoted nearly all his time to keeping the books. Keating went to England, and afterwards witness also went to England, and in London there was a proposition that he and defendant should form a partnership in certain matters. Some flour was ordered in connection with the partnership. Upon their return, they tendered for four or five jobs unsuccessfully, and it was then (in December) agreed that Keating should take over the concerns, and that they should have no further transactions together. The Nazareth House contract was finished in October. The firm continued to keep the books up to November, but only charged up to the termination of the Nazareth House contract. It was originally arranged that the bank interest should be charged on the advances, and that the firm should take half the profits. A signboard (Keating and Co.) was put up outside the office, and the cost of this—£3—was one of the items claimed for. This was paid for before the partnership ended, and was one of the matters for which the defendant was liable, as he took over everything. The flour transaction was taken over by Keating. The latter afterwards asked him to finance him in the flour transaction, but witness refused. When the bill became due, he again came to witness, and asked him to assist him, but he refused. Ultimately, however, witness agreed to give him a cheque for £73 from Nannucci Ltd. That was on the 28th December, and the flour did not arrive until February. In January there was a quarrel, owing to the defendant suing a party for a debt, after witness had been given to understand that the matter had been fixed up. The witness proceeded to depose as to certain correspondence, and went in detail through other items referred to in the declaration.

The witness was cross-examined at length by Mr. Benjamin regarding arrangements made in conversation, and the relations at different times between the parties.

Postea (November 29th).

Mr. Benjamin intimated that an agreement had been arrived at between the parties.

[Hopley, J.: I am very pleased to hear it.]

Mr. Close said that the terms of the settlement were that the defendant should pay to plaintiff the sum of £100, instead of the £69 he had tendered, together with the costs of this and previous proceedings, and that the £200 deposited in court should be released and paid to the plaintiff for that purpose.

Judgment was entered accordingly.

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

GOW V. STEWARDES, AFRICAN METHODIST EPISCOPAL CHURCH. 1905. Nov. 29th.

Mr. P. S. T. Jones moved, on behalf of the petitioner, who is the general superintendent of the African Methodist Episcopal Church, for an order directing the stewards of the church at West London to deliver up the keys of the church, and to show cause why they should not acknowledge the Rev. A. A. Morrison as the proper pastor, who had been appointed at the Beaufort West Conference to take the place of the Rev Mr. Spawn.

The respondents were ordered forthwith to deliver up the keys of the church, and to be interdicted from obstructing the services to be held by the Rev. Mr. Morrison until December 12, and a rule issued calling upon them to show cause by the 12th December why they should not be interdicted in future from obstructing the services conducted by Mr. Morrison.

PATERSON V. HEYDENRYCH.

This was an action brought by James E. A. Paterson, broker of Cape Town, to recover from Benjamin Heydenrych the sum of £75, which the plaintiff alleged the defendant agreed to pay on a certain settlement.

The declaration set out that the plaintiff was a broker and agent, of Cape Town, and the defendant was also of

Cape Town. In April, 1904, plaintiff and one Reginald C. de Heton were in partnership, and the partnership had a claim against one Louis Pitt and Wm. Twine on two promissory notes, amounting to £155. Judgment was taken out against Pitt, who approached Attorney Steer with a view to negotiations. The defendant was also a creditor of Pitt's. It was agreed between Steer, Pitt, and Heydenrych that De Heton should receive from Pitt a covering bond for his half-share. The defendant, it was further arranged, was also to receive a covering bond, ranking prior to De Heton's, for a sum sufficient to cover Pitt's indebtedness to him, and an additional £75, which he agreed to advance to enable Pitt to pay out Paterson, who declined to accept anything but a settlement. It was further agreed that so soon as a promissory note to Heydenrych and the covering bonds had been passed, the defendant was to pay the sum of £75 to Steer for the plaintiff. At an interview Steer, at the plaintiff's request, asked the defendant to hand over the cheque for £75, and the defendant refused until the documents were signed. Subsequently the documents were signed and completed, but the defendant declined to fulfil his part of the agreement. In consideration of the defendant's promise, the plaintiff stayed all further proceedings against Pitt, and had now lost his remedy, as both the defendant and De Heton had covering bonds, and Pitt's estate had become insolvent. Plaintiff claimed £75, with interest and costs.

The plea set out that about the end of April Pitt, who, in conjunction with his wife, was indebted to the defendant on three notes, amounting to £205 5s., applied to the defendant for a loan of £75, wherewith to discharge his liability to the plaintiff. The defendant agreed, on condition Pitt signed a note for the amount owing to the defendant interest thereon to the 1st June, 1904, interest due on a certain note for £105, and the said sum of £75 to be lent—in all, for £380 9s.; further, that the amount of the note be paid on the 1st June, 1904, and that Pitt and his wife should pass a covering bond to the defendant to rank prior to that of De Heton. It was further agreed, if the note was not paid on the due date, Pitt should pay £15 per month, or part of a month, as interest. The defendant denied he entered into the agreement as stated by the plaintiff. The note was not paid at its due date, and in August, when it was overdue, Steer applied to defendant for payment of £75, and the defendant refused to recognise plaintiff's right to receive any money from him, but expressed his willingness to pay to Pitt the sum of £45, being the balance of £75, after deduction of two months' interest agreed upon against re-

ceipt of the bond and the promissory note duly signed. The plaintiff had ample opportunity of taking action against Pitt before his insolvency. The balance of £45 had been appropriated by the defendant towards payment of interest on the note for £380 9s. Defendant prayed that the plaintiff's claim be dismissed with costs.

Mr. Searle, K.C. (with him Mr. D. Buchanan) for plaintiff; Mr. Burton for defendant.

James Edward Alexander Paterson stated that in April last he was carrying on business with De Heton. The firm held two bills made by Pitt to the amount of £155. About the end of April judgment was given against Pitt. On the 30th April the partnership was dissolved. Pitt approached witness, and subsequently witness met the defendant at Steer's office, when there were present De Heton and Steer. The defendant agreed to take a covering bond and a promissory note for money owing by Pitt, and Mr. De Heton also agreed to take a covering bond and a promissory note for his half-share. Seventy-five pounds was to be paid by the defendant to Mr. Steer for witness's half-share. At that time witness insisted on payment in cash, and there was no mention of the amount of Pitt's indebtedness to the defendant. The defendant agreed to pay the £75 to Mr. Steer for witness. If the £75 had not been secured in that way, witness would have pushed Pitt for the money, and he believed he would have got it. Witness refused to accept £45 after he had written several letters to Mr. Steer. Mr. Pitt's estate had since been assigned. Witness had not been paid his £75 or any part of it.

Cross-examined by Mr. Burton: The reason he pressed Pitt into court was to have all the accounts in before the dissolution of partnership. Witness did not pay the expenses of passing the bond. Subsequent to the arrangement Mr. Steer asked the defendant for witness's cheque, and he replied that he would furnish it when the documents were signed. The arrangement was not that Heydenrych was to advance the £75 to Pitt. Witness heard there was some delay in signing the note and passing the bond.

Arthur Wallace Steer, attorney, who acted for Paterson and De Heton, and recovered judgment against Pitt on two promissory notes, stated at the meeting in his office it was agreed that the defendant was to advance for payment to Paterson £75, that he was to take a covering bond for £500 to cover this advance and previous indebtedness due to him by Mrs. Pitt and Pitt himself, and De Heton was to get a covering bond for his half-share, plus interest, and that De Heton's bond was to be subsequent to that of the defendant. Witness took it that all parties under-

stood the arrangement. Upon that proceedings against Pitt were stayed. The delay in passing the bonds was due to some delay in signing the bill between Pitt and Heydenrych.

Cross-examined by Mr. Burton: When the £45 was offered by the defendant, witness did not remember him saying that that was the utmost he could give to Pitt.

Re-examined by Mr. Searle: It was clearly understood in the original arrangement that the defendant was to pay witness £75 for the plaintiff.

Louis Pitt gave corroborative evidence as to what took place at the interview.

Mr. Searle closed his case.

Vincent Alexander van der Byl, attorney for the defendant, said that Mr. Orpen called upon him in reference to the mortgage bond, and said that before they could pass transfer, Mr. Heydenrych would have to release the bond. Witness told Mr. Orpen he would have to consider the matter, as it might prejudice Heydenrych in the case then pending in regard to the transaction. Subsequently witness told Mr. Orpen that he did not think, under the circumstances, it would prejudice Heydenrych, and the latter then, upon witness's advice, signed the release.

Benjamin J. Heydenrych, the defendant, said he had certain promissory notes made in his favour by Pitt and his wife, prior to 1904. Some were made in favour of Twine, but witness held them all. They amounted to £205 5s. Pitt wrote witness in April, and afterwards called on him at Observatory, and asked for a loan of £500. This was about the 20th April. Witness refused to make the loan. Towards the end of the month Pitt called and asked for a loan of £75, saying it was to pay off a debt to Paterson and De Heton, and that the former wanted the money, and the latter had agreed to take a bond. Witness said that if Pitt showed him the property he would consider the matter. Witness saw the properties, and agreed to advance the money if Pitt would give a bond covering all his indebtedness. He asked Pitt if there were any other creditors, saying that if there were it might be undue preference. Pitt assured him there were no other creditors. Witness gave him the note, and read it to him, and told him to take it home and read it to his wife. Witness stipulated that the money must be paid at the due date; otherwise, that interest should be paid at the rate of £15 per month, or part. Pitt did not bring the note back. The first witness heard of the note being signed was in July, when Mr. Steer told him the note had been signed and the bond passed. He asked witness for the £75. Witness said he was not going to give Pitt the money, as the promissory note was two months overdue. Steer said he would get the bond, but witness said the bond was no good to

him. Witness said the most he would do would be to deduct two months' interest and pay £45. Mr. Steer said his client expected the money, but witness said he had nothing to do with Paterson. Witness did not remember the meeting referred to in Steer's office. He never agreed to give the £75 to Paterson. A couple of days before he got the demand he met Paterson, who said Pitt's estate was assigned. Witness said: "I am sorry for you, and I am sorry for myself, because we will both lose our money." This was in April. Witness signed the deed of assignment. He was a creditor of Pitt's independently of this. At that time Paterson seemed perfectly resigned, and said nothing about the claim for £75. Witness had made no claim on the estate in respect of the bond, or the new promissory notes.

Mr. Searle: You signed the deed of assignment, as a mortgagee? You saw the heading "mortgagees" on the deed?

Witness: I did not look at that. I simply signed after the last name that was on the paper.

You see there is a special list for mortgagees, and a special list for concurrent creditors?—That must have been put in afterwards.

Do you say you did not know you were signing as a mortgagee?—I didn't know that. I simply signed after the last name before me.

In further cross-examination, witness said he knew Paterson would not take a bond, and that he wanted the £75 in cash.

Mr. Searle: Pitt came to you because he was in difficulties? You knew he was in these difficulties?—He told me he wanted the £75.

You don't deny that you knew of these difficulties. People don't pay you 45 per cent. for money unless they are in difficulties?—He paid 60 per cent. to Paterson.

We haven't had that. We have it that he paid £2 10s. a month. There is no suggestion made that that is so, and you should not say so. Do you deny that you knew Pitt was in great difficulties? Do you suggest he was going to pay you between 45 and 50 per cent. interest if he were not in difficulties?—He came to me and asked me for a loan of £75 to square off Paterson, as there was a dissolution of the partnership, and they wanted the money.

And I put it to you he told you that there would be judgment, and his goods would be attached unless you advanced the money? That is what Mr. Steer, Pitt, and Paterson say?—No, no; he did not tell me anything of the kind.

You won't deny being present in Mr. Steer's office when Pitt, Paterson, and Mr. Steer were there?—I won't deny it, but I don't see why I should go there.

Further cross-examined, witness said

he told Mr. Steer he did not want the bond.

Re-examined by Mr. Burton: The £15 per month interest was not on account of the £75 only.

Reginald Charles de Heton, a former partner in the firm of Paterson and De Heton, deposed that the arrangement with regard to the debt of Pitt to the firm, was that it should be divided, Paterson to be paid out by Pitt, and witness to get a bond. Witness understood from Pitt that he was going to get the money from Mr. Heydenrych. Witness remembered a meeting at which Heydenrych, Steer, and Paterson were present. The defendant said he was willing to advance the money to Pitt, and that would go to pay Paterson's share; and that witness was to have a bond, which would rank after Heydenrych's, he (Heydenrych) having had previous transactions, which the bond would cover. Witness did not remember whether Pitt was at the meeting he had referred to; he did not think so.

Mr. Pitt (recalled) said he took the deed of assignment to certain of the creditors. Before he obtained the signatures, the words "mortgagees" and "concurrent creditors" were on the deed.

Malcolm Powrie said the words were on the document before the signatures were made.

Mr. Burton closed his case.

Mr. Burton, in the course of argument, said much was made in these cases of the apparently exorbitant interest. That question did not enter much into this case, and he would only say that here was exemplified the fact that the interest was not so great as it appeared. In many of these instances the security given for the advances was very low, and the person who advanced the money ran so much risk of losing the capital and the interest, that the large interest should not strike one as so very reprehensible. In this particular case that was exemplified.

Mr. Searle was not heard.

Maasdorp, J., said the whole of the case really depended upon what occurred at Mr. Steer's office, and with respect to that the conflict of evidence created really no difficulty in so far as the decision of the case was concerned, because on the one side the Court had the evidence of witnesses who stated what actually occurred at the meeting, and the only real contradiction there was was that of the defendant, who said that he was not present at such a meeting. It was not difficult to dispose of the evidence of the defendant in that respect, because it was impossible to doubt that there was this meeting, and that the defendant was present. It was an extraordinary lapse of memory—if such it could be called—because it appeared that the defendant remembered other little occurrences, and meetings with the parties in

this case very clearly, but if he could be guilty of such a lapse of memory as that, then his evidence as to some other material points in the case would not be of very great value. His lordship proceeded to review the evidence, and said that the defendant's signature to the deed of assignment as a mortgagee amounted to an admission that he had accepted the mortgage bond in question. Here, then, was a statement in writing by the defendant that he was the holder of this mortgage bond. That disposed of the whole case. He (the learned Judge) found that the sum of £75 was due from the defendant to the plaintiff, and judgment would be given for that amount, with costs.

[Plaintiffs' Attorney: A. W. Steer; Defendant's Attorney: V. A. Van der Byl.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

REX V. COLLIERIES. { 1905.
 { Nov. 30th.

Public place.

A shop is not a public place.

Maasdorp, J., mentioned a case that came before him as Judge of the week, in which Petrus Johannes Colliers was fined £1 or 14 days' imprisonment for using obscene language in a public place. The evidence showed that the language had been used in a shop, and the conviction must therefore be quashed.

Ex parte THE EAST LONDON PINE MILK CO.

Mr. P. S. T. Jones moved for the liquidation of the company and the appointment of a liquidator to the East London Pine Milk Supply Company.

Order granted, placing the company in liquidation and appointing Mr. A. R. Watson as liquidator, with the usual powers.

ADMISSION.

Mr. P. S. T. Jones moved for the admission of Donald Grant Hodge, as an advocate of the Supreme Court, and that the oath should be taken before the Registrar of the Eastern Districts Court.

Granted.

Ex parte COETZEE.

Mr. Watermeyer moved for the appointment of a curator to the petitioner's husband, who, as a farmer of Aliwal North, there was reason to believe, was of unsound mind.

Floris Coetzee was appointed as curator bonis, and David Stroyen as curator *ad litem*, pending a further order of Court.

THE "STAG" LINE LTD. V. { 1905.
TABLE BAY HARBOUR { Nov. 30th.
BOARD. { Dec. 4th.

Harbour Board—Graving Dock—Demurrer.

The plaintiff company agreed with the defendants to hire the use of their Graving Dock for the purpose of painting one of plaintiffs' vessels, from March 27th. On that date plaintiffs were prepared to dock their vessel, but another vessel having meanwhile been placed on the slip, the plaintiff's ship was not docked till April 10th. Plaintiffs now claimed demurrage.

Held, that as, under all the circumstances, the Harbour Board had not been guilty of any avoidable or unreasonable delay, they were not liable for demurrage.

This was an action brought by the plaintiff company to recover £1,000 damages for wrongful detention.

The plaintiffs' declaration said that the company was duly registered in England, having its office at North Shields, and was the owner of sundry steamships. The plaintiffs were owners of the S.S. *Clematis*. About 20th March, 1901, the plaintiffs, by the agents at Cape Town of the said steamship, entered into an agreement with the defendants through the Dock Superintendent, subsequently specifically approved of by the Board, whereby the defendants undertook and agreed to take the *Clematis* into the Graving Dock for painting on the 27th March, 1901, upon the following terms and conditions.

1. The vessel shall be taken into the Graving Dock by and under the direction of such person as may be appointed thereto by the Board, in the presence of the master or his duly appointed representative.

2. So far as the vessel is declared by the person in charge to be properly placed on the blocks, the Master, or his

duly appointed representative, shall forthwith satisfy himself thereof, and, failing to point out any defect in such placing to the superintendent or his representative, the vessel shall be considered to have been properly and safely placed on the blocks.

3. The Board shall not be liable for any damage which may be sustained by the vessel, and the vessel shall not be liable for any damage which may be sustained by the dock or its appurtenances, either in docking or undocking.

4. The Board shall not be responsible for any detention of vessels in the Graving Dock through stress of weather, disarrangement of machinery, block of work, or from any other cause whatever.

5. Every vessel using the Graving Dock will be charged at least one day's rent, in addition to the charge for docking and undocking.

6. Notice in writing must be given by the master or agent, when the vessel is ready for undocking, but such notice will not be accepted by the Superintendent until the vessel has finished her work, and the dock cleaned, cleared, and ready for flooding; if such notice is served before ten o'clock a.m., the day on which such notice is given, Sunday's excepted, will be considered the undocking day. Amongst the lawful regulations regarding the said Graving Dock made by the Board, under the Act aforesaid, was the following: "On failure to place a vessel in the Graving Dock or on the patent slip on the day appointed for that purpose, such vessel shall, if the dock or slip be required, lose her turn on the list, and the owner, master, or agent of such vessel shall be liable to pay to the Board the expenses, if any, which may have been incurred on preparing the dock or slip for her reception," and the said regulation was in contemplation of the parties to the aforesaid agreement and binding upon them. On March 23 an agreement on these terms was entered into between the defendant and persons representing a vessel named the Matabele, but the day appointed for the Matabele to be placed in the Graving Dock was the 24th March, 1901. The Matabele lost her turn, and was taken in on the 27th March in place of the Clematis. The Clematis was detained for fourteen days, and the plaintiff sustained damages in the sum of £1,000, in consequence of such detention and claimed that amount, with costs.

The defendants' plea denied that any agreement to take the Clematis into the Graving Dock for painting on the 27th March was entered into between the plaintiff and the Dock Superintendent, and that any such agreement was subsequently specially approved by the Board. On the 20th March, 1901, the Dock Superintendent signed the following document: "Terms on which the

Table Bay Harbour Board engage to place the Clematis . . . in the Graving Dock" on the following condition, which was signed by the agents of the plaintiff: "We agree to the above condition," and the document contains in the margin the words, "cleaning and painting only." Application to have the Matabele, which was represented as a vessel carrying mails, and as fitted as a passenger boat, dry-docked, was made prior to the month of March, 1901. The Matabele arrived in Table Bay on the 27th March. The dry dock was then partly occupied by a vessel lawfully and properly placed there previously. The Clematis required the whole dock, which was not available, whereas the Matabele only required that portion of the dry dock which was available. Defendants contended that they were not legally bound to take such other vessel out of the dry dock to make room for the Clematis. The Matabele was placed in the said portion of the dry dock on the 27th March, and remained there until the 9th April. They denied that the plaintiffs had any legal right to claim that the Clematis should be docked on the 27th of March, or for the fourteen days thereafter. The defendants denied that they were liable for any part of the sum claimed, and prayed that the plaintiffs' claim be dismissed, with costs.

Mr. Close (with him Mr. D. Buchanan) for plaintiffs; Mr. Searle, K.C. (with him Mr. Bisset) for defendants.

Mr. Close read evidence taken on behalf of the plaintiffs on commission, bearing out the allegations made in the declaration.

Mr. Searle called

John Veall, shipping clerk in the employ of Messrs. Thomson, Watson and Co., agents, for the steamer Matabele. He said he remembered receiving a letter in February, 1901, relative to the arrangements for dry-docking the Matabele in March. This was from Rennie and Sons, asking them to impress upon the authorities the necessity of dry-docking the Matabele, or otherwise the ship would have to cease to run, and the mail service would have to be stopped. Witness saw the Dock Superintendent and the letter was shown to the Dock authorities. On March 23, a telegram was read from Durban stating that the vessel had sailed from Natal, and was due to arrive on the 26th. Witness thereupon wrote notifying the Dock authorities. The Matabele arrived on the 27th, and it was found that she required somewhat considerable repairs—more than witness had supposed. She was in dock for nearly a fortnight, leaving on the 9th April. The firm agreed to pay from the 25th March. This was because they originally engaged the dock from the 25th. The vessel carried the East Coast mails during the war. On the 27th, the conditions were signed.

Cross-examined by Mr. Close: Captain Stephen told him the dock would be available on the 25th; witness looked upon that arrangement—made on the 23rd—as binding. Witness held that they had engaged the dock from the 25th until the vessel arrived and had been repaired. It was expected before the arrival of the vessel that the repairs would be completed in a couple of days. He considered on the morning of the 27th that the vessel was going in under the arrangement that the dock was at their disposal from the 25th.

Wm. Stephen, Port Captain and Dock Superintendent in Table Bay, said that when the Clematis came in, the Bay and Docks were very congested; over forty vessels were waiting to be docked, some of which had been waiting for months. The Goodwin arrived on the 11th January, and came into dock on the 2nd March, being berthed outside another vessel. She had afterwards to be shifted to the entrance to the Graving Dock, where she remained until the 4th April. If it had not been for the Matabele, witness would have had her shifted from the Graving Dock entrance. Ordinarily she would not have stood in the way of vessels being dry-docked. Application was made to dock the Clematis, but witness never at any time stated that she should get in before the Matabele. No particular date was stated. He could not recollect exactly what took place; but, presumably, when he was approached on the matter, he said the Clematis would be docked as soon as possible. Witness never fixed dates for a vessel going into dock; he always made the condition, "if possible." Witness never said the dock was engaged for the Clematis on the 27th March. Some time previously he had been approached in reference to the Matabele. He believed the last witness showed him the letter from the Matabele's owners. He did not give the Clematis the dock on the 25th, because he knew the Matabele was coming, and would, in the ordinary course, arrive shortly. Furthermore, to prepare the dock for the Clematis would involve expense, and take some time, as she required the whole dock, and the Goodwin would have to be shifted and other preparations made. The Matabele required only half the dock. Witness had no knowledge until the Matabele was in the docks that the repairs would take so long. If he had thought the repairs would take nine or ten days, he would possibly have made different arrangements. Witness considered it a case where more than ten days should be given. He acted for the best in the interests of everyone. The terms of the Clematis's charter party were never mentioned to witness.

Cross-examined by Mr. Close: Witness did not take up an altogether offi-

cial attitude over the docking of the ship; he denied that he fixed a date for the docking of any ship.

Mr. Searle closed his case, and counsel were heard in argument on the facts.

Cur. Adv. Vult.

Postea (December 4th).

Maasdorp, J.: The plaintiff company allege in their declaration that on March 20, 1901, they entered into an agreement with the defendants, whereby the defendants undertook to place their ship (the Clematis) in the Graving Dock of the Table Bay Harbour for cleaning and painting on March 27, upon the terms and conditions contained in the printed form of contract, which was duly signed by all the necessary parties. The plaintiffs were on the appointed day prepared to place their ship in the dock, but the defendants failed to take her in, and delayed doing so until April 10. They now claim as damages sustained by them, by reason of the delay of fourteen days, the sum of £1,000. It appears there was a prior undertaking on the part of the Harbour Board to place another ship (the Matabele) in the Graving Dock on March 25. That ship did not arrive until the 27th, when she was docked, and she was not undocked until March 9. It was the presence of the Matabele in the Graving Dock which prevented the Clematis going in. And in anticipation of this fact being set up as a legal impediment to docking the Clematis on the 27th, the plaintiffs proceed to state that upon the failure of the Matabele to go into the Graving Dock on March 25, which was the day appointed for the purpose, she lost her turn on the list in accordance with Regulation No. 45, sub-section D of the Harbour Board. It is alleged that if this regulation had been observed, the Graving Dock would have been available for the Clematis on March 27. The defendants deny that they agreed to place the Clematis in the Graving Dock on March 27, and say that the dock was not available for that ship until April 10, being occupied by the Matabele until that day, but they admit that they engaged to place the Clematis in the dock in terms of the printed document which was put in at the trial. The first point to decide is whether there was a definite agreement on the part of the defendants to dock the Clematis on the 27th. It appears from the evidence of Captain Stephen, the Dock Superintendent, that when he was approached in the matter by the agents of the ship, which had not then arrived, he entered into the agreement mentioned, pointing out to the agents that he had already undertaken to place the Matabele in the dock on March 25, and he was under the impression that she would be disposed of in a couple of days, in which

event the dock would be available for the *Clematis*. He says he never definitely undertook to dock the latter ship on the 27th. This is the only direct evidence in respect of the terms of the agreement at the time it was entered into, the agent who made the contract on behalf of the ship not having been called at the trial. Captain Stephen said he never enters into an engagement by which he undertakes to put any vessel on an appointed day out of the dock to make room for another, and he did not do so on this occasion. I am bound, under the circumstances, to take the evidence of Captain Stephen as conclusive upon this point, there being no direct contradiction of it. Captain Stephen is supported in his statement by a passage in a letter written by the agents of the *Clematis* on April 1, to the following effect: "The steamer *Clematis* arrived here on the 24th ult., the Dry Dock having been booked by the Matabele from the 25th, which latter steamer we were informed would leave the dock again on the 27th ult." There is no pretence here that the 27th was fixed in express terms as the day for the docking of the *Clematis*. In the printed undertaking no date is fixed. I come to the conclusion that the plaintiffs have failed to prove that there was an agreement to place the *Clematis* in the dock on the 27th. The defendants undertook, on the 20th, to place the *Clematis* in the dock, and I am of opinion that they then entered into a binding contract to do what was required within a reasonable time, having regard to the regulations of the Harbour Board and the ordinary course of business at the port. These agreements are entered into in contemplation of the regulations and the ordinary course of business at the port. It would appear that in the ordinary course, it would be reasonable to expect that a ship would be docked within such time as the necessary arrangements can be made if the dock is available, or so soon after as the dock becomes available. Independently of the consideration of the further question raised by the plaintiffs, which I still have to deal with, it would seem that the Matabele, which had a prior claim, and had to be disposed of, occupied the dock until April 9. The work on the Matabele took longer than was anticipated, and the dock was not available for the *Clematis* until April 10, when she was actually docked. But it is contended on behalf of the plaintiffs that in calculating the reasonable time within which the defendants should have carried out their undertaking to dock the *Clematis*, the alleged prior rights of the Matabele should not enter into the calculation, because she had, under the Harbour Board regulations, forfeited her claim to be docked through her failure to be placed in the Graving

Dock upon the appointed day. The regulation in question is to the following effect: "On failure to place a vessel in the Graving Dock on the day appointed for that purpose, such vessel shall, if the dock be required, lose her turn on the list, and the master shall be liable to pay to the Board the expenses, if any, which may have been incurred in preparing the dock for her reception." It seems to have been contemplated by the regulations that a book should be kept in which the names of vessels applying for the use of the Graving Dock should be entered, and that such vessels should be placed in the dock in the order in which they appear on the list, providing all the prescribed conditions were fulfilled. The above-mentioned rule provides for the forfeiture of this right of precedence under certain circumstances. It was contended for the plaintiffs that the moment the vessel fails to be placed in the dock on the appointed day she as a necessary consequence lost her place on the list, and the next vessel could claim the right to go in. If the regulations were strictly construed, a vessel would lose its turn on the list even where the failure to go into the dock arose from no fault on her part, and, indeed, when the failure was due to default on the part of the Harbour Board. That could never have been intended. The regulation seems to me to provide for a forfeiture of a right and for a penalty upon failure to enter the dock through default of any vessel as a matter of contract between the Harbour Board and that particular vessel, and in no direct concern under its contract of any other vessel on the list. In the analogous case of forfeiture provided by contract, the rule is that a forfeiture of rights should not be too readily assumed, and in this case, I think, it was in the discretion of the Dock Superintendent to take into consideration all the circumstances before he pronounced that the Matabele had lost her right to go into dock. I can find nothing in the evidence to show that he exercised his discretion in an unreasonable manner, even if it were in the jurisdiction of the Court to interfere with his discretion, a point which it is unnecessary to decide. I am of opinion that the Harbour Board placed the *Clematis* in the Graving Dock in such reasonable time as they had by their contract undertaken to do, when they put her in after the dock was vacated by the Matabele on April 9. That being my view of the case, it is unnecessary to decide whether the measure of damages contended for in the declaration is the correct measure to apply in a case like the present. Judgment must be given for the defendants, with costs.

[Plaintiffs' Attorneys: Finlay and Tait; Defendants' Attorneys: Reid and Nephew.]

SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

RIX V. SEARLE AND VON WITT. 1905.
Dec. 1st.

This was an application to have the second respondent interdicted from carrying on business as a draper in the same building as the applicant, in breach, it was alleged, of a lease, and for an order calling on the first respondent to show cause why he should not be restrained from letting the premises at the corner of Frero-street and Victoria-road, Woodstock, as a draper's shop. In the lease which the applicant entered into with the former owner, John Henry Pfuhl, there was a clause that the lessor should not let a shop in the same building for a similar business to that of the applicant. Some months ago the second respondent opened a draper's business, known as the "Why go Further Store," and the applicant sought to establish his right under that lease.

Mr. Uppington was for the applicant, Mr. Burton was for the first respondent, and Mr. Benjamin for the second respondent.

During argument,

Hopley, J. asked Mr. Benjamin if the parties could not fix on some measure of damages until the action was decided. Perhaps a sum of, say, £50 a month could be agreed upon as damages if applicant succeeded in his action.

Mr. Benjamin said that the usual procedure was to have an account taken.

[Hopley, J.: Then you may argue that it doesn't follow that people who bought at your client's shop would have gone to the other.]

Mr. Benjamin said he did not think that view had ever been taken by the English Courts.

Hopley, J., remarked that he thought the shortest way would be to argue on some measure of damages.

Mr. Benjamin argued that no case had been made out for the granting of an interdict. He contended that a contract between two parties could not be held as binding a third party who had taken a place innocently, and ignorant of the fact that there was such a contract. Mrs. Von Witt had made extensive preparations, and he urged it would be unjust now to compel her to close, when she had acted throughout without knowledge of any restriction.

Mr. Burton said the position of his client was an unfortunate one. He had purchased the property *bona fide* in the insolvency proceedings, subject to the two leases. He admitted he was bound by the lease, but he was helpless to do anything in the matter. He placed no obstacle in the way of carrying out the contracts, and, under the circumstances,

he (Mr. Burton) submitted that costs should not be granted against him. It was true Mr. Searle was the landlord, but he had done nothing; he could do nothing. He was prepared to agree to the application for an interdict.

Hopley, J.: This is an interesting application, and very interesting points of considerable difficulty are raised by it, and it does seem to me it is very difficult to make any order at the present stage without possibly damaging the legal rights of some of the parties. It would appear that Mr. Pfuhl, who is now, I believe, insolvent, made a lease with Mr. Rix, who, for a very large rent, leased a shop and obtained a monopoly in the particular building to carry on the business of a draper. Subsequently to such lease Mr. Pfuhl seems to have entered into, with the Von Witts, another lease, the terms of which were drawn up by Mr. Von Witt, letting to him, for his wife, in general terms, a certain part of the building as a shop. Now, of course, Mr. Pfuhl ought in that to have seen that the restriction about not carrying on a draper's shop was imposed. It is said, but there is no affidavit on the point, that he drew the attention of the Von Witts to the terms of Rix's lease, and that they knew perfectly well that they could not carry on the business of a draper. Well, if that is so, it will very materially affect the result of any action hereafter brought by Rix against the Von Witts, but it is very difficult to say at present how that matter stands, because Mr. Pfuhl has not come forward, and the Von Witts have denied that any such notice was given them. As to Mr. Searle, his position is, as his counsel has said, one rather to be sympathised with than otherwise; yet he may find—I do not say he will, at present—that having purchased the property with the knowledge of these two leases, though they are not on the face of them inconsistent, but still of such a nature that they might at any future time become inconsistent if one of the lessees chooses to enforce his rights—he may find, in spite of being absolutely innocent in the matter, that having stepped into the shoes of the insolvent, he has an action for damages against him. I do not say there is a cause of action against him; I do not say there is not. I would not like to decide that point. But with regard to the Von Witts, it seems to me their being stopped must depend very largely on whether they had this notice. It is said they should be stopped whether they had notice or not, but I do not feel inclined, on an interlocutory motion, to give judgment on that somewhat complicated and important point, for they hired the shop on general terms, and they say they acted within their rights in using it as a draper's shop. Ought they under such circumstances to be interdicted from carrying

on a business which is no longer in contemplation, but which is now, I understand, actually in existence as a going concern? Although Mr. Rix's right is clear in a certain way, the remedy does not seem to me to be equally clear—whether he can come to this court and ask for an injunction to stop the Von Witts carrying on a drapery business, or whether he is confined to an action for damages against somebody or other. Another point not so clear is whether he is suffering irreparable damage. As far as I can see it won't be beyond the powers of the Court, if the Von Witts are acting wrongly, to assess a sum of damages which will handsomely reward Rix. It seems to me it would be wiser to leave this matter for adjustment on a subsequent action for damages than to make a peremptory order closing up Von Witt's business, which it is quite possible Von Witt may establish a right to continue. I think, therefore, the balance of convenience would be not to grant the present application, but to leave the parties to decide the matter by action, suggesting that it should take place as soon as possible. The matter ought not to be delayed, because of course it is important to Mr. Rix, if he has the right he claims, that Mrs. Von Witt should cease to carry on the business, while, on the other hand, if Mrs. Von Witt has no right to be there, the damages will be running against her. There will, therefore, be no order on the present application. Costs will be costs in the cause.

FEBRUARY V. JOHNSON.

This was an action to compel the defendant to pay the purchase price and take transfer of certain property.

The declaration set forth that the plaintiff was a builder and contractor, and the defendant a barman. On the 13th July the parties entered into an agreement whereby the plaintiff agreed to sell and the defendant to purchase a certain piece of land, at Fairview, for the sum of £270, of which £250 was to be paid in cash against transfer and £20 to remain on a promissory note payable two months after the sale. Plaintiff had tendered transfer, but the defendant refused to take transfer, and to pay the purchase price. Judgment was claimed for the £270, and costs of transfer and of suit.

The defendant pleaded that there had been no sale. He said the plaintiff approached him, and there were negotiations which fell through. One McLeod, acting on behalf of the plaintiff, did offer him the property for £270, whereupon the defendant said he would consider it, and see whether he could raise the £250, and in case he was successful he might be able to purchase the ground for himself. He was unable to

raise the money, and did not purchase the property.

Mr. Gardiner for plaintiff; Dr. Greer for defendant.

Simon Marcus, conveyancer, said he acted on behalf of February. He gave the defendant a refusal. The defendant offered £250 for the property, but finally he agreed, at a meeting in witness's office, to buy the ground for £270. Witness offered to make an arrangement with regard to a bond, but defendant said he had made arrangements for raising £250, and witness said the balance should remain on bond. He did not have the diagrams to put the agreement into writing. Witness repeated the arrangements to the defendant three times. On the 17th, witness wrote confirming the conversation. The money was not paid, and on the 26th July a letter of demand was sent to the defendant.

Cross-examined by Dr. Greer: Witness did not go to see the defendant with Christians before the 11th July. The defendant told witness that Mr. Macley was giving him £250, and at the same time the defendant said he had £150 of his own. Witness had no doubt in his mind that the defendant understood he bought the property. Because he had not the diagrams, he did not put the bargain in writing. It was a usual practice in his office to send a letter of demand within three days if a purchaser failed to sign the documents.

Moses February (plaintiff) stated that Christians introduced him to the defendant with a view to a disposal of the property. The defendant was satisfied with the offer of £300, and told witness he would have to wait till Mr. Macley saw the property. Subsequently the last witness was instructed to take £290 for the property.

Cross-examined by Dr. Greer: After Johnstone sent the letter offering £300, Mr. Macley came out to see the property.

Rufus G. R. McLeod, attorney for the plaintiff, said he heard Marcus say to Johnson: "It is an understood thing that the price will be £270, £250 cash and a promissory note for £20." This he repeated later.

Mr. Gardiner closed his case.

Peter Johnson (the defendant) said that in June there were negotiations between witness and February for the purchase of the property. He went out and saw it, and February said he would take £350 for it. Witness said it was too much for him, but that he would see Mr. Macley about it, with reference to raising a bond. Early in July witness saw Macley, who went to see the property. Witness got a letter from Christians offering the property for £290. Before he saw Macley, he wrote a letter offering February £300. On the 12th July witness saw Marcus, and told him that he

must wait until witness had seen Macleay. On the 13th he went to McLeod's office and saw Marcus. He told Marcus he had seen Macleay, but the latter had talked of giving £200. He said, however, that if Macleay would advance him £250, he would purchase for £270, and would pay the £20 by instalments. Marcus said he knew Macleay, and that it would be all right. He asked witness to sign the declaration, but witness said he could not, as he had not got the money. On the following Wednesday, Marcus and February came to the hotel to see witness. Witness said he was too busy, and that they were not to come to the hotel. Witness said they must wait until Macleay had decided. Witness refused to take a note which Marcus had, but the latter left it on the counter while witness was away tapping some beer. Next day witness sent his wife to McLeod's office to tell them that he had not agreed to purchase the land.

Cornelia Johnson, wife of the last witness, and Cornelius Christian gave evidence corroborating certain of the statements made by the defendant.

R. Macleay, farmer, said Johnston came to him in connection with the matter. He told Johnson he would give £200, but that it was not a property he would advise him to have anything to do with.

After hearing Dr. Greer in argument on the facts, and without calling upon Mr. Gardiner,

Hopley, J., said they found in this country so frequently that professional men talked—he had almost said gabbled—over their business without being prudent enough to make a memorandum, which they could easily get initialled, embodying the terms of an agreement. They had it in their power to keep an office diary, which would frequently settle points, and save the Court many hours of work. They could easily put into writing the terms of any arrangement, instead of which they trusted to conversations and tricky memories, with the result that matters came before the Court, and there was a huge conflict of evidence, and a great waste of time. All he could say was that he wished to goodness he could see some sort of sign in this community of an improvement in regard to this, so that business should be carried on in a more proper, conventional, decent style. A prudent professional man would always, he thought, see he had writing. His Lordship proceeded to refer in detail to the evidence given in the case, and said that, after hearing the evidence, he had no doubt that the transaction was completed, and that the defendant did agree to buy the property. Judgment would be given for £270, with costs.

[Plaintiff's Attorney: R. G. McLeod]

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice, the Hon. Sir JOHN BUCHANAN.]

FOURIE V. HENDRICKS. } 1905.
} Dec. 4th.

This was an action to recover the cost of the keep of certain horses.

The plaintiff's declaration was as follows:

1. Plaintiff resides at Cape Town, at which place defendant likewise resides, and carries on the business of a livery stable proprietor.

2. On or about August 23, 1905, plaintiff purchased and defendant sold for the sum of £85 a certain pair of horses, which he (defendant) warranted good and sound, and capable of doing Garlick's delivery work, that is to say, certain delivery of goods which plaintiff had contracted to perform for one Garlick.

3. Thereafter on or about August 24, 1905, plaintiff discovered that the said horses were not good or sound or capable of doing the said work, but on the contrary that the said horses were unsound in their legs, being able to stand only with difficulty the next morning after being driven for twelve or fifteen miles, one of them becoming quite stiff and walking with great difficulty, and the other having his off foreleg much swollen, both animals being unfit for use.

4. By reason of the breach of warranty aforesaid plaintiff became entitled to return the said horses to defendant, and to receive repayment of the purchase price; and on or about August 25 he did so tender the said horses, but defendant wrongfully and unlawfully refused to receive them or return the said purchase price.

5. Plaintiff has incurred on and since August 24 aforesaid, and is still incurring expense in the maintenance of the said horses at the rate of eleven shillings per day.

6. Plaintiff is still willing, and herein tenders to re-deliver to defendant the said horses upon satisfaction of his claim herein.

Alternatively the plaintiff says:

7. He craves leave to refer to paragraphs 1, 5, and 6 hereof.

8. On or about August 23, 1905, he purchased and defendant sold a certain pair of horses for the sum of £85.

9. Thereafter on or about August 24, 1905, he discovered that the said horses were not sound of limb, and that the next morning, after being driven for twelve or fifteen miles, they could stand only with difficulty, one of them having become quite stiff and walking with

great difficult, and the other having his off foreleg much swollen, both animals being unfit for use.

10. The fact that the said horses were so unsound in limb was at the time of the purchase latent and unknown to plaintiff.

11. By reason of the said unsoundness plaintiff was entitled to return the said horses to defendant, and to receive payment of the purchase price, and on or about August 25, he did so tender the said horses, but defendant wrongfully and unlawfully refused to receive them or to return the said purchase price.

Wherefore, subject to the tender hereinbefore made, plaintiff prays:

(a) Judgment for the sum of £85, together with a sum in respect of the maintenance of the said horses calculated at the rate of eleven shillings per day from the 24th August inclusive. (b) Interest *a tempore morae*; (c) alternative relief, together with (d) costs of suit.

The defendant's plea was as follows:

1. The defendant admits paragraph 1 of the declaration.

2. As to paragraph 2 thereof, he admits the said sale, but denies the alleged guarantee. He says that the plaintiff purchased the said horses after having carefully examined them, and that, in reply to an inquiry by the plaintiff as to their condition, the defendant informed him that he would give no guarantee, but sold the animals as they then were.

3. The defendant has no personal knowledge of the allegations contained in paragraph 3 of the declaration, and puts the plaintiff to the proof of them.

4. As to paragraph 4, he admits the said tender and his refusal to accept it, but otherwise denies the said paragraph.

5. He has no knowledge of the matters pleaded in paragraph 5.

6. As to the plaintiff's alternative claim, the defendant craves leave generally to refer to and repeat the allegations above set forth.

7. He specially denies paragraph 10 thereof, and says that even if it be true, as alleged, that the horses were subsequently found to be unsound, it was clearly understood and agreed at the time of the said purchase that the said horses were sold as they then were, and that the defendant would not be responsible for any defects which might subsequently be discovered in them.

Wherefore the defendant prays that the plaintiff's claim may be dismissed, with costs.

Mr. Benjamin (with him Mr. Sutton) for plaintiff; Mr. Burton for defendant.

Jonathan Adrian Fourie (plaintiff) said that some time ago he secured a cartage contract from Messrs. Garlick. He called on the defendant, and witness agreed to take two horses, pro-

vided that they were useful, as well as ornamental. Witness asked whether Hendricks guaranteed the horses, and the latter replied: "If I do business with a gentleman, I always like him to come back to me." Witness purchased the horses. Two gentlemen of the S.P.C.A. drew his attention to a splint on the gelding's near leg, which they said would not affect the horse. Witness was practically satisfied, and bought the horses. Witness wanted to give a postdated cheque for the carriage, and the defendant said he would like to have a cheque in date for the horses. Subsequently he found that something was wrong with the horse, and he stopped payment of the postdated cheque; but as it had been parted with to a third party, he had to pay up. The horses were sent from Rosebank to Cape Town and back, and next morning he found the gelding lame and the mare stiff. Witness had not been able to use the horses, and from the 9th September to 30th November he paid 5s. per day for the stalling of the horses. Witness told the defendant the horses were no good, and the latter told him to bring them up and he would exchange them. Witness refused to do so, and on returning them, the defendant refused delivery.

Cross-examined by Mr. Burton: The gelding was not lame at present, but the mare was very stiff. He was of opinion that it would have been impossible for two S.P.C.A. officials, who were present at the time of the sale, to have heard the defendant say that he would not guarantee the animals. The horses left Cape Town in a landau for Rosebank on August 23, at 6.55, but at what time they were stabled that night he did not know.

John Forrest. M.R.C.V.S., Edinburgh, said that when he saw the animals next day after they arrived, he rejected them. On November 30 he drove the mare slowly from Rosebank, and when she reached the stables, she was much distressed.

Archibald Mitchell, in the employ of the plaintiff as manager to the stables, stated that he had stalled the plaintiff's horses at Rosebank from the 9th September to 30th November. His charge was 2s. 6d. per day per head. During the time witnesses had the horses the mare could not have been used; the gelding would have required a couple of months' rest. The mare was very unsound.

Cross-examined by Mr. Burton: Witness rented the stables at Rosebank. He had no horses of his own at present. When witness saw them first they were unsound. Anyone that understood horseflesh must have known the horses were unsound. The gelding was limping, suffering from a sprained tendon, on the day it was delivered. Witness sent the gelding out to work that night,

because the sprain might have not gone back on it.

Ahmed Allie, formerly in the employ of Hendricks, said he knew the horses in question. The gelding was lame, and the mare was stiff on her return from Messrs. Liberman and Buirski.

Cross-examined by Mr. Burton: Witness was not dismissed for taking two of Hendrick's whips.

Mr. Benjamin closed his case.

Jaberdien Hendricks, the defendant, denied that the plaintiff said he wanted horses to do Garlick's work. The plaintiff was satisfied with a trial drive, and witness refused to give a guarantee. The plaintiff accepted the horses without a guarantee. Witness never noticed anything wrong with the gelding in his stable. The mare usually did Liberman and Buirski's work, and there was nothing wrong with her. It was raining on the night the horses were sent to the plaintiff. When they were returned in three days they were all right.

Cross-examined by Mr. Benjamin: Witness sold the horses as they were without a guarantee. When the horses were returned to him, as far as he could say, they were free from lameness.

Joel Bull, inspector, in the employ of the S.P.C.A., said he was at Hendrick's place with another inspector, when the plaintiff came up. After the horses had been driven around, Hendricks said he never guaranteed horses. At the request of the plaintiff, witness looked at the horses, and told him the horses were in fairly good condition. The splint was the only thing witness saw in the gelding, and the plaintiff said that did not matter if it was set.

Cross-examined by Mr. Benjamin: Hendricks distinctly said after the cheque was paid that he would not guarantee the horses.

Fred Howcher, another inspector, gave similar evidence.

John Williams, a coloured man, formerly in the employ of Fourie, said that on August 23 Louis took the horses out of the stable at about seven o'clock, and did not return them until two the following morning.

Mr. Benjamin asked leave to call Louis on this point.

Louis said he was in the employ of Fourie. He remembered driving to Rosebank, and upon returning he outspanned. The last witness was then tipsy. Upon returning from taking the people to the theatre, he outspanned. He drove slowly back the second time, because the horses were stiff, and he arrived late at the station.

The witness Venter (recalled) said that he was at the stables when the horses were brought back on both occasions on the night referred to. The first time they came home after eight, and the second time between 12 and 1.

Mr. Benjamin having been heard in argument on the facts, the Court, with-

out calling upon Mr. Burton, gave judgment for the defendant, with costs.

Buchanan, A.C.J., said that it was clear—even on the plaintiff's own evidence—that there was no warranty. But it was further contended that the defendant would still be responsible if at the time of sale there was a latent defect in the horses known to the seller. As to the gelding, he (the Acting Chief Justice) was inclined to say that the sprained tendon found afterwards by Mr. Forrest was the result of the user of the horses by the plaintiff that night, and that at the time of the sale the horse was sound but for the splint which was pointed out to the plaintiff before he bought. With regard to the mare, there was no evidence of the existence of rheumatics before the sale, and he did not think it was anything but what might reasonably be expected to find that after the mare's treatment on the night in question, she should have suffered as Mr. Forrest deposed she did when he examined her. There was an express repudiation of any warranty, and there was no knowledge proved on the part of the seller of any latent defect. Judgment would be for the defendant, with costs.

[Plaintiff's Attorney: G. Trollip; Defendant's Attorney: J. F. E. Bernard.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.)]

REX V. HAM AND OTHERS. { 1905.
Dec. 5th.

Betting-house—Act 36 of 1902—
Horse racing—Jockey Club
of S. Africa.

The appellants authorized the use of a totalizator for purposes of betting at a race meeting held by them, but they had no licence from the Jockey Club of S. Africa and, although they professed in their advertisements of the race meeting to act under the rules and regulations of the Jockey Club,

they allowed jockeys, who had been warned off the course, and horses which had been disqualified by the Jockey Club, to run at such race meeting, in contravention of such rules and regulations.

Held, that the appellants had been properly convicted of a contravention of the 16th section of Act 36 of 1902, and that they were not protected by the 21st section of the Act.

This was an appeal from a judgment of the Assistant Resident Magistrate of Cape Town, who had convicted Ham and a number of others of a contravention of Section 16 of Act 36 of 1902, in that on September 16 last they had wrongfully and unlawfully opened, kept, and used at or near Goodwood Park Estate a certain house or building, known as Goodwood Park Club, as a betting house or place within the meaning of Section 16 aforesaid.

Mr. Burton (with him Mr. Lewis) was for appellants; Mr. Nightingale was for the Crown.

Mr. Burton said that the case shortly was this: It was proposed some time ago to start a racecourse at a place called Goodwood, which was some little distance out of Cape Town, on the way to the Paarl, on the main line. Several gentlemen, including a certain Mr. Martin, a broker in Cape Town, Mr. Ham, a well-known Johannesburg man, and others, banded themselves together, bought a certain property at Goodwood, invested a good deal of money in it, and formed themselves into a limited liability company for the purpose of promoting racing. They erected buildings and so forth, and eventually advertised a race meeting to be held. Their race meeting was advertised to be held under the Goodwood Park rules. It was then brought to their notice that the 21st section of this Betting Act exempted from liability for betting offences only such proceedings on racecourses as were conducted under the rules of the Jockey Club, and that their own rules could not entitle them to come within the exemption of that section.

[De Villiers, C.J.: I have read the record. I suppose you will admit that but for the 21st section there has been an infringement of the Act?]

Mr. Burton: Yes, I think so. The point is whether the exemption of the 21st section is an exemption only of such racing clubs as are under the control of the Jockey Club, i.e., as are licensed by the Jockey Club, or whether it is an exemption of racing clubs which conduct their racing in accordance with

the racing rules of the Jockey Club. There is an important distinction between those two things. The real objection taken is that these people are not licensed by the Jockey Club. Therefore, they construe the exemption clause as meaning that the exemption is only granted to such race meetings as are licensed by the Jockey Club. Proceeding, counsel pointed out that since the Act was passed the headquarters of the Jockey Club, which were formerly at Port Elizabeth, had been removed to Johannesburg, and therefore were now beyond the jurisdiction.

[De Villiers, C.J.: Is there no other statutory recognition of the Jockey Club than is contained in the Act of 1902?]

Mr. Burton said that he believed there was not.

De Villiers, C.J., said that the fact of the removal of the headquarters of the Jockey Club might be a reason for altering the 21st section.

Mr. Burton went on to contend that the exemption was given to bona-fide racing, which was carried on under the rules of the Jockey Club.

De Villiers, C.J., took the illustration of horses and jockeys disqualified by the Jockey Club, and put it to counsel whether the intention of Parliament was not that racing should be conducted fairly and honourably, and whether, if the Jockey Club warned a jockey off the course, and that jockey rode at a meeting not licensed by the club, that was not contrary, at all events, to the spirit of the Act.

Mr. Burton: We must then interpret the section as going so far as to say that no person shall be exempted unless he bets in a race which is held under the licence of the Jockey Club.

[De Villiers, C.J.: Ah, that may be the effect.]

Mr. Burton: Logically, my lord, I submit that we must go that length. One must go to the length of saying that Parliament meant to give the Jockey Club a monopoly of racing throughout South Africa.

[De Villiers, C.J.: Did any jockeys ride at this meeting who had been warned off?]

Mr. Burton: No.

[De Villiers, C.J.: Any horses?]

A horse called Foxrock ran, which had been disqualified by the Jockey Club of South Africa. Counsel went on to say that the Jockey Club was more or less in the nature of a close corporation. It was very jealous of its own rights, of its own jurisdiction, and its own control. It was very jealous indeed of the control which it had exercised in the past over clubs licensed by it. According to Mr. Cloete's evidence, the objections really to the racing of the Goodwood Park Club was that this club was not licensed. Counsel proceeded to submit that the

word "under" in the Act did not mean "under the control of." "Under" simply meant the same as "in accordance with." The Act did not say "any race which may be held under the licence of the Jockey Club." He contended that it was never intended by Parliament to give to the Jockey Club a monopoly of racing in South Africa. It was clear, he urged, that appellants had acted *bona fide* throughout.

[Do Villiers, C.J.: What was the ground of the disqualification of that horse?]

Mr. Burton said that he did not know why Foxrock was disqualified. He added, however, that the matter was not finally settled, as an appeal had been taken. Counsel went on to draw the Court's attention to the heavy penalties imposed by the Court below upon appellants, who had acted honestly and *bona fide*, with a view of testing the case. He also addressed the Court on behalf of the bookmakers and their clerks, in mitigation of sentence.

Without calling upon Mr. Nightingale, Do Villiers, C.J.: The terms of the 16th section of Act 36 of 1902 are extremely wide, and the learned counsel for the appellants admits candidly that if that section had not been qualified by another section, the conviction would have been good. He contends, however, that the appellants are protected by the 21st section. Now, it is clear that if the appellants relied upon the exception it is for them to prove that the case falls within the exception. The 21st section is as follows: "Nothing in this part contained shall extend to any person receiving or holding any money or valuable thing by way of stakes or deposit to be paid to the winner of any race or lawful sport, game, or exercise, or to the owner of any horse engaged in any race, or to any owner or occupier, or person duly authorised to act for him, of any racecourse or other ground used for horse-racing, keeping, or using, on any day on which any race is being held under and in accordance with the rules and regulations for the time being in force of the Jockey Club of South Africa, any buildings, sheds, structures, or any enclosed spaces on or within such course or ground, for the purpose of betting, between persons there assembled, on races there and on that day to be held." The section is extremely involved, but it is quite clear that the Legislature regarded the Jockey Club as a corporation who, although, as was said, a close corporation, would, at all events see to it that racing is conducted in a fair and honourable manner. That could be the only reason for requiring that the races—the protected races—should be held under and in accordance with the rules and regulations for the time being in force of the Jockey Club of South Africa. Now, it would appear that by the rules of racing estab-

lished by the Jockey Club, that club has the power of disqualifying horses—in other words, of preventing any horse which had been disqualified by them from running in any race under the sanction of the Jockey Club. It would appear that the appellants did not recognise the power of the Jockey Club, and that one of the horses which ran at the appellants' race meeting was a horse which had been disqualified in accordance with the rules and regulations of the Jockey Club, and the question now is whether under such circumstances the race could be said to be under the rules and regulations of that club. It appears to me that this is a matter of extreme importance—that jockeys who have been warned off the course should not run horses, and that horses which have been disqualified should not be allowed to run in any race, and if any club which has not the authority of the Jockey Club or any license of the Jockey Club chooses to disregard that rule and allow horses which are disqualified to run in any race, it appears to me clear that such a race is not held under and in accordance with the rules and regulations for the time being in force of the Jockey Club. For this simple reason, I am of opinion that the Magistrate was quite right in his judgment, that there was a contravention of the section. But it has been contended that the appellants were acting in perfect bona-fides, and that, therefore, the amount of the fine is excessive, and that somehow or other this Court should reduce that amount. The 16th section of the Act authorises a much higher fine than the one which was actually imposed. The fine for the first offence is not exceeding £200, and for the second offence not exceeding £500, or imprisonment with hard labour. I confess that the amount of £25 does seem high, considering all the circumstances of the case. Captain Ham, one of the appellants, produced very good testimonials, and apparently he was a man who would not wilfully infringe any provision of the law, and he seems to have been advised that he was not infringing any provision of the law. But that is a circumstance which this Court as a Court of Appeal cannot take into consideration. It is a matter for the executive to decide whether the fines are too high, but so long as the fines are within the limits authorised by the Act, this Court should not interfere with the discretion of the Magistrate. This is to be said in regard to the fines that all the appellants had due notice that an objection was raised to the meeting, and that there would be a prosecution, and, in spite of this notice, the appellants took upon themselves the risk of proceeding with the race meeting, and, therefore, they have only themselves to thank if in the result a heavier penalty

was imposed than that which they expected. In any case, whether the penalty is high or low, inasmuch as it was within the limits authorised by the law, this Court should not, as a Court of Appeal, set aside the sentence. The appeal, in my opinion, must therefore be dismissed.

[Appellants' Attorney: F. B. Andrews.]

REX V. MABANTI AND OTHERS. (1905.
Dec. 5th.

Onus of proof—Criminal offence—Proof of want of consent.

Under the Transkeian law it is an offence for any native in certain locations to erect a hut within such locations without the consent of the Resident Magistrate. The accused were convicted of a contravention of the law, but no evidence had been produced of such want of consent.

Held, that the burden of proving the want of consent lay on the prosecution, and that the accused had been improperly convicted.

This was an appeal from a judgment of the Resident Magistrate of Lusikisiki, Eastern Pondoland, who had convicted five natives of contravening sections 3 and 9 of Proclamation No. 125 of 1903, in that, on or near Nozozo's Location, they had wrongfully and unlawfully erected a certain hut or building without the consent of the Resident Magistrate being first had and obtained. The Court below imposed a fine of £5.

The Magistrate, in his reasons for judgment, said that the evidence for the prosecution was very clear, and the witnesses for the prosecution gave their evidence in a very straightforward and truthful manner. It was difficult to get at the exact date when this building was commenced, as the natives had very little idea as to time. The prosecution alleged that it was commenced in the winter of 1904, which might be any time between May and September. The defence, on the other hand, definitely stated that the hut was begun on the 16th July, 1904. The Court had come to the conclusion that this date was decided upon by the defence in order to endeavour to prove an alibi. The Court was of opinion that it was quite possible that Headman Nozozo did give these men permission to erect the hut, and it was just likely that he, knowing the risk

that he was running, changed his mind immediately he saw the hut being erected. The followers of the Ethiopian Church had for the past seven or eight years been endeavouring by legal means, i.e., by formal application, to obtain Church sites in this district without success, and in this case the Court was of opinion that the prisoners, who were all interested in the Ethiopian movement, knew perfectly well that they were doing wrong in erecting this church, and they did so risking the consequences, in order to get a footing for their Church in this district. Taking all the circumstances into consideration, the Court was firmly convinced that the prisoners did build this hut without permission, at the same time knowing that, had they applied to the Magistrate for permission, it would have been refused them. Before concluding (added the Magistrate), he would like to mention that Mabanti, previous to his residing in Nozozo's Location, lived at the Palmerston Mission Station, and was turned out on account of his mixing up with the Ethiopians, and allowing them to use his huts for church. He was turned out by the Assistant Chief Magistrate, and ever since his removal to his present home, he had continued to support them. This fact did not come out in evidence, but would have done so had Mabanti given his evidence.

Mr. Douglas Buchanan appeared for the appellants, Mabanti, Balandile, Madonyela, Matshikilana, and Jeremiah. Mr. Nightingale was for the Crown.

Mr. Buchanan said that there was no evidence given in the Court below that the Magistrate's consent had not been obtained. There was no evidence further that the hut was built within any location. He submitted also that the Proclamation was *ultra vires*. He contended that the onus lay upon the prosecution of proving that the Magistrate's consent had not been obtained.

Mr. Nightingale said that there was sufficient notice to the appellant that he was building within a location. The Proclamation referred generally to the whole of the Territories.

De Villiers, C.J.: It is a first principle in the administration of criminal justice that the prosecution should prove its case. It is of the essence of the offence in the present case that the erection of the hut by the natives should have been done without the consent of the Resident Magistrate of the district, and evidence should have been led that the Magistrate had not consented. It may be said, "Well, if the Magistrate had consented, the accused could have proved it." That may be so, but it does not dispense with the necessity on the part of the prosecution of proving the want of consent. The case is not one in which a fact is alleged which would be peculiarly in the knowledge of the accused, for the prosecutor must

and could have known whether or not the Magistrate had given his consent. It is not one of those cases in which it is not possible to prove a negative. It was quite possible to prove the negative that the Magistrate had not given his consent. It is clear that in the present case the Magistrate who tried the case believed that the consent had not been given. He assumed, however, the fact, and he omitted to take the requisite evidence which was necessary for the prosecution. On this simple ground, I am of opinion that this failure was a failure on the part of the prosecution to establish a fact which was essential for the purpose of the conviction. The appeal, on this simple ground, must therefore be allowed, and the conviction quashed. I may add that in the case of a person charged with selling liquor without a licence, the Legislative found it necessary specially to enact that he shall be deemed to be unlicensed unless he produces satisfactory proof of being licensed.

[Appellants' Attorneys: Ziet-man and Bosman.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAANDORP.]

Ex parte LALOO. $\left\{ \begin{array}{l} 1905. \\ \text{Dec. 5th.} \\ \text{" 6th.} \end{array} \right.$

Alien immigrant—Act 47 of 1902
—Domicile.

Mr. Burton moved, as a matter of urgency, for an order calling on the Colonial Secretary to authorise the Immigration Officer to allow an Indian to land in the Cape Colony. The applicant, it was stated, had been domiciled in Natal, and there was a certificate to that effect from the Immigration Officer at the Point. He was about to proceed to Port Elizabeth, but he was refused permission to land there, and also at Cape Town. He was at present detained on the S.S. Briton at the Docks. Counsel contended that although the applicant could not pass the education test, he could not be refused admission once he had been domiciled in South Africa.

Mr. Nightingale, who appeared for the Crown, read the affidavit of the Immigration Officer at Cape Town, which set out that the applicant could not pass the education test, and that he had stated his wife and children were at present resident in India. Counsel pointed out that there was no evidence of domicile in South Africa, and that all the circumstances of the case did not constitute a domicile which the Court would

uphold. The applicant might be domiciled in Natal, but he would not be domiciled in South Africa under the common law.

Maasdorp, J., said there was not sufficient information on either side, and ordered the matter to be mentioned again to-morrow morning.

Postea (December 6).

Mr. Nightingale read an affidavit of the Assistant Immigration Officer, who examined the applicant. It set out that the applicant, who was unable to pass the education test, stated he had resided for some years in Durban, had followed several occupations, that he had no immovable property in South Africa, that he had a wife and one child in India, and in six months' time he intended making a visit of a year to India, but he made no mention of bringing his wife to South Africa.

Mr. Burton read a replying affidavit, in which the applicant set out he was not going to remain in India, that he was going for the purpose of seeing his wife and family, whom he had not seen for the past nine years; and, if he was able to support them, he would bring his wife and family to South Africa.

Mr. Nightingale pointed out that we had not had a large body of immigration of Asiatics in this Colony such as they had had in Natal. His contention was that from the terms of the Natal Act it was perfectly clear that the object of this certificate framed under the Act was not to afford evidence to any applicant of domicile in South Africa, but evidence of the right of such a person when he left Natal to come back again at such time as he pleased. He submitted that that was perfectly clear from the 4th section (sub-section f) of the Act. He contended that the certificate was worthless when an endeavour was made for the purpose of proving and covering the term "domicile" as known in our law. If the applicant had come with his wife and family there would have been no objection to his readmission, because there would have been evidence of his intention of settling in South Africa and making South Africa his home. But he had not brought his wife and family, and there was absolutely no evidence of an intention on his part to make South Africa his domicile. The circumstances of Natal and this colony in reference to this matter of immigration were totally different. There was no reciprocity between the Colonies in this respect. The Natal Act was very much broader than ours. It was perfectly clear that the domicile contemplated by the Cape Act was the domicile known to the common law of South Africa.

Mr. Burton said that his learned friend had argued that the Natal Act

name of the said John Walker, by reason whereof he is a necessary party to this suit.

6. All things have happened, all conditions have been performed, and all times have elapsed necessary to entitle the plaintiffs in their aforesaid capacity to receive transfer of the said properties, but the defendants notwithstanding lawful demand have failed and neglected to give such transfer to the said properties in favour of the plaintiffs.

7. John Walker and Sons and John Walker aforesaid carry on business in London, and upon the petition of the plaintiffs this Honourable Court did on the 22nd March, 1904, grant leave to the plaintiffs to sue the defendants by edictal citation, and did order that the said properties be attached *ad fundandam jurisdictionem* in this action.

Wherefore the plaintiffs in their said capacity pray for: (a) An order compelling the defendants to pass transfer to the plaintiffs in due and customary form of law of such of the properties aforesaid as are registered in their respective names. Or in the alternative only, as to the properties registered in the name of the defendant John Walker. (b) An order compelling the defendant John Walker to pass transfer to the defendants John Walker and Sons and compelling the defendants John Walker and Sons thereupon to pass transfer in due and customary form of law to the plaintiffs. (c) An order authorising and directing the High Sheriff, upon failure by the defendants or either of them to comply in whole or in part with such order as this Honourable Court may make as aforesaid, to pass transfer in place and stead of such defaulting defendant of the property to which such default relates. Or that this Honourable Court may grant to the plaintiffs in the premises such further or other relief as shall seem fitting, together with costs of suit.

The schedule annexed to the intendment set out five properties at Alice, two at Bedford, and four at King William's Town.

The plea of the defendants (John Walker and Sons) and of the defendant (John Walker) was as follows:

1. They admit that a certain order was made by this Honourable Court on the 14th November, 1903, appointing the plaintiffs receivers of the Grand Junction Railways, but do not admit that the defendants (John Walker and Sons), as partners in the Grand Junction Railways or otherwise, were consenting parties to the said order or to the appointment of the plaintiffs as alleged.

2. They do not admit that by the said order the plaintiffs were authorised to receive any assets of the Grand Junction Railways, save and except certain amounts therein set forth, or that the plaintiffs were authorised to deal with or dispose of any assets of the Grand

Junction Railways, save as directed by the said order.

3. They deny that any of the immovable properties referred to in paragraph 3 of the intendment or contained in the list attached thereto were or are amongst the assets of the Grand Junction Railways. They deny the correctness of the heading of the said list, but admit the correctness of items 1 to 11 therein.

4. They deny that the properties numbered 1, 2, 5, 6, 7, 8, 9, 11 in the said list, or any of them, were acquired by or at the expense of John Walker and Sons in connection with their undertaking, as alleged, or that they or any of them are properties included amongst the lands and buildings belonging to John Walker and Sons in connection with their said undertaking.

5. They deny that the properties numbered 3 and 4 in the said list or either of them were acquired by or at the expense of John Walker and Sons in connection with their said undertaking, as alleged, or at all, or that they or either of them are properties included amongst the lands and buildings belonging to John Walker and Sons in connection with the said undertaking, as alleged, or at all. The properties numbered 3 and 4 are the only properties in the said list which stand registered in the name of the second defendant, John Walker, and are the private property of the said John Walker.

6. They deny that the Grand Junction Railways became entitled to the properties numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, or any of them, under either of the agreements referred to in paragraph 4 of the intendment, or that the plaintiffs are entitled to receive any of them as assets of the said joint venture or otherwise, or to deal therewith.

7. They admit that the property numbered 10 in the said list belonged to John Walker and Sons in connection with their said undertaking, and admit that the Grand Junction Railways became entitled thereto, but deny that the said property has become an asset of the Grand Junction Railways under either of the said agreements, or that the plaintiffs were authorised to receive the same.

8. They admit the agreements of the 4th May, 1898, with supplemental agreement, and 18th August, 1898, and say that, according to the same, the said joint venture became entitled to certain immovable properties belonging to the defendants, John Walker and Sons, and the said joint venture became liable in return to pay to the defendants or any of them *inter alia* the amount of the liability of the Grand Junction Railways, Ltd., to the said defendants, and also to pay all the liabilities incurred or payments made by the defendants, or any of them, after the 1st

January, 1898, in connection with any of the immovable properties to which the joint venture had become entitled under the said agreements. They deny that any of the immovable properties to which the said joint venture became entitled as aforesaid, and which stood registered in the names of the defendants, John Walker and Sons, or in the name of the second defendant, John Walker, on the 1st January, 1898, or at any subsequent date, were or are assets of the said joint venture, unless or until the same were or are transferred into the name of the said joint venture.

9. They admit that they refuse to give transfer of any of the said properties in favour of the plaintiffs. They deny the remaining allegations in paragraph 6 of the *intendit*.

10. Paragraph 7 is admitted.

Wherefore, the defendants, John Walker and Sons and John Walker, pray that the plaintiffs' claim may be dismissed with costs.

For a claim in reconvention, the first-named defendants, John Walker and Sons (plaintiffs in reconvention) say:

1. They crave leave to repeat the allegations in the plea in convention.

2. The Grand Junction Railways, Ltd., is indebted and liable, and was on the 18th August, 1898, indebted and liable to the said John Walker and Sons in the following amounts: (a) To capital moneys upon 3,870 debentures of £100 each, issued to John Walker and Sons by the Grand Junction Railways, Ltd., £387,000; (b) to interest paid by John Walker and Sons on behalf of and as agreed with the Grand Junction Railways, Ltd., upon 500 debentures of £100 each from 31st October, 1896, to 14th August, 1898, £3,500; (c) to interest paid by John Walker and Sons as aforesaid upon 210 debentures of £100 each, from 13th November, 1896, to 14th August, 1898, £1,410; (d) to interest paid by John Walker and Sons as aforesaid upon 290 debentures of £100 each from 8th February, 1897, to 14th August, 1898, £1,740; (e) to interest paid by John Walker and Sons as aforesaid upon 200 debentures of £100 each from 16th November, 1897, to 14th August, 1898, £600; (f) to interest paid by John Walker and Sons as aforesaid upon 500 debentures of £100 each from 15th February, 1898, to 14th August, 1898, £1,000.

3. The said joint venture did by the said agreements of the 4th May, 1898, and 18th August, 1898, agree to pay all the liabilities of the Grand Junction Railways, Ltd., and the said joint venture is now indebted to the first-named defendants (plaintiffs in reconvention) in the amounts set out in paragraph 2 hereof.

4. If this honourable Court should hold that the said receivers are entitled to maintain their action in convention

for recovery of any of the properties therein demanded, then and in that case the first-named defendants (plaintiffs in reconvention) are entitled to claim from the said receivers (defendants in reconvention) the said amounts in paragraph 2 hereof set out and due, and owing by the said joint venture to the said first-named defendants (plaintiffs in reconvention).

Wherefore the first-named defendants (plaintiffs in reconvention) pray: (a) Judgment for the said sums of £387,000, £3,500, £1,470, £1,740, £600, and £1,000; (b) interest thereon *a tempore morae*; (c) alternative relief; (d) costs of suit.

The second defendants' claim in reconvention was as follows:

1. The second defendant (plaintiff in reconvention) craves leave to repeat the allegations of the plea in convention.

2. On or about the 30th June, 1898, the said defendant (plaintiff in reconvention) made a payment of £1,200 out of his own moneys in part satisfaction of a mortgage debt of £2,500 on the property numbered 10 in the list attached to the *intendit*, to which property the said joint venture was entitled as from the 1st January, 1898, and the said joint venture has in consequence become indebted to the said second defendant (plaintiff in reconvention) in the said sum of £1,200, with interest thereon from the said 30th June, 1898.

3. If this honourable Court should hold that the said receivers are entitled to maintain their action in convention for recovery of any of the properties therein demanded, then and in that case the second defendant (plaintiff in reconvention) is entitled to claim from the said receivers (defendants in reconvention) the said sum of £1,200, with interest as aforesaid, due by the said joint venture to the said second defendant (plaintiff in reconvention).

Wherefore the said second defendant (plaintiff in reconvention) prays: (a) Judgment for the said sum of £1,200; (b) interest thereon from the 30th June, 1898; (c) alternative relief; (d) costs of suit.

Mr. Schreiner, K.C., for plaintiffs. Mr. Russell for defendants.

Mr. Schreiner outlined the principal features of the case.

Mr. Russell said that it might simplify matters a good deal if he stated at the outset that he did not propose to lead evidence on the first claim in reconvention.

Mr. Schreiner: Do I understand that my learned friend abandons that claim?

Do Villiers, C.J., said that he did not suppose Mr. Russell could press the claim unless he had evidence to support it.

John E. P. Close, accountant, Cape Town, was called in support of the plaintiffs' claim. He said that he was familiar with the subject-matter of the action. He had officiated as one of

the referees to inquire into the actual cost of the four lines of railway built by the Grand Junction Railways. He had prepared a schedule (produced) from the books and documents, showing the properties registered in the name of John Walker and Sons and John Walker among the assets of the joint venture. Witness gave evidence as to the several properties in question. One of these was a piece of ground at Mossel Bay, bought from Sir Jacob Barry, in respect of which £2,000 was paid in debentures and £2,000 in cash. A bond was raised on the property for £2,500, through Mr. Chiappini. The capital of John Walker and Sons, contributed at the Cape and in London over and above Government subsidy, was £23,535. The expenditure at the Cape up to the 1st January, 1898, amounted to £78,061 13s. 2d. The London and Cape expenditure included the expenditure on the properties that witness had placed in the column as John Walker and Sons, as at the 1st January, 1898, i.e., all properties except those marked "joint venture" and "no cheque paid." He did not consider that Walker was entitled to payment of £1,200 from the receivers. Walker had been credited with the whole of the land, and it was for him to settle with anybody who had lent him the money.

Cross-examined: Lots 3 and 4 were registered in John Walker's name. No. 4 was paid for by a joint venture cheque, and witness therefore considered that it must be a joint venture asset. In arriving at John Walker's capital account, he had included all these properties. He had deducted the sum of £1,325, paid on behalf of Walker.

Benjamin T. Tonkin, formerly secretary of the Grand Junction Railways, and afterwards accountant to John Walker and Sons in connection with the joint venture, said that all these properties were acquired in connection with the undertaking of John Walker and Sons. Witness spoke of the way in which, when the joint venture's account was very much overdrawn, and the financial position was desperate, an account was opened in his own name, on behalf of his employers, so as to prevent money paid into the bank from being impounded. From this account, opened in his name, payments were made from time to time for the joint venture.

Mr. Russell having been heard in argument,

De Villiers, C.J.: The case has been considerably simplified by the fact that the defendants have not tendered any evidence in support of the first claim in reconvention. The Court, therefore, has to decide the case on the pleas, and on the second claim in reconvention.

In regard to the pleas, one of the defences raised is that the defendants

were not consenting parties to the order for the appointment of the plaintiffs as receivers, but I am satisfied that they were consenting parties, and that even if they were not in their capacity as partners in the Grand Junction Railways, consenting parties before the order was made, their subsequent conduct estops them from denying the validity of the appointment. They repeatedly recognised the plaintiffs as receivers, and by so doing they saved their own estates from sequestration as insolvent at the suit of the receivers on behalf of the creditors.

It has been further urged on the defendants' behalf that the plaintiffs as receivers are not entitled to institute this action without an order of Court. This objection ought really to have been taken *in limine*, for if there were any force in it, the plaintiffs could have fortified themselves by obtaining the requisite order. Under the circumstances disclosed in this case there would have been no difficulty in obtaining such consent, and, if such consent be necessary, the Court has no hesitation, even at this stage, to approve of the action. The appointment of the plaintiffs as receivers, with the full consent of the defendants, would be wholly nugatory if the plaintiffs were not to be allowed to take the requisite steps to realise the property of the Grand Junction Railways for the benefit of the creditors. The plaintiffs were to have the power to sell and realise the assets of the Grand Junction Railways, and to distribute the available assets according to the legal order of preference in insolvency.

The only question which remains—and that is the material question—is whether the properties mentioned in the schedule to the *intendit* can be claimed by the plaintiffs as receivers of the Grand Junction Railways. If the plaintiffs had been trustees in insolvency, it is clear that they would have been entitled to make good their claim. The Grand Junction Railways have not acquired a *jus in re* by transfer of the scheduled properties, but they have a *jus ad rem*, and the receivers appointed by the Court are entitled to acquire the full ownership by means of duly registered transfers. It is abundantly clear from the evidence that these properties had been acquired by the partners, not for themselves individually, but for the Grand Junction Railways, a partnership concern in which they were partners. The receivers have to realise these properties for the benefit of the creditors of the partnership, and they cannot do so without first obtaining transfer on their own behalf, or on behalf of the partnership.

In regard to the second claim in reconvention, it is impossible to hold that the defendant, John Walker, is entitled to receive from the plaintiffs the sum of £1,200, which he is alleged to have paid in part satisfaction of the mortgage debt

of £2,500 on one of the scheduled properties. Quite apart from the objection that he cannot sue for payment of a debt due to him by the partnership until the creditors of the partnership have been satisfied, it appears to me that the sum of £1,200 sued for is counterbalanced by the sum of £1,325, which has been paid by the partnership in respect of the mortgaged property. The amount was paid out of joint subsidy money, belonging to the partnership, and went in reduction of John Walker's capital account.

The judgment of the Court will be for the plaintiffs in terms of prayer (a) of the interdict (without prejudice to any right the Government might have to double transfer duty), or failing transfer on or before the 28th February, 1906, judgment in terms of prayer (c), with costs. On the claims in reconvention there will be absolution from the instance, with costs.

[Plaintiffs' Attorneys: Moore and Son; Defendant's Attorneys: Dold and Van Breda.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

ADMISSIONS.

{ 1905.
{ Dec. 12th.

Mr. Benjamin moved for the admission of John Dalgarno Milne as an attorney, notary, and conveyancer.

Application granted and oaths administered.

Mr. Benjamin moved for the admission of Daniel Petrus Smit as an attorney and notary, the oaths to be taken before the R.M. of Colesberg.

Application granted.

Mr. Benjamin moved for the admission of Clement James Boomsma Foster as a conveyancer.

Application granted and oaths administered.

PROVISIONAL ROLL.

COURTILLER AND WALLIS V. TAYLOR
AND MYLES.

Mr. Gardiner moved for provisional sentence on a bill of exchange for

£188 10s., with interest from 3rd October.

Mr. Benjamin, for defendant, put in an affidavit from Joseph Powell Taylor, a partner in the firm, which set out that the plaintiffs had not kept to their contract with regard to the shipment of certain cases to South Africa, and the defendant had to purchase in the local market, and suffered damages in £125 12s. 3d., the difference between this amount and the amount claimed being tendered.

On the 12th August, 1,000 cases of potatoes were to be shipped, and on the 19th August, 546 cases, but the plaintiffs failed to ship until later on. Counsel submitted that the plaintiffs should be forced into the principal case in order that the defendant could put in his counter-claim, otherwise the defendant would have to pursue his claim outside the jurisdiction of the Court, as the plaintiff was a foreign firm.

Maasdorp, J.: In this case the plaintiffs agreed to supply the defendants with certain shipments of potatoes, and the defendant agreed on his part to give bills upon receipt of the different shipments. It appeared that a number of shipments were received and bills were given which were subsequently settled. The bill upon which the present suit is brought is for potatoes actually delivered. The defendant sets up a claim for damages against this liquid document. As a rule a defence of that kind is not allowed in provisional proceedings unless the claim for damages is so directly connected with the subject matter of the promissory note that it really refers to the same sum between the parties. In this case the claim for damages is in respect of other shipments which have not arrived, and under the circumstances provisional sentence ought to be given on this promissory note, leaving it to the defendant to make his claim for damages in some other form. Provisional sentence will be granted as prayed.

SCHMIDT V. GRAY AND SON.

Dr. Greer moved that an order of provisional sequestration be discharged. Granted.

BEHR V. ANDREWS.

Mr. Benjamin, for the plaintiff, moved for provisional sentence on a mortgage bond for £50, and that the property be declared executable. Mr. De Waal was for the defendant, the executors of the late Mrs. Andrews.

Provisional sentence as prayed, the defendant's share of the property declared executable, the defendant to pay the plaintiff's costs.

ZUCKERMAN V. BERNHART AND SARIF.

Mr. P. S. T. Jones moved for a final order of sequestration against the private and partnership estates of the defendants.

Granted.

PURCELL, YALLOP AND EVERETT V. PRESWICH.

Dr. Greer moved for a provisional order of sequestration to be made final.

Granted.

ESTATE GLYNN V. ROSS.

Mr. Struben moved for provisional sentence on a mortgage bond, with interest, that the property be declared executable, and for the attachment of rents. The bond became due by reason of non-payment of the capital, when called up.

Granted.

ARDERNE V. MELNIKOV.

Mr. D. Buchanan moved for a final order of sequestration against the defendant's estate.

Granted.

ESTATE BOTES V. MARAIS.

Mr. Wright moved for a final order of sequestration against the defendant's estate.

Granted.

COETZEE V. DIEBEL.

Mr. Gutsche moved for provisional sentence on a promissory note for £780 18s. 6d., with interest and costs of suit.

Granted.

CUTHBERT AND CO. V. SHORKEND.

Mr. Gutsche moved for the final adjudication of the defendant's estate as insolvent.

Granted.

CUTHBERT AND CO. V. REST.

Mr. Gutsche moved for the final adjudication of the defendant's estate as insolvent.

Granted.

ESTATE STEYTLER V. SCHNEIDER.

Mr. D. Buchanan moved for provisional sentence on a mortgage bond for £1,200, with interest, less £20 paid on account, that the property specially hy-

pothecated be declared executable, and that the rents should be attached by the defendant, with costs.

Granted.

ESTATE SEARLE V. HOGGARD.

Dr. Greer moved that a provisional order of sequestration be made final.

Granted.

STEPHENS, LTD. V. RILEY.

Dr. Rainsford moved for the final adjudication of the defendant's estate as insolvent.

Granted.

SELIGMAN AND CO. V. VAN DER BERG.

Mr. De Waal moved for the final sequestration of the defendants as insolvent.

Granted.

MARAIS V. VAN DER MERWE.

Mr. Sutton moved for provisional sentence on two mortgage bonds for £600 and £250, with interest, and that the property specially hypothecated be declared executable.

Granted.

FEDERAL SUPPLY AND COLD STORAGE CO. V. FLEESER AND FISHER.

Mr. Payne moved for the final adjudication of the defendants' estates—partnership and private—as insolvent.

Granted.

RICE V. MOHR.

Mr. Watermeyer moved for provisional sentence on a promissory note for £300, with interest and costs.

Granted.

FAIRBRIDGE V. BLAKE.

Mr. Long moved for provisional sentence on a dishonoured cheque for £10, with interest and costs.

Granted.

PALMER V. TUCKER.

Mr. Gutsche moved for provisional sentence on a mortgage bond for £250, with interest. Counsel also asked that the lease be declared executable.

Granted.

PURCELL, YALLOP AND EVERETT V. ADAMS.

Dr. Greer moved for a decree of civil imprisonment against the defendant on

an unsatisfied judgment of the Court for £18 10s. 2d., and taxed costs.
Granted.

EUSTACE V. BARNETT AND HURTWITZ.

Mr. Benjamin moved for provisional sentence on two mortgage bonds for £750, with interest, and £1 15s. insurance premium, and that the property be declared executable.
Granted.

LOTTER AND CROSS V. CLOETE.

Dr. Rainsford moved for the final adjudication of the defendant's estate as insolvent.
Granted.

MOSSOP V. DE KLERCK.

Mr. Bailey moved for provisional sentence on a mortgage bond for £600, with interest, and that the property be declared executable.
Granted.

MOHR AND ANOTHER V. BERNARD.

Mr. Bailey moved for the final adjudication of the defendant's estate as insolvent.
Granted.

ESTATE WORDON V. EVANS.

Mr. Wright moved for the final adjudication of the defendant's estate as insolvent.
Granted.

GRAAFF V. ESTATE SCHOLTZ.

Mr. Van Zyl moved for provisional sentence on three mortgage bonds, and that the property be declared executable, with interest and costs.

Granted, subject to the production of the certificate from the executor.

PHILLIPS V. ZUIMMIN, ALIAS ZEMAN.

Dr. Greer moved for a decree of civil imprisonment on an unsatisfied judgment for £16, with taxed costs amounting to £14 12s. 8d.

The defendant appeared in court with a Yiddish interpreter, and said that he had got no money.

By Dr. Greer: He was in partnership with Berkowitz, and he sold the goods of the partnership on the Parade. Witness offered the plaintiff £7, which was refused. After that he had a shop, which he gave over to another man. He received nothing for the goods in the shop. Witness "only had old boots; no licence."

No order made.

HEYDENRYCH AND ESTATE CLEAR V. NOWROOJEE.

Mr. Struben moved for the final adjudication of the defendant's estate as insolvent.
Granted.

DE VILLIERS V. CRAIG.

Mr. D. Buchanan moved for judgment on a promissory note for £168, with interest at the stipulated rate of 9 per cent. and costs.
Granted.

STRANG V. VAN ROOYEN.

Mr. Payne moved for provisional sentence on an unsatisfied judgment of the Resident Magistrate's Court, Oudtshoorn, for £24 16s. 4d., and that certain property be declared executable.
Granted.

VAN DER VYVER V. STAAL.

Mr. De Waal moved for provisional sentence on a mortgage bond for £250 with interest, and that the property specially hypothecated be declared executable, with costs.
Granted.

STEYTLER V. ISAACS.

Mr. Sutton moved for provisional sentence on a promissory note for £75, less £57 10s., which had been paid on account. He now asked for judgment for £17 10s., with interest and costs.
Granted.

ILLIQUID ROLL.

PURCELL, YALLOP AND { 1905.
EVERETT V. HOTZ. { Dec. 12th.

Dr. Greer moved for judgment, under Rule 329d, for £3 17s. 10d., for goods sold and delivered, with interest and costs. Since summons was issued, £6 had been paid on account, leaving a balance of £3 17s. 10d.

Granted.

ROSEN V. PRICE.

Mr. Gutsche moved for judgment, under Rule 329d, for £20 and £49 10s., due for rent, less £10 paid on account.
Granted.

WILSON, SON AND CO. V. BARRON.

Mr. Roux moved for judgment, under Rule 329d, for £66 3s. 8d., for goods sold and delivered, with interest and costs.

Granted.

HUTTON V. SPENCE.

Mr. Alexander moved for judgment, under Rule 329d, for £41, balance due on two promissory notes, with interest and costs.

Granted.

MULLER V. ALLDER.

Mr. Gutsche moved for judgment, under Rule 329d, for £55 6s. 3d., for goods consigned and delivered, for £6 17s., for goods sold and delivered, and for £6 18s. 6d., the amount of railway charges.

Granted.

MOBIRKINTYRE V. WALSH.

Dr. Greer moved for judgment, under Rule 329d, for £13 1s., balance on goods sold and delivered, less £4 10s., paid on account, since issue of summons, with costs.

Granted.

HEPWORTHS, LTD. V. HOLLIDAY.

Mr. Lewis moved for judgment, under Rule 329d, for an amount of costs, the principal amount having been paid

Granted.

APPEL V. WIGGETT.

Mr. Van Zyl moved for judgment, under Rule 329d, for £500, money lent and advanced to one Striddingh, which was guaranteed by the defendant to the plaintiff, with interests and costs.

Granted.

SPILHAUS V. GAFFOOR.

Mr. Wright moved for judgment for £150 0s. 8d., for goods sold and delivered, with interest and costs.

Granted.

KALK BAY COUNCIL V. BRUYN.

Mr. Alexander moved for judgment for £32 15s. 8d., balance of rates, with interest and costs.

Granted.

CLAREMONT COUNCIL V. LEVY.

Dr. Rainsford moved for judgment, under Rule 329d, for £72 4s., balance of rates, less £25 paid on account, with interest and costs.

Granted.

GEOMAN AND ANOTHER V. DAKERS.

Mr. Roux moved for judgment, under Rule 329d, for an order compelling the defendant to sign an irrevocable power

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of attorney to the plaintiffs, in order that the plaintiffs might deal with the property as they wished, and to pass over the title-deeds of certain property, according to an agreement.

Maasdorp, J., said the claim was not an ordinary liquidated claim, and ordered the plaintiff to proceed with his action in the ordinary way. The summons to stand.

CAPE TOWN TOWN COUNCIL V. MOSTAPHA.

Mr. Gutsche moved for judgment, under Rule 329d, for £21 1s. 2d., due for municipal rates.

Granted.

STEVENS V. MYERS.

Mr. Alexander (for the defendant) moved, under Rules 25 and 330, for judgment, the plaintiff having not proceeded with his action within the time fixed by the Court.

Granted.

MORRISON V. BATES.

Mr. Wright moved for judgment, under Rule 329d, for £75, rent for September, October, and November, with costs of suit.

Granted.

CATHCART V. WARD AND CO.

Mr. D. Buchanan moved for judgment, under Rule 329d, for £50, for rent, with costs.

Granted.

CAPE TOWN TOWN COUNCIL V. SOEKER.

Mr. Gutsche moved for judgment, under Rule 329d, for £152 15s., in respect of rates, and £34 17s. 6d. for water supplied.

Granted.

REX V. CRYSTAL.

Undesirable—Domicile—Deportation—Act 47 of 1902.

This was an application upon notice of motion for an order calling on the Colonial Secretary to show cause why Annie Crystal, who was about to be deported, should not be released from custody, or, in the alternative, for an order admitting her to bail until her case was decided by the Supreme Court.

Dr. Greer moved.

[Maasdorp, J.: What is the urgency about the matter?]

Mr. Nightingale (for the Crown): Arrangements have been made so that she will leave this afternoon.

Dr. Greer read an affidavit made by the applicant in Roeland-street Gaol, in which she set out that she came to Cape Town from London two years ago, and that she had lived in Cape Town ever since, and had made it her permanent home. She claimed to be domiciled in Cape Town.

Mr. Nightingale put in a replying affidavit from the Acting Officer-in-Charge of the Immigration Department to the effect that the applicant was a Russian-Polish subject. She was a well-known prostitute. Several times she had left the Colony for the Transvaal, and when she re-entered the Colony she contravened Act 47 of 1902.

Dr. Greer, in the course of his argument, said the Act distinctly exempted the applicant. Section "f" provided that the Act should not apply to persons domiciled in South Africa, and it said nothing about being domiciled in the Cape Colony. Taking the statement of the respondent, she was still domiciled in South Africa, even although she entered the Transvaal. However desirable it might be to deal with such persons, the authorities had not the power under the Act.

Mr. Nightingale quoted sections 4 and 8 of the Act, and contended that the applicant was a prohibited immigrant within the meaning of the Act, as she made her living by prostitution. It lay upon the applicant to clearly prove that she was domiciled in South Africa. Her statements were contradicted by the Immigration Officer. Clearly, the Act was designed to meet this class of case.

Maasdorp, J.: Under section 4 of Act 47 of 1902 prohibited immigrants are prohibited from immigrating either by land or sea into this colony, and if they should in violation of that section enter the Colony, then under section 8 they are liable to be removed at any time from the limits of the Colony, and to be kept in such custody as the regulations prescribe, pending their removal. It is stated on the part of the immigration authorities that the applicant in this case is prohibited, because she is a person who lives on the proceeds of prostitution, which is provided for in sub-section "e" of section 2. There is no denial of that statement as to her character. The applicant says the Act does not apply to her, because under section 3 she is one of the exempted persons having her present domicile in South Africa. The only question now the Court has to decide is whether the applicant is a person who is domiciled in South Africa. Her domicile before she came to this country appears to have been in Poland. She herself says that she came to this country permanently to reside here and make it her home. It is necessary for her to establish the fact when she has changed her domicile. She says she arrived in Cape Town

two years ago, and ever since she remained here. In order to ascertain the intention of a person with respect to the change of such domicile, one has to arrive at the necessary inferences from the express intention of such person, together with the actual conduct of the person. Now, in this case, in the short affidavit, there is a palpable falsehood. She has not been in Cape Town ever since she arrived here, because she was out of the Colony for six months; consequently I should be unwilling to accept her statement of her intention when she arrived in the Colony with respect to permanent residence. Having regard to her actions and mode of life here, it is difficult to discover any circumstance upon which the Court could find a decision of her permanent domicile. It is often easy to discover from a business which is carried on, or from the occupation a man is engaged in, and the manner in which he carries on his business, whether he has come to the country for a permanent residence. Those are circumstances which are taken into consideration, and assist the Court in coming to a conclusion. In this case the occupation of the applicant is not such as one could infer therefrom that she intended to carry on that business here permanently. She seems to be what she is described: a common prostitute, and she seems, having left her native land, to be a sort of wanderer. It is said, although she went to the Transvaal, it is part of South Africa, and that her presence there does not affect her statement that this is her domicile, but clearly by merely going to a country and wandering from one province to another no domicile is established. It would be necessary, in the first instance, to have some permanent place of residence where a person intends to reside here. The only evidence is that, having resided for a period of more than sixteen months in Cape Town, she moved up to another country—to the Transvaal—and she lived there for six months. Not satisfied there, she comes back to the Colony. Under the circumstances, I find that the applicant has failed to establish the fact that she is domiciled in South Africa, and the application must be refused.

CAPE TOWN TOWN COUNCIL { 1905.
V. RATEPAYERS' ASSOCIATION. { Dec. 12th.

This was an application on behalf of the Town Council on notice of motion, calling upon the respondents, who were the applicants in a matter in which a rule had been granted, returnable on January 12, to show cause why an order should not be granted anticipating the return day of the rule nisi, and for

an order to set down the hearing of this application for a day before January 12, and that costs be costs in the cause.

The affidavit of William George Fairbridge, of Cape Town, one of the applicants' attorneys, was as follows:

1. The above-named petitioners applied to this honourable Court on the 17th ult., *ex parte*, and obtained a rule nisi, calling upon the respondent council to show cause why it should not be interdicted from signing a certain contract referred to in the petition; the said rule was made returnable on January 12 next.

2. The Town Council of Cape Town had no notice of the application. The petitioners applied for a rule returnable on the 12th inst. The rule was made returnable on January 12, as I understand on account of pressure of other work before the Court. The Town Council had no opportunity of showing urgent reasons why the motion should be made returnable on an earlier date.

3. The question raised in the petition has relation to the execution of a contract between the Town Council and the firm of Edmund Nuttall and Company, in respect of paving certain streets in Cape Town, the said firm being the successful tenderers therefor, their tender having been accepted by the Town Council.

4. Considerable opposition has been raised within the Town Council to the completion and execution of the written contract, which has to be executed between the Town Council and the said firm of Edmund Nuttall and Company, although the Town Council duly accepted the tender in question so far back as August 10 last.

5. From that time the tender and contract in question have been continually before the Town Council, and have taken up an inordinate amount of time, although very little progress has been made in the matter.

6. The affidavits made by certain members of the Council, who are in favour of executing the said contract, state that, in the opinion of the deponents, there is an intention on the part of the members of the Council opposed to the contract, to use every device to delay the execution of the contract in the expectation or hope that something may occur which would enable the said contract to be thrown out.

7. At the present time the next question will have to be dealt with by the Council will be to settle the terms of the contract to be executed, and motions in respect of this have been set down for consideration by the Council. The Mayor has, however, ruled that to consider such motions will be contempt of Court, and progress in this respect is stayed, and unless relief be granted will be stayed until January 12 next.

8. The time of the officials of the Council has been taken up to an undue extent by matters connected with this motion, and, in consequence of the delay, caused by the granting of the rule nisi in question.

9. The Town Council urge that the return day should be anticipated and an earlier date fixed for the hearing of the motion.

10. On the 9th instant, I saw the Honourable Sir John Buchanan, who informed me that the Court would be prepared to take this motion on the 14th instant, and suggested that I should see the petitioners on the subject. I accordingly saw the petitioners' attorney on that day, who informed me that he would not consent to the application being heard on the 14th instant. He stated that one of his reasons was that when the replying affidavits of the Town Council were served, the petitioners intended to appoint an accountant to investigate the books of the Town Council.

11. Replying affidavits were served on petitioners' attorneys on the 9th instant, and I say to the best of my knowledge and belief that an investigation of the books of the Town Council will not be necessary for the purposes of this motion. Moreover, that had the return day been fixed for the 12th instant, there would have been no more time for such investigations than the petitioners now have.

12. The Town Council will be seriously prejudiced, and impeded in its work if the motion be not heard before the 12th January next.

The answering affidavit of Alexander John MacCallum was as follows:

1. That I am attorney to the Cape Town Ratepayers' Association and others, petitioners (respondents in this application).

2. That I was at 3.30 p.m. (Monday, the 11th inst.) served with a copy of this application on behalf of the petitioners.

3. That at 12.40 p.m. on Saturday, the 9th inst., I was served with various replying affidavits in the principal case herein, extending to about 54 pages brief sheets.

4. That on the same day Mr. W. G. Fairbridge, the attorney for the Town Council, called on me and desired to know whether I would consent to the return day being anticipated on the 14th inst.

5. That I intimated that as the matter was very important, and that as intricate points were raised, and that as they had not sooner made application, I could not in the interests of my clients agree to any such anticipation of the return day.

6. That on Monday morning, Mr. Fairbridge served on me the petition attached hereto praying the Judges in Chambers to anticipate the return day on the 14th inst., and that thereafter I

proceeded with Mr. Fairbridge to the Supreme Court, but that the Judge declined to hear the petition.

7. That when the rule *nisi* in question was granted my clients applied to have it returnable on the 12th December, but the presiding Judge stated that in view of the pressure of work presently before the Court he would have to make it returnable on the 12th January.

8. That had the rule *nisi* been made returnable on the 12th of December, your deponent would have asked that the replying affidavits should be filed at least ten days prior to the said return day.

9. That your deponent would point out that although the rule *nisi* was granted so far back as the 17th November last, no replying affidavits were filed until Saturday as above mentioned.

10. Your deponent begs to state that the matters treated of in the petition under question are so intricate and involve so considerable an amount of investigation that he has, on behalf of his clients, retained the services of a qualified accountant to investigate the state of certain accounts in connection with the paving of streets, and examine certain financial statements in the possession of the Town House authorities.

11. That such investigation is absolutely necessary, and will take some considerable time.

12. That with reference to paragraph 11 of the said Fairbridge's affidavit, stating: "That in his opinion the investigation of the books of the Town Council will not be necessary for the purposes of this motion," I have simply to state that as the legal adviser of the petitioners in the case under question, my opinion differs from that of Mr. Fairbridge.

13. That your deponent cannot admit that the work of the Town Council will, as asserted in the said affidavit, be seriously prejudiced or impeded.

14. That your deponent informed Mr. Fairbridge yesterday morning that, provided the return day were anticipated at some period not within 10 days from this date, he would raise no objection, but that in consideration of the mass of affidavits filed on behalf of the Town Council, your deponent considered it an absolute impossibility to furnish satisfactory replies within any such period as that suggested by the said Fairbridge.

15. Your deponent begs leave to suggest to this honourable Court that, in view of the fact that no steps had been taken until Saturday last to anticipate the return day herein, and that until 12.40 on that date no replying affidavits had been lodged, the said Town Council do not appear to have been so greatly prejudiced or inconvenienced as the affidavit under reply would appear to indicate.

16. On behalf of the petitioners, who are members of the Town Council, I

deny the assertion in paragraph 4 of the affidavit under reply, to the effect that the "Town Council duly accepted" the tender in question.

17. It is not the fact that the tender and contract in question have been continually before the Town Council; on the contrary, the said contract has only been discussed in Council since the rule *nisi* herein, members not having previously had an opportunity of perusing the same.

18. I acquiesce in the statement in paragraph 6 of the affidavit under reply, in so far as that every lawful effort has been used to prevent the Council from entering into what, in the opinion of your petitioners, is an illegal contract.

Mr. Schreiner, K.C., for applicants.
Sir H. Juta, K.C., for respondents.

Mr. Schreiner said that the great practical point was to have the matter decided one way or another. With all respect to Mr. MacCallum, it was scarcely possible he should be in a position to determine how far this was a serious prejudice to the working of the Town Council, of which he was not a member. It was unlikely such an application would be made unless the matter was seriously inconveniencing the Town Council. It would be seen how inconvenient it might be that the matter should be left in abeyance for a long period of time in relation to a contract which, upon the acceptance of the finder on August 10 last, should really have been brought to a head one way or the other. Everything had been done since then to prevent this matter going through. It was an unusual thing, seeing how long the matter had been in abeyance, that the Corporation had no notice of the application made on November 17, and, therefore, had no opportunity of preventing the rule being granted. The respondents said they wanted 10 days to reply, and counsel said they were not entitled to it; neither did they show any reason for the 10 days. Counsel thought 48 hours would be sufficient.

[Maasdorp, J.: Ten days seems a long time in comparison with 48 hours. What about Friday?]

We would be content with Friday.

Sir H. Juta: We can't be ready by Friday. Counsel (proceeding) said upon a statement by the City Treasurer and the Town Clerk, it appeared that no one was prepared to say whether the amount voted would be exceeded or not. He believed if the contract was above a certain amount, the Town Council would have to go to the ratepayers. He did not suppose that the Town Council had the power to enter into a contract and bind the ratepayers to £500,000, without going in for a loan.

[Maasdorp, J.: I thought the ratepayers had sanctioned it?]

A certain amount of it.

Our point is that this contract exceeds it, and consequently they will

have to go to the ratepayers for the other part of the loan. I represent, not only the Ratepayers' Association, but some five or six Town Councillors.

[Maasdorp, J.: That makes no difference.]

Yes, because they say we object to any contract being entered into when the money has not yet been voted by the ratepayers, and further, if the ratepayers refuse to endorse the action of the Council, the Town Council will become personally responsible.

[Maasdorp, J.: I dare say it is a rich association, and they can go through the whole of the books in three days, by the aid of a large number of accountants.]

Mr. Schreiner, in reply, said that the respondents hoped to delay the execution of the contract, so that six months would elapse from the date of the original motion in July last, and a mere majority would be sufficient to review and rescind.

Maasdorp, J.: The only question the Court has to consider is whether, upon a day being fixed for the hearing of this motion, the parties will be all prepared to go on with their case. It has been contended by the legal advisers of the respondent in this matter that, in order to support the issues there raised, it will be necessary for them to obtain a good deal more information, and they say a number of days will be required before they can be prepared with such information; but it appears to me that they rather exaggerate the amount of labour required to obtain that information. Perhaps, if the date is fixed for the 15th, it will happen that, when the argument comes on, some difficulty may be presented from the shortness of the time granted, but so far as I can see through the case at present, I feel that they ought to be prepared by Monday, the 18th. The Court will therefore set down the hearing of this motion for Monday, costs to be costs in the cause.

[Applicants' Attorneys: Fairbridge, Arderne, and Lawton. Respondents' Attorney: A. J. McCallum.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

ESTATE PRITCHARD V. FISCHER. { 1905.
Dec. 13th.

Mr. Benjamin was for the plaintiff and Mr. H. G. v. Zyl for the defendant.

Mr. Benjamin moved for provisional judgment on a promissory note for £481.

Provisional sentence as prayed.

GOVEY V. CLARKE AND CO.

Mr. Upington (with him Mr. Long) was for the plaintiff, and Mr. Gardiner was for the defendant. Mr. Upington moved for provisional sentence on a promissory note for £515, with interest and costs. The defendants, Mr. Upington said, made a promissory note for the amount claimed in respect of a consignment of eggs in favour of R. Warner and Co., who had the bill discounted by the plaintiffs. Defendants pleaded want of consideration on the ground that the eggs were not according to the samples. The eggs, which came from Russia, it appeared from the correspondence, were below the "electioneering stage."

The eggs had originally been imported in favour of Zion, Chiat and Co.

Maasdorp, J.: There is a serious dispute as to the facts between the parties in this case, and it would be impossible for the Court finally to determine that dispute upon the affidavits which has been put in, and all the Court can do at present is to ascertain which of the parties is in all probability likely to be successful if all the circumstances of the case are taken into consideration. The action is brought by the plaintiff as legal holder of a promissory note made by the defendant in favour of Warner and Co. The defence sets up want of consideration against this bill. Now, it is quite clear that unless there are certain special circumstances which vary the rights of the parties, that want of consideration between the original parties to a bill cannot be set up against a subsequent legal holder. The defendant says such circumstances do exist, but there is a strong indication that the transaction was such as alleged by the plaintiff to have been, that he merely discounted the promissory note and took it in part settlement of a debt due by Warner to him. Upon the information before the Court, provisional sentence must be given with costs, with liberty to the defendant to sue to recover these costs in the principal action if he thinks fit to establish his position.

TENNANT V. ZIERADZKI.

Mr. Swift moved for judgment under Rule 329d for £22 17s. 7d. for professional services and costs.

PHILLIPS V. LEA.

Mr. Gardiner, for the plaintiff, moved for provisional sentence on a mortgage

bond for £59 10s., balance of an instalment of £150, and that the property specially hypothecated be declared executable.

Mr. W. P. Buchanan, for the defendant, said the question was whether the plaintiff was entitled to claim certain costs from the defendant, seeing there were negotiations for a settlement. A promise of a tender was made, with costs up to date, and after that the plaintiff's attorney set down the case. It was the costs of setting down that were objected to.

Provisional sentence granted, with costs, including the costs in dispute, and the property declared executable.

SHEPHERD V. VAN RENEN.

Mr. W. P. Buchanan moved for the final adjudication of the defendant's estate as insolvent. Mr. Benjamin was for the defendant. The plaintiff had obtained judgment for £250 and £1,000 on two mortgage bonds. The property was subsequently sold, and realised £200 and £750, leaving a balance of £497 5s. 10d., which included Sheriff's expenses.

Mr. Benjamin said that his client had a good action against the plaintiff's son for a substantial sum of money, and that when the action was instituted the sequestration proceedings were commenced.

Order granted.

SEDGWICK AND CO. V. DAVIDOFF.

Mr. Benjamin was for the plaintiff and Mr. Alexander was for the defendant.

Mr. Benjamin moved for an order adjudicating the defendant's estate as insolvent.

Mr. Alexander read the affidavit of the defendant, which set out that while he admitted his indebtedness in the sum of £555 on a mortgage bond, he denied his indebtedness in the amount of £683 for goods sold and delivered. He admitted he was indebted in the sum of £27 4s. 9d. At a meeting of the defendant's creditors, it was agreed that he should assign his estate, and that he should continue to carry on the business at a salary of £3 a week until the business showed a profit. For a considerable time the defendant carried out the decision of the creditors, but a creditor who had not signed the deed of assignment came along, refused to sign, and then the other creditors said their obligations were at an end.

Order of sequestration granted.

REHABILITATIONS.

Mr. Bailey moved for the rehabilitation of Alexander Craighead Cruickshanks, Roelof Chas. Malherbe, and William Walker. Mr. De Waal moved for the rehabilitation of Petrus Johannes de Wet, and Mr. J. E. R. de Villiers moved for the rehabilitation of Hendrik Cornelius Dreyer.

Granted.

GENERAL MOTIONS.

Ex parte THE ASSIGNEES { 1905.
OF THE ESTATE OF PITT. } Dec. 13th.

Mr. Bailey moved to make absolute a rule granted under the Derelict Lands Act.

Rule made absolute.

Ex parte PIENAAE.

Mr. Roux moved to make absolute a rule granted under the Derelict Lands Act.

Rule made absolute.

Ex parte THE RECEIVERS GRAND JUNCTION RAILWAYS.

Mr. Uppington moved to have a rule granted under the Derelict Lands Act made absolute.

Rule made absolute.

Ex parte GOEZAAR.

Mr. P. S. T. Jones moved for leave to raise certain money on mortgage. The petitioner was the executrix in the will of her late husband and her children, who were all minors, were the registered owners of certain land valued at £1,100. The properties had been in a dilapidated state for some time, and she was desirous of obtaining £350 to put the houses in proper repair, in order that she might get rents sufficient to maintain herself and children.

Order granted, the bond to be executed, with the condition that £24 per annum be paid off by the applicant.

WILKINSON V. WILKINSON.

Mr. Gutsche moved to make absolute a rule calling on the respondent to show cause why plaintiff should not be allowed to sue *in forma pauperis*.

Rule made absolute.

Ex parte DE KLERK.

Mr. J. E. R. de Villiers moved for leave to the petitioner to raise £650 on a farm in order to pay the debts of the petitioner's children, who had made themselves responsible for the debts, to assist the petitioner.

Leave granted to mortgage the property to the extent of £650, to enable the applicant to pay the debts mentioned.

Ex parte BASKIND AND WIFE.

Mr. Watermeyer moved on behalf of the petitioners for leave to register an ante-nuptial contract. The matter had previously been before the Court, and it was ordered to stand over for further information as to the property of the parties. The terms of the contract set forth were now testified to by both parties as the terms they intended entering into, and they would have done so before marriage had they not been told that it could be done afterwards.

Leave granted to execute the contract in terms of the draft put in.

LYONS V. LYONS.

Mr. Sutton moved to make absolute a rule to enable the applicant to sue the defendant in *forma pauperis* for judicial separation. The rule was granted to the petitioner on the ground of cruelty. Several times he threatened to take his wife's life, and the petitioner ultimately left him.

The defendant appeared and denied the allegations, and made certain charges against his wife.

Leave granted, Mr. Lewis, having had charge of the proceedings on a former occasion, appointed as advocate.

Ex parte ADAMS.

Mr. Payne moved for an order authorising the Registrar of Deeds to amend a bond so that the petitioner's full name would appear on the bond.

Granted.

STYLE V. STYLE.

Mr. D. Buchanan moved for leave to sue the wife, who is defendant, by edictal citation, for restitution of conjugal rights, by reason of her malicious desertion.

Leave granted, return day 1st February, personal service to be effected.

Ex parte DU TOIT.

Mr. Gardiner moved for an order authorising the acceptance of a bond

which the applicant had executed in favour of his wife, but not in same christian name as that appearing on the ante-nuptial contract.

Granted.

Ex parte RONALDSON AND WIFE.

Mr. Swift moved for leave to the petitioners to register an ante-nuptial contract. The matter had been ordered to stand over for information as to the property. Petitioner's wife at the time of the marriage was possessed of £35 and personal effects, and the applicant had half-share in a shipping business at East London.

Leave granted to register the ante-nuptial contract in terms of section 5 of the petition, without prejudice to the creditors.

VAN DER VYVER V. VAN DER VYVER.

Mr. Roux moved for the appointment of a curator to the respondent, who was incapable of managing her own affairs. Medical testimony showed that the respondent, Anna Christiana van der Vyver, was an imbecile, and totally incapable of looking after her own affairs.

Mr. Reitz appointed *curator ad litem* in proceedings to have the respondent declared incapable of managing her own affairs. Proceedings to be taken by means of notice of motion, the affidavits to be served on Mr. Reitz, who is authorised to obtain information on affidavit, and to send written reports. The return day to be 1st February.

Ex parte MILLS.

Mr. J. E. K. de Villiers moved for the appointment of petitioner's husband as trustee to accept transfer of certain property on behalf of her minor daughter by her previous marriage.

The matter was ordered to stand over for further information.

Ex parte GIBBS AND OTHERS.

Mr. Struben moved for leave to raise £5,000 on mortgage, to meet certain liabilities and to pay legacies. There was a consent from the major heirs in the estate, and the Master's report was favourable.

Order granted in terms of the Master's report.

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

GENERAL MOTIONS.

In re THE AMOY BRICK SYNDICATE. 1905.
(Dec. 14th.

Mr. J. E. R. de Villiers submitted the final report of the liquidators, and moved for its confirmation with certain compromises.

Granted.

Ex parte MILLS.

Mr. J. E. R. de Villiers mentioned this matter, which was ordered to stand over from the previous day for information as to the circumstances of the petitioner's divorce from her first husband. Counsel produced the report, which showed she was plaintiff, and there was no claim in reconvention. The application was to have petitioner's husband, David Mills, appointed as trustee to take transfer of property for a minor daughter by the first marriage.

Granted.

In re WARD AND CO., LTD.

Mr. Douglas Buchanan applied for the confirmation of the official liquidator's report. Counsel also applied to allow the books to remain in possession of Henry Ward, who was carrying on the business.

Granted.

Ex parte KNOETSEN.

Mr. Russell moved for an order authorising the signature of certain partition transfers. The Master's report was favourable.

Granted, subject to the Master's recommendation being carried out.

Ex parte BOUWER.

Mr. Sutton moved for an order confirming a sale of property, in an estate in which the petitioners were executors, to Jacobus Stephanus Bruwer, who made the best offer for the property.

Granted.

Ex parte VAN ECK.

Mr. Russell moved for an order authorising the execution of a mortgage bond in the estate in which the petitioner was executor testamentary. The Master's report was favourable.

Granted, subject to the Master's recommendation being carried out.

COLONIAL GOVERNMENT V. LE ROUX AND CONCORDIA (NAMAQUALAND) COPPER MINING CO.

Mr. Nightingale moved for the cancellation of certain mineral leases granted to the respondents for a period of 99 years, on the ground that the respondents had failed to pay any rent or carry out the conditions of the lease. The officials of the syndicate could not be found.

Maasdorp, J., granted a rule nisi returnable January 12, one publication in the "Gazette" and "Cape Times."

Ex parte FOURIE.

Mr. Russell moved for an order authorising the exchange of certain property in order that the petitioner's inherited property might be merged in one farm and not scattered over the country, and to raise a mortgage. The Master had no objection.

Granted.

Ex parte DE WITT AND WIFE.

Mr. Watermeyer moved for leave to register an ante-nuptial contract. The parties intended to execute the contract, but as the petitioner could not find a notary public in Cathcart, he got married on the 19th September, 1905—the day fixed for the event.

Granted, without prejudice to the rights of creditors.

WILTER V. WILTER.

This was an action for a decree of divorce, and for a declaration that the defendant has for feited a half-share in the property acquired since a deed of separation was entered into between the parties.

Dr. Greer was for the plaintiff, and the defendant was in default.

FEDERSEN V. GOLDBERG.

Mr. Sutton moved to make absolute a rule granted restraining the defendant from removing goods pending an action.

Granted.

Ex parte THE EXECUTORS IN ESTATE LATE MCGRATH.

Mr. Bailey moved for an order authorising the amendment of certain letters of administration in order to have the heir's names corrected so as to get transfer of certain property.

Granted.

Ex parte KLEYN.

Mr. W. P. Buchanan moved for an order authorising the passing of certain transfers of property. The petitioner was the executrix in the estate of her late husband, and she sold the property for £2,400 to her two grandchildren, reserving the right to remain in possession herself.

Maasdorp, J., ordered the application to be renewed after notice to the widow in the estate of petitioner's son and to the children, Mr. Krige to act as curator to the children.

Ex parte CORNELIUS AND WIFE.

Mr. Struben moved to have an antenuptial contract registered.
Granted.

Ex parte VAN HUYSTEEN.

Mr. Wright moved for leave to sue Peter Hendrik Ferreira by edictal citation for damages for seduction, and for an order restraining him from receiving money he has inherited pending the action.

Leave granted, returnable 1st February, personal service to be effected and the legator restrained from paying the sum of £83 and the Master restrained from paying £63 to the respondent pending an action.

Ex parte THE CAPE CANNING CO.

Mr. Van Zyl moved for the liquidation of the company and the appointment of Mr. G. W. Steytler as provisional liquidator.

Granted.

Ex parte DU PLESSIS.

Mr. W. P. Buchanan moved for an order authorising the passing of a certain transfer of property. All the children were majors, and had consented to the transfer and the sale of the property.

Maasdorp, J., made no order, as it appeared certain minors might be interested in case their parents predeceased the surviving testator. The parties if advised could make a further application, and in that case the minors should be properly represented.

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

GENERAL MOTIONS.

GOURLAY V. BAUMGARTEN. { 1905.
Dec. 15th.

Dr. Rainsford moved for an order, calling on the respondent to complete the transfer of certain letters patented to the applicant, who had advanced certain moneys to the respondent to carry on a lighting company, with an acetylene gas generator, on condition that he was to get a cession of the patent. Letters patent had been granted to the respondent in Pretoria.

Order granted, directing Baumgarten to execute transfer of the cession, with the patent rights.

THE MASTER V. DURANDT'S TRUSTEE.

Mr. Nightingale moved for an order on the respondent, who is sole trustee in the estate, compelling him to file a liquidation account.

Respondent ordered to file the account within three months, and pay the costs of the application.

In re THE ROYAL HOTEL CO., LTD.

Mr. Roux moved for the confirmation of the liquidator's report. The report had lain for inspection for the usual time, and there was no objection. Counsel also asked for directions as to how the claims of creditors were to be proved, and for an order to make certain payments, according to agreement of 16th June, 1905.

Report confirmed, payments sanctioned, and creditors to prove by affidavit.

Ex parte VIJELLSTROM.

Mr. Lewis moved for the confirmation of the sale of certain property to the petitioner, who was executor testamentary in the estate. There was evidence that the sale was well attended, and that the price was a fair and reasonable one.

Granted.

Ex parte CLASSEN.

Mr. Watermeyer moved for an order authorising the transfer of certain property.

Granted.

ESTATE STEPHAN V. PARTRIDGE.

Mr. Searle moved, on behalf of William A. Currey and Ed. J. Moore, as joint trustees of the estate of J. C. J. Stephan, for an order authorising the cancellation of a sale, or grant of leave to them to sue Astley C. Partridge by edictal citation for the completion of the sale, or alternatively for the cancellation thereof, with an order, if necessary, to attach the property registered in the name of Partridge.

The affidavit of the applicants showed that on October 2, 1903, Stephan passed a first mortgage bond for £3,500 of Evan Hopkins Jones, of Mowbray, and a second bond to Hilda Roberts for £1,000, under which he specially hypothecated certain house and grounds at Rosebank, known as Gavenwood. Partridge became surety for the payment of the bonds. Thereafter Stephan became insolvent, and the property was submitted to public auction, and purchased by Partridge for £3,165. The petitioners were given to understand by Partridge that he had arranged with the mortgagees, and he would assume the liabilities of Stephan, in settlement of the purchase price of the property. About April 1, Partridge disappeared. For a long time no trace of his whereabouts was discovered, but petitioners were informed that he was now in London, engaged as an employee in a motor-car business. He had failed to comply with the conditions of sale on which he purchased the property, and had neglected to take transfer of the property. Petitioners were anxious to complete the liquidation of Stephan's estate, and consequently brought this suit to compel Partridge to take transfer. Counsel explained that Partridge had been seen in London by one person, but his present whereabouts were not now known.

Leave was granted to sue by edictal citation, personal service to be effected if possible, and if not, an advertisement to be inserted in the "Daily Telegraph."

Ex parte **STRADLING.**

Mr. D. Buchanan moved for an order as to the dealing with certain moneys. The affidavit stated that applicant was the sole trustee in the estate of the late John Godfrey Kruger. There were two children of the marriage, both of whom are minors. It was his duty to hand over certain moneys to the wife of the deceased, but he did not feel prepared to do so without an order of the Court, as she had been separated from her husband and was addicted to drink. It was feared that if the money was paid over to her that she would not devote it to the interests of the children. A rule nisi calling on the wife to show

cause why some maintenance should not be kept for the children out of the interest was granted.

Ex parte **LOOTS.**

Mr. W. P. Buchanan moved for an order authorising the passing of certain transfers. The petitioner and his wife, Maria Magdalena Elizabeth Loots, since deceased, made a will leaving the joint property to the survivor and the children of the marriage, and as it was necessary to wind up the estate, an order to transfer certain portions of the property as set down in the will to the children.

Maasdorp, J., said he thought it better to refer the matter to the Master before giving judgment.

Ex parte **VEEDT.**

Mr. De Waal moved for leave to mortgage certain property which was bequeathed to minors. It was necessary that the mortgages should be raised before the transfer could be effected.

An order in terms of the Master's report was granted.

Ex parte **THE EXECUTORS IN THE ESTATE OF THE LATE GRUNDLING.**

Mr. Benjamin moved for leave to sell certain property situate in the district of Oudtshoorn. The Master's report was favourable.

Granted.

HOWARD V. HOWARD.

Mr. Sutton moved on behalf of Ellen Mabel Howard for the appointment of a curator *ad litem* in the estate of her husband, who was at present confined at Valkenberg Asylum.

[Maasdorp, J.: What is the value of the property.]

There is property in Johannesburg and £50 in cash.

[Maasdorp, J.: I think you will find that there is no necessity to take this course unless the property exceeds £500.]

But there are certain minor children.

[Maasdorp, J.: I think we had better get further information.]

Mr. Sutton: It is to be presumed that they had legal advice.

The matter was adjourned for further information as to the value of the estate.

SANDERS V. CAPE TOWN TRAMWAYS CO.

Mr. Watermeyer was for the applicant and Sir H. Juta, K.C., was for the respondent. Mr. Watermeyer said this was the return day of a rule calling on

the respondents to show cause why the applicant should not be allowed to sue them *in forma pauperis* for £400 damages, by reason of an accident to the applicant on August 1 last. It appeared from affidavit that the applicant was driving down Sir Lowry-road in a cart with another man, and owing to the unlawful action of the company in putting the road in a dangerous condition, the shaft of the cart broke, the horse bolted and overturned the cart, and both applicants were thrown out, with the result that the applicant sustained injuries and was confined to the hospital for some time.

Sir H. Juta read replying affidavits, which set out that every care was taken in relaying the blocks.

Sir H. Juta: The applicant did not even suggest in what respect the company was acting unlawfully, nor did he give any details of the accident, or as to how or where it occurred. The applicant should reasonably give some details of the accident. The superintendent of the Tramway Co. saw the cart after the accident, and he stated that the shaft was in a rotten state, and might have broken at any time. In submitting a claim, one of the applicant's attorneys stated there was a collection of rails on the road, but the superintendent was in a position to state that there was no such heap of rails. A witness of the action, in an affidavit, said the driver had a large picture in front, which seemed to hamper him in the control of the horse.

Maasdorp, J., said the petition was very vague in merely stating that the damage was occasion by the unlawful act of the respondents. The Court could not ascertain from that if a *prima facie* case was made out. He thought it would be possible to amend the petition by annexing some statement as to what the unlawful action was, or whether there was neglect. More definite information must be tendered as to what the cause of action was. The matter could stand over, and be mentioned again.

LIS V. CODONIAL GOVERN- { 1905.
MENT. { Dec. 15th.

Undesirable — Deportation — Act 47 of 1902, Sec. 3 (d).

This was an application on notice of motion, calling on the Colonial Secretary to show cause why the applicant should not be released from custody. The applicant had been arrested on entering the Colony from the Transvaal, and it was the intention of the Government to deport him. The applicant's affidavit set out that on November 19 he was arrested and confined in Roeland-street, awaiting deportation, at the instigation of the

officer in charge of the Immigration Department. His arrest, he maintained, was wrongful and unlawful, as the Act could not apply to him. He was a Russian by nationality, and had been in South Africa for five years. For the five years he had never departed from South Africa, and during the war was enrolled as a member of the Cape Town Guards, and had a discharge, and his conduct was exemplary.

A lengthy correspondence between Mr. Brady (the attorney for the respondent) and Mr. Cousins (the officer in charge of the defendant) was read.

The answering affidavit of Mr. Cousins dated November 15, stated that in consequence of inquiries he had caused to be made as to the record of the applicant, it appeared that he was generally a man of bad repute and an associate of pimps. The validity of the discharge from the Town Guard, produced by the applicant, was questioned. He was living on the earnings of a prostitute in German South-West Africa. The applicant had been charged with serious crimes on several occasions.

Regarding the question as to whether the applicant had been enrolled in the Town Guard, Mr. Brand, of the Defence Department, filed an affidavit to the effect that the only Lis in the Town Guard in 1901 was a Joseph Lis—the applicant was named Jack Lis.

Several replying affidavits made by non-commissioned officers of the Long-street company in which the applicant was enrolled, stated they recollected him serving in the corps.

The applicant denied the allegations contained in Mr. Cousins's affidavit, adding that he was receiving £30 a month from a general store in the Transvaal. He produced framed souvenirs of the regiment presented to each member by the officer commanding the regiment before it was disbanded, and in which his name appeared.

Dr. Greer was for the applicant, and Mr. Nightingale was for the Crown.

Mr. Nightingale was about to read further affidavits, when

Dr. Greer objected to further affidavits being read without the permission of the Court. The first application was made in November, and the case was ordered to stand over until December 12, and it was only on that morning that the affidavits counsel was about to read were served on them.

Maasdorp, J., said the sole point rested on the question of the applicant being honourably discharged from the Town Guard.

Mr. Nightingale: We question the validity of that discharge.

Mr. Nightingale was about to read the affidavit of Detective Head Constable Grant, which was testifying to character, when

Maasdorp, J., said all the Court wanted was evidence that the applicant was not in the Town Guard.

The affidavit of Captain Johnstone stated that he was adjutant of the Town during the time Lis was alleged to have served in it. He had seen the discharge put in by applicant. The discharge mentioned no regimental number, and the character was filled in in a different handwriting to the rest of the discharge, and it was not in accordance with regulations to give an exemplary character for short service, and it would be noticed that the character was given as "exemptory." To the best of his belief, the signature to the discharge was not that of Major Scale.

Dr. Greer put in certificates granted to other men in the same company, which corresponded with that produced by the applicant.

Mr. Nightingale said one of the exemptions under the Act was anybody who had served in His Majesty's Forces, and had received a good discharge. Now, Lis, when first asked denied having served in a corps, but then said he served in the Town Guard. It would also be noticed that the name of Jack Lis was not on the roll, but there was a Joseph Lis. The Crown admitted that the applicant did serve in the corps, but after the date admitted by him, and he put in no certificate of his service then, whilst the Act required him to produce a certificate for his whole service.

Without calling on Dr. Greer, Maasdorp, J., said that this matter could be very shortly disposed of, without considering many of the points which had been raised in the affidavits and arguments. It appeared that the applicant had been treated as a prohibited immigrant by the Immigration Department, and he alleged that he had been wrongly so treated, because he held that he came under the exemption in the Act. The section he referred to was sub-section D of section 3. The applicant produced a discharge, in which his character during service was described as exemplary. It was suggested at first that it was impossible for him to have a discharge, because he never served in the Volunteer forces at all, and even when that was disposed of, another difficulty was raised, because it was said that he served for a much longer period than he gave a certificate for. Doubt was thrown on the certificate, to the effect that it was forged. On the face of it, that certificate seemed to be a genuine one, and comparing it with the others, it appeared to be all right. The Court had therefore to accept it as the discharge given by Major Scale to the applicant, in which he was described as a man of exemplary character. An affidavit had been produced to the effect that the document was not in

proper form, and that the military authorities would have regarded it as in all respects an irregular discharge, which they would never accept as good, but he (his lordship) could not hold that view, and he arrived at the conclusion that Jack Lis did serve in the Volunteer forces, and that he received on the expiration of his service a good discharge. It was unnecessary to go into the question of domicile, and the Court held that under sub-section D of section 3, the applicant was exempted from deportation.

Dr. Greer asked for costs in the case. His client had done all in his power to give the Immigration Officer every chance of inspecting his papers, etc.

Maasdorp, J., said that, as he had said in another case, the Court would not readily grant costs against the authorities when they were doing their duty. It certainly appeared that there were circumstances in this case to mislead the Immigration Officer, and he did not blame the Immigration Officer for having arrived at the conclusion he had. The application for costs would be refused.

Ex parte LIQUIDATORS, BEIRA COLD STORAGE CO.

Mr. Burton moved for leave to appeal from the judgment of the Supreme Court to the Privy Council.

Granted.

BRADLEY AND CRAVEN V. RANE.

Mr. Burton moved for leave to substitute the name of Mr. Nathan or Mr. Charles de Villiers, in place of that of Mr. Saul Solomon, on a commission sitting in Johannesburg.

Granted.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

CAPE TOWN RATEPAYERS' ASSOCIATION AND OTHERS V. CAPE TOWN TOWN COUNCIL. } 1905.
Dec. 18th.

Municipal Council—Administrative acts—Interdict—Illegality—*Ultra vires*.

The Supreme Court will not, by interdict, interfere with the

administrative acts of any Municipal Council unless such acts are ultra vires or otherwise illegal.

This was an application on behalf of the Cape Town Ratepayers' Association and others, calling on the City Council to show cause why the rule nisi, interdicting them from signing the Nuttall contract, should not be made absolute.

Mr. Upington appeared for the petitioners, and Mr. Searle represented the City Council.

Mr. Upington said this was a matter which was specially set down for hearing for to-day, but it had been very difficult for the petitioners to get their case properly together in the time at their disposal. He had an affidavit from the attorney for the petitioners.

[De Villiers, C.J.: The case must be heard to-day.]

Mr. Upington explained that this was an application to have a certain rule nisi which was granted by the Acting Chief Justice made absolute. The rule nisi was returnable on the 12th January, 1906, and called on the respondents to show why they should not be interdicted from signing a certain contract—the Nuttall contract.

De Villiers, C.J., said he had read the petition and the affidavits of the petitioners and the respondents.

Mr. Upington: There are certain replying affidavits which have only been sworn to this morning. I do not know if copies have been received on the other side.

[De Villiers, C.J.: You had better read them.]

Counsel then read the affidavit of Dr. Caporn, which was as follows:

1. That I was present at the meeting of ratepayers held to authorise a loan of £366,000 for the paving of certain streets.

2. That I agree with and confirm the statements of the Mayor, and of John Bartlett, late member of the Town Council.

3. That at the said meeting I asked the chairman (then the Mayor), whether all the streets would be paved in accordance with a schedule then produced, and in particular whether Jordaan, Buiten, and Orphan streets, for which a sum of £6,017 was set apart in the said schedule, would be so paved, and the answer was in the affirmative, and was specially emphatic on the point.

4. The said statement was corroborated both by Mr. Councillor Matthews, the then chairman of the Public Works and Improvements Committee, and by the then City Engineer, Mr. Wynne Roberts, who produced the said schedule for my inspection and satisfaction.

5. Had the answer been otherwise, I

should not have voted for the loan in question, as then the Council would have been at liberty to devote all the money to one particular part of the city, instead of distributing it uniformly, with the consequent benefit to all ratepayers.

The affidavit of Mr. John Bartlett, builder, of Cape Town, was as follows:

1. That I was a member of the Town Council of Cape Town for about five years, and that at the date on which the ratepayers were asked to sanction a loan of £366,000 for the improvement of adopted streets, I was then a Councillor.

2. That at a meeting of ratepayers called on that date for the purpose of sanctioning the said loan, I was present, and in company with Councillors Liberman and Matthews (chairman of the Streets Committee) and other Councillors, represented the Town Council.

3. At that meeting a schedule of all streets to be paved, drawn up by the City Engineer, was placed before the meeting, and the said schedule set forth in detail the exact sum to be spent on each particular street.

4. It was distinctly understood by the ratepayers present at that meeting that the Town Council would, if the said loan were sanctioned, be bound to spend, if necessary, on each street the amount set apart for that particular street in the schedules referred to.

5. This was a fact upon which great stress was laid by the other Councillors and myself, and we, as Councillors, depended on the said schedules, as submitted to the meeting in question, and on the promise that the money would be so spent, to get the said loan sanctioned by the ratepayers.

6. Owing to the fact that on several occasions prior to the said date various sums authorised by the ratepayers for certain purposes had subsequently been diverted by the Council to other uses than those understood by ratepayers, there was a very considerable amount of dissatisfaction among the ratepayers, and, accordingly, the understanding that the money was to be spent as per schedule was very explicit.

[De Villiers, C.J.: What was the form of the resolution passed at that meeting?]

Mr. Upington: It was not a resolution exactly, but a poll.

[De Villiers, C.J.: What was the form of the meeting?]

Mr. Upington read the notice convening the meeting of ratepayers, and explained that before the meeting was held, a schedule was submitted to the ratepayers personally, and a poll was demanded, and a schedule was published, which lay at the office of the Town Clerk for the inspection of the ratepayers.

[De Villiers, C.J.: It is your contention, then, that the laying of the

schedule before the ratepayers prevents the Town Council from paying a penny more than is on the schedule?]

I cannot go that length, but I say they are not entitled, having named certain streets to the ratepayers to leave these streets without being done.

[De Villiers, C.J.: The question is, are they spending more than they ought to, on any particular streets?]

That will be mentioned when the Court is asked to say how much has been expended out of the £366,000, and how much is to be spent.

Counsel then read the affidavit of John B. Wheelwright, member of the Corporation of Accountants, Fellow of the Chartered Institute of Secretaries, at one time Treasurer and Town Clerk of Woodstock, presently carrying on business as an accountant in Cape Town, and Henry Rowe Rowe, member of the South African Society of Architects, carrying on business in Cape Town as an architect and quantity surveyor. It was as follows:

1. That, acting upon instructions from the respondents' attorney, we made certain investigation at the Town-House in reference to the matters dealt with in the original petition, and that the result of our investigations is as follows:

2. We append hereto a report signed jointly, dealing with the loan of £366,000 authorised by the ratepayers in July, 1901, for the purposes of paving certain adopted streets in Cape Town, and that the facts and deductions contained therein are to the best of our knowledge and belief true and correct in every respect.

3. That we hold, as a result of our investigations, that there is not at the present moment a sufficient balance of the said original capital sum available for the purposes of the contract which it is proposed to enter into with Messrs. Nuttall and Co.

4. That the appellation "adopted streets" refers to streets which at the date of the passing of the Municipal Act of 1893 had already been taken over, and were being maintained at the cost of the municipality.

5. With reference to the appellation "unadopted streets," these were streets existing at the time of the passing of the said Municipal Act, but which had not been formally taken over by the municipality, and for the maintenance of which the municipality were not responsible.

6. The term "new streets" refers to streets which have been or may be constructed subsequently to the date of the passing of the said Municipal Act.

7. That your deponents append hereto an abstract of the municipal accounts for the year 1904.

8. That on page 94 of the said abstract, under the expenditure in connection with unadopted streets loan, the flotation expenses are charged as an

item against the same, and your deponents allege that this is a proper course to pursue in such cases.

9. That no such item has been charged against the capital sum of £366,000 which was borrowed for the making up of adopted streets.

10. That another item which has not been charged against this loan is that of the percentage for departmental provision, and its expenditure in connection therewith, and your deponents are informed by the City Treasurer that the usual charge in this respect is one of 3 per cent. on the amount of the expenditure.

11. That in the case of other loans by the Municipality of Cape Town, these items for departmental provision and for flotation expenses, are, as will appear from the abstract of accounts referred to, customarily charged.

12. That with reference to the statement by Cunningham in a replying affidavit of the respondents, to the effect that £2 will cover all extras, we desire to point out that the average sum expended on extras in similar contracts, both with Nuttall and Co. and other firms, amounts to about 12½ per cent. of the capital sum in each case.

13. I, the said Henry Rowe Rowe, state that in reference to paragraph 27 of the said Cunningham's affidavit as to the extra excavation required in order to bring St. George's-street to a proper level, that the cost of the same, together with the expenses of removal, will cost at least £500.

14. That with reference to the statement in paragraph 5 of C. B. Martin's affidavit, to the effect that the Council has authority to expend upon works for which a loan has been authorised by the ratepayers, such additional sum over and beyond the amount so authorised any additional sum required to complete such works, we deny emphatically that such is the case.

15. That in corroboration of our statement, we beg to refer the Court to page 101 of the said abstract of the City Treasurer's accounts, from which will be seen the various sums required for the building of the new City Hall.

16. That the original estimate for the City Hall was £50,000, and authority was obtained from the ratepayers for this amount, in the usual manner, on the 19th November, 1891.

17. Subsequently it was found that more money would be required to build the City Hall, and accordingly on the 4th July, 1901, the ratepayers were again applied to, and sanctioned a further sum of £100,000.

18. Accordingly, the statements contained in paragraphs 6 and 7 of the said Martin's affidavit, to the effect that it has at all times been the practice of the Town Council to complete a contract for which an insufficient amount has been sanctioned by the ratepayers

from moneys taken out of revenue or otherwise, is utterly inaccurate.

19. That as a result of our investigations as detailed in our report, we find that the balance available for the contract in question does not exceed £58,479.

20. That the time at our disposal for the investigation of the books and accounts necessary to be gone into by us in order to frame this report was so limited that we are unable to state that this amount might even have to be still considerably decreased, on account of the omission by us of the minor streets as stated above, which we have not had the necessary time to go into.

21. That the particulars upon which our report is based were taken from the original schedule presently in the possession of the City Treasurer, and which schedule was exhibited at the meeting of ratepayers at which the poll was instructed to be taken.

22. That the schedule presented at the said meeting, specified in detail the amount to be spent on each street, and upon the understanding that each amount would be so spent on each particular street, the ratepayers passed the said loan.

23. That deponents desire to point out that in the statement by Thorpe, the Acting Treasurer during Mr. Martin's absence, the said Thorpe takes the same view as your deponents and admits that the sum of £97,843 was specially authorised by the ratepayers for the paving of the six streets in question.

24. That your deponents desire to express their regret that owing to the lack of time at their disposal, and owing to the involved nature of the investigations they have not been able to place as full and detailed a report before this Court as they would otherwise have done.

The following is the report referred to:

The original estimate was £425,000; from this deduct £59,000. Total, £366,000. This was the amount the ratepayers were asked to grant, as £20,000 had been granted on a separate loan for paving and £39,770 previously, put down for Dock-road was withdrawn.

The method by which the deduction of £20,000 is dealt with is apparently by transferring the £10,000 of Section 4 for lanes (or the greater part thereof) to the unadopted streets account and striking out contingencies £9,144, leaving balance of £405,856 on original estimates. From this deduct the £39,770, leaving £366,086 and the ratepayers were asked to sanction a loan of £366,000, which was granted.

Section 1.—Streets requiring immediate attention, £227,880; less deduction for Dock-road, £39,770—Total, £188,110.

Section 2.—Streets requiring attention within five years, £140,058.

Section 3.—Streets not urgent, £37,869—Total, £366,037.

The loan, therefore, provides for the streets in the three sections, excepting the small amount of £37, but there is no allowance for contingencies whatever.

For the six streets it is now proposed to pave at a cost of some £100,000, the following amounts were placed, viz., Long-street, £30,215; Plein-street, £9,150; Darling-street, £13,243; Adderley-street, £26,441; St. George's-street, £11,062; Parliament-street, £7,723—Total, £97,834. But of this has already been expended the following amounts to 31-10-05:

Long-street, £2,081 16s. 8d.; Plein-street, £2,799 1s. 3d.; Darling-street, £1,805 1s. 5d.; Adderley-street, £4,281 8s. 10d.; St. George's-street, £2,678 11s. 6d.; Parliament-street, £285 6s. 10d.—Total, £13,931 6s. 6d.

Therefore, unless the other streets to be provided for are to be robbed, or unless they have all been completed and at considerably under estimated cost, only £83,902 13s. 6d. was available for these streets on October 31 last, since when amounts have been spent which would further reduce this balance. These amounts, however, have not yet passed through the City Treasurer's books. According to the books of the council, the position of the £366,000 is as follows: Expended to 31st October, 1905 (accurate), £238,380 13s.; expended to 31st November (not yet finally verified), £5,304 7s. 9d.; total, £243,685 0s. 9d.

Add for transfer from unadopted to adopted account, information supplied by City Treasurer, not yet passed through books, £2,363 5s. 4d.

Retained money which has to be paid to Nuttall for work already done (the total retention money is some £8,477 18s. 4d., of which one-fourth may fairly be accounted as on adopted streets), £2,119 9s. 7d.; total, £248,167 15s. 8d.

Thus only leaving £117,833 available for the completion of all the unfinished streets, and also providing funds for the large proposed paving contract, which, it is admitted, will not cost less than £100,000. That a very large amount of work still remains to be done is very obvious, as a rapid inspection shows 13 streets, estimated to cost £3,359, not touched; two streets, estimated to cost £428, only had under £1 each spent on them. Beach-road, estimated to cost £10,846, remains unfinished, having so far only had £3,173 spent on it; and Platteklip-road, which was (including culverting slurt) estimated to cost £5,093, has only had £2 spent on it.

In section 1 of streets requiring in 1901 immediate attention according to the estimates, eight important streets, for which £26,996 was authorised, have only been partially attended to, and only £10,132 has been expended thereon up to 31st October, 1903.

In section 2 of streets requiring attention within five years from 1901, there are 13 important streets, for which £42,378 was authorised, and which remain uncompleted, with only £20,579 spent on them.

In section 3, as the streets are declared not immediately in need of attention, I would only refer to three streets, for which £6,966 is authorised, and only £2,825 spent. Of those streets, the contractors have been called upon to deal with two, so the work is apparently requisite, and streets in this section cannot be hung up indefinitely.

So far, therefore, from the £117,833 previously shown being available for the new paving contract, the following deductions have to be made to provide for the other work for which the loan was granted: For 13 streets not touched, £3,359; for two streets practically untouched, £426; Beach-road to complete, £7,674; Platteklip-road, £5,091; section 1, to complete eight streets, £16,864; section 2, to complete 13 streets, £21,799; section 3, to complete three streets, £4,141; total, £59,354.

Thus, if the estimate of amounts required for the streets to be made under the loan as authorised be anything like accurate, not only will nothing like £100,000 be found available for the next contract, but actually the amount of £83,902 13s. 6d., which stands to the credit of the six streets in question would really be found deficient, owing to over-expenditure in many cases on other streets, as for example: Items of Estimate Exceeded (no amount under £100).—Section 1: Sir Lowry-road, £541; Breda-street, £1,146; Prince-street, £160; Grey's Pass, £278; Park-road, £420; Burg-street, £419; Bouquet-street, £146; Liddle-street, £264; Jordaan-street, £1,338; De Lorentz-street, £554; Schoonder-street, £773; Union-street, £518; Vrede-street, £784; De Villiers-street, £139; Drury-lane, £106; Harrington-street, £548; Primrose street, £105; Stuckeris-street, £2,952; Coburn-street, £100; Courville-street, £103; Jarvis-street, £127; Combrinck-street, £368; Bennet-street, £382; Pontac-street, £757; total, £12,828.

This does not represent the whole amount of estimates' exceeds, as there are many amounts under £100.

In addition to this also, £229 of work has been done on lanes out of the adopted street contract, whereas the item of lanes was transferred to unadopted streets' contract, to which account the other expenditure on lanes, viz., some £6,000, has been debited.

There are other items of expenditure which do not appear to have been put against the loan, and which would render still more hopeless the possibility of finding anything like £100,000 for another contract, namely, the expenses of loan flotation and office

and supervision expenses in connection with this work. Loan flotation was some 4 per cent. on the amount of the loan, but has been charged to revenue. (Flotation expenses are charged against unadopted streets' loans, but not against adopted streets' loans.) Supervision and office and departmental expenses must also be added, a further 3 per cent. on work done.

It must therefore be obvious that, unless every other street provided for or meant to be provided for by the ratepayers in granting the loan, be thrown aside in favour of the six streets which it is now proposed to pave, there is not and cannot be anything like £100,000 available for the contract, and if the other streets be completed, the under-estimated amounts and extra work done would absolutely encroach on the £83,902 13s. 6d. at present standing to the credit of these streets, to a very considerable extent.

[De Villiers, C.J.: Supposing certain of the other streets could be done at a less cost, can they not do it?]

Of course, the Town Council will have to reduce the cost of other streets if they pay £85,000 for Adderley-street.

[De Villiers, C.J.: I see there is £100,000 of the loan still left.]

As far as we can ascertain there is £117,833, but our contention is that that amount is not available, because certain streets have to be repaired, according to the schedule submitted to the ratepayers, and there will not be sufficient money to pay this contract after that is done.

Mr. Searle said he had a short affidavit from the Town Clerk in which he pointed out that for several days after the matter was before the Court fixing the date for trial, nothing was done at all by the applicants in the matter.

The affidavit was in the following terms: (1) On Friday, the 16th instant, Mr. J. M. P. Muirhead and Mr. Douglas, accountants, called at my office with the object of seeing certain books relating to the loan transactions of the Town Council for the expenditure of moneys on streets. All the information in my possession and in the possession of the City Treasurer which was asked for was given to them, and a considerable amount of time of the Treasurer and myself was taken up for this purpose. (2) On Saturday, the 16th instant, Mr. J. B. Wheelwright and Mr. Rowe called for the purpose of obtaining the same information, which was afforded to them again at considerable length by myself and the City Treasurer. (3) The said gentlemen were the only persons who have attended at the City Hall for the purpose of examining the books and accounts of the Council with reference to the Nuttall contract now in question since the rule nisi was granted.

[De Villiers, C.J.: You have applied for the discharge of the order?]

Mr. Searle: We applied on Monday last to the Court to fix a date.

[De Villiers, C.J.: I will hear you.]

Mr. Searle said he would submit that in this matter there was now really no legal ground on which this rule could be confirmed. He took it that the principle was clear that unless the applicants could make out that in some way the Town Council had acted *ultra vires*, or outside the powers conferred by the Act of Parliament, they could not succeed. The Court could not inquire into matters of administration of the Council, and even matters such as the expediency of the Council in entering into a conflict—

[De Villiers, C.J.: We can take it for granted that the only two tangible points as far as I see are, first, that the contract is not in terms of the tender, and the other seems to be that there is no resolution which authorises this particular expenditure.]

Mr. Searle: With regard to the authorising of the loan, the position I take up is this, that there was nothing which bound the Town Council to spend a particular sum of money on any particular street.

Continuing, counsel contended that the petitioners had not shown that any particular sum of money had been allocated to any particular street so as to bind the Town Council to carry out the repairs on that street to the extent of the sum voted. Sections 104 and 105 provided the law by which these loans could be raised, and it would be seen on reference to the notice calling the meeting that no particular streets were named. The Town Council had not exceeded the total sum provided. The Town Council had certain rating powers under which it could levy a rate of 4d. in the £, and it would be admitted that the rates did not nearly come up to that amount at present. If the Town Council could get money from any other source to carry out its contract there was nothing in the Act to prevent it using the money. If they had any money from the rates they could use it on this work. They had the necessary power to make up the streets, and the reason why they went to the ratepayers was to get the power to enable them to raise the extra amount. The mere fact of their getting this £330,000 did not prevent them using other money for the work. He contended there was nothing in the Act to justify the attitude adopted by the petitioners. The affidavits of the officials, who were all men of experience, were to the effect that there was sufficient money available for this contract and the streets. Counsel contended that the facts alleged by the petitioners were not established.

[De Villiers, C.J.: As to the other points raised by the petition, I would like to hear Mr. Upington.]

Mr. Upington said the position had been considerably simplified since the case last came before the Court, and he was not prepared to support all the positions taken up by the petitioners, but he did contend that there were two grounds on which the Court should grant the interdict sought. The first was that the draft contract which it was proposed to sign differed in an important detail from the tender as accepted by the Council. The tender stated that the party agreed to complete the work in 18 months, and they guaranteed that the paving would carry the traffic for a period of three years, and the tenderers (Messrs. Nuttall) added a memo., in which they undertook to maintain the paving for a further period of three years, depositing with the Council £10,000 in Cape Town Corporation Municipal Stock. The draft contract which it was proposed to sign did not contain the latter portion of the contract. He contended that the guarantee in the letter was in addition to the guarantee embodied in the printed form, and it should be included in the draft contract.

[De Villiers, C.J.: Do you hold that the contract should mention four and a half years?]

No, the 18 months is for the completion of the contract.

[De Villiers, C.J.: Then what point do you raise?]

We say that after the period of maintenance has expired, they, in their letter, undertake to guarantee the pavement for a further period of three years.

[De Villiers, C.J.: What period do you say the contract covers?]

Six years, according to their letter. It would be seen that the tenderers had actually changed the draft contract to that effect.

[De Villiers, C.J.: What is the period of maintenance? Where is it mentioned?]

Mr. Upington: It is mentioned in the printed document.

[De Villiers, C.J.: Surely that means only three years' guarantee?]

We contend that it is not the same thing to guarantee the maintenance of a thing as to guarantee it as a perfected thing. Counsel (continuing) said the next point was as to whether the Council were justified in undertaking this paving when the streets for which the money had been allocated had not yet been done. He contended that to leave streets that had been mentioned in the schedule would be illegal. If the Council gave a specific answer to a question as to the streets they intended doing, and did not do those streets, they would be acting illegally. The Town Council certainly had the right to levy a rate of

fourpence in the £, but that had to be arranged at the beginning of the year, and no amount could be put on the estimates for a year after those estimates had been agreed to. Therefore, if this work was to be paid for out of the rates, it should be ordered to stand over until the estimates for next year came up for consideration. In conclusion, he contended that the petitioners were entitled to have the rule made absolute, and to prevent this contract being signed until the Council could prove that they were authorised to incur this very serious liability without having any funds at their disposal.

De Villiers, C.J.: It appears that the learned Judge, who had heard the previous applications in this case, had a perfectly open mind on the matter, and that he only granted the rule for the purpose of enabling the Town Council to lay before the Court its version of the dispute between the Council and a number of the ratepayers of Cape Town. The question does not come before the Court by way of an appeal, but on the information originally given by the applicants, and the further information given by the Town Council. The one point that is perfectly clear is that the Court has no jurisdiction to interfere with a purely administrative concern of the Town Council. If it were in the power of a minority of councillors who objected to a resolution of the Council to come before this Court and ask it to rescind that resolution this Court would have much more on its hands than it could possibly attend to. The Councillors have presumably been elected by reason of the confidence placed in them by the ratepayers, and it is not the business of this Court to withhold its confidence merely because it might not approve of the administrative conduct of a majority of the Council. The only ground upon which this Court can be asked to interfere is illegality in the conduct of the Council, or any such abuse of its powers as amounts to illegality. It would appear that the decision to accept the tender of Nuttall and Co. was arrived at by the majority of the Council. Subsequently attempts were made to reverse the decision. One member of the Town Council gave notice that he would move to rescind the resolution, but when the time came for his motion to be put he was absent. He explained his absence; he had to go elsewhere. And so the matter did not come on. It was postponed. When it came on again the Town Councillor was not in his place to move his resolution. Therefore, the Town Clerk, one would suppose, as any other Town Clerk would do, gave notice to the tenderers that their tender had been accepted. The tenderers expected to have an answer within a reasonable time. They could not wait till the squabbles of the Town

Council were finished. They expected an answer within a reasonable time, and if the Town Clerk had waited until the question had again come on before the Council as to whether this resolution was to be rescinded or not, probably the resolution would not have been brought on up to the present time, and it might even be next year before that member of the Town Council would move his resolution, and in the meanwhile the whole matter would be suspended, the Town Council could not sign the contract, and the tenderer would have to wait. Now, the only question that arises is, was there any illegality in accepting the tender? I fail to see where the illegality was. Then it is said that there is no money to pay for the work, but it appears that the ratepayers had authorised a loan of £366,000 for certain works. The whole of that £366,000 has not been expended, and there is money available for the purpose of the particular work which is now in question. Then it is said that this would necessitate other work which had also been authorised not being carried out. That might be, or it might not be, so; but if that work could not be carried out, then probably the Council would have to levy a rate for the purpose. The Town Council has had specific authority from the ratepayers to raise a sum of £366,000 (which should be expended upon certain works), and until the whole of that amount has been expended, or until so much has been expended as would not leave a sufficient sum of £85,000 for the purpose of this contract, it is impossible for the Court to say that the Town Council has acted *ultra vires*. This application, therefore, seems to me to rest upon no foundation whatever. Then comes the further point whether the contract which the Town Council intended to sign was in conformity with the form of the tender. Well, the form of the tender must be read by the light of the notice given by the Town Council inviting tenders, and in that notice it was said: "If the party tendering was prepared to guarantee that the pavement would carry the traffic and remain in condition for a number of years—the period to be specified." But in the tender itself, which was annexed to this printed form, nothing was said about the guarantee. There was simply a tender to do this work within a certain time, and to have it completed within 18 months. Then there was a letter which accompanied the tender, and which stated that the paving was not in any way an experiment, and to show their confidence in it they were prepared to maintain it for a period of three years, without charge, and to leave as security £10,000 on Cape Town Corporation Municipal stock, the interest to accrue to them. The contract some-

what expanded the tender, and a substantial sum was offered to be deposited with the Corporation as a guarantee, not only for the satisfactory maintenance for a term of three years, but as a further guarantee for the efficiency of the pavement. Here, there is an absolute guarantee for the efficiency of the pavement. No doubt there are other reasons why the efficiency would have to be decided soon, because the Town Clerk would have to give his certificate, and he could not withhold that for an indefinite time. After a careful reading of the tender, and the notice calling for the tender, and the contract which was tendered. I am unable to say that there is such a discrepancy between the contract and the tender as to justify the Court in making the rule absolute. For those reasons I think that the rule already granted should be discharged, with costs.

[Applicants' Attorney: A. J. McCallum. Respondents': Fairbridge, Arderne, and Lawton.]

Ex parte DUSSEAU'S ESTATE, LIQUIDATORS OF.

Mr. Douglas Buchanan moved, on behalf of the liquidators in the estate of Valentin Dusseau, for an order calling on the respondent Hartman to show cause, on January 12, why leave should not be granted to issue a writ of execution on his goods and chattels to satisfy a debt of £50 on certain shares in the liquidated company.

Dr. Greer (for the respondent) pointed out that the respondent was out of the Colony, and it was not known when he would return. It was quite clear that he was liable for the money, but the question was, whether his property should be attached or should the liquidators be forced to wait for a certain time?

De Villiers, C.J., granted the order as prayed.

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

GOW V. DILIZANE AND { 1905.
OTHERS. { Dec. 19th.

This was an application to have a certain rule *nisi* made absolute.

The rule *nisi* had been granted on the 9th November calling on the respondents 'o show cause why

an interdict preventing them from interfering with the applicants' use of the A.M.E. Church at West London should not be granted. It appeared that the former pastor of the church, the Rev. Spaun, was expelled, and the Rev. Morrison appointed in his place.

The respondents, as stewards of the church, refused to recognise the Rev. Morrison or to hand over the keys of the church. The applicant alleged that he was duly appointed Superintendent-General to the A.M.E. Church, and when he went down to West London for the purpose of inducting the Rev. Morrison, the respondents refused him access to the church. Mr. Burton now appeared to show cause, and read an affidavit which set out there was no such office as that of general superintendent, and that office had been illegally created for the applicant at a wrongly-instituted conference. Neither the Bishops nor a general conference had any right over the church property. According to the A.M.E. Church discipline the legal trustees of each church were responsible for the management of all the temporal concerns of the church property, which was vested in the board of trustees of the A.M.E. Church in America, and that board alone could obtain an order for the handing over of the church. The property was not under the jurisdiction of the Cape Colony Conference.

It was denied that the Rev. Spaun was expelled by a properly constituted conference, and the respondents held that he was still their duly appointed pastor. The property was registered in the name of the A.M.E. Church, and no persons were mentioned.

Mr. F. S. T. Jones was for the applicant and Mr. Burton appeared for the respondents.

Maasdorp, J.: The ordinary process of the Court by means of which property can be recovered is by way of action. Sometimes in cases of emergency or where matters of fact are not in dispute, the Court will deal with the matter by way of motion, and an interdict is granted where a clear right has been established.

In this case the church in question belongs, according to the Registry of Deeds, to the African Methodist Episcopal Church, and it is clear that there is no one now before the Court who holds any special authority from that body to appear before the Court and assert these rights. That church was represented by the Bishop before he left. The Bishop has gone to America, and in his absence he left the keys in the hands of persons called trustees. The only persons who are now in the Colony who represent the interest of the parties are the trustees on the one hand and the applicant, who claims to have been duly appointed a minister of the church,

The dispute between them as to who is entitled to the key should be readily settled by reference to headquarters, and that would be the proper way to settle it, instead of going in for litigation. The trustees were in quiet possession of the key, which represents the possession of the church, and the application which was made by a person who seemed to have undoubtedly authority as minister appeared to be one of urgency. It now appears that his authority is disputed, and under the circumstances the Court would not perhaps in the first instance have granted this interdict if it had appeared that there was a matter of serious dispute between the parties. Under the circumstances, the parties must be put back into the position they occupied before the rule nisi was granted.

The rule will be discharged and the question of costs can stand over.

M McNALLY V. ESTATE WIGGETT.

Preferent claim—Last illness.

This was an application on notice of motion, calling on the trustee in the estate of the late Matthew Wiggett to show cause why a certain proof of debt of £130, tendered on behalf of the applicant, and accepted by the R.M. of Mossel Bay at a second meeting of creditors in the estate, should not rank as preferent.

The applicant, who is a medical practitioner, set out in an affidavit that from August, 1903, to July, 1904, he rendered professional services to the deceased during his last illness. Accounts were rendered, and supplied during the deceased's last illness. When he made the affidavit he did not know his claim was preferent, and that was why he omitted to mention that accounts had been rendered during the lifetime of the deceased.

A replying affidavit was put in denying that Wiggett was ill from August, 1903, to July, 1904. In October the deceased was sufficiently recovered to be able to attend his own business, and was plaintiff in a case and attended the Court.

Mr. Burton, for applicant. Mr. Bisset, for respondent.

Maasdorp, J., said it was impossible to give a general description or definition of what a last illness might be, it would certainly depend on the circumstances of each case. To his mind it was the intention of the law to protect as far as possible the medical practitioner, who might be called in during the last sufferings of a man, and there might be circumstances which would prevent him from asking for his fee until the decease of that patient. It might often happen that a medical man would not in the

last illness of a patient trouble him with his account, but the present case was of a different nature. It seemed that the patient had been suffering from a chronic complaint for some years, and during that time he was often able to attend to his business. There seemed to be no reason why during the course of that period the doctor did not ask for his fees. He did not think that his suffering from a chronic complaint could be regarded as the last illness within the meaning of the law. They found that the widow of the deceased had made an affidavit in which she stated her husband was quite able at times to do his work, although not quite well, and consequently he was well enough to attend to the payment of his doctor's bills. The Court would give an order for the payment of £4, the amount incurred from the time he last went to bed before his death.

COATES AND COTTRELL V. ST. JOHN'S BENEFIT SOCIETY.

This was an application by Joseph John Wates and Lewis Cottrell, for an interdict restraining the secretary or any other member of the St. John's Benefit Society paying out of the funds of the society any money for a purpose contemplated by a resolution pending an action to be instituted.

The applicants' petition stated that they were members of the society, which had for its object the raising of funds by entrance fees, subscriptions, fees, fines, etc., for various benefit purposes. At a meeting of the members of the society in December last, it was resolved by the majority of members (several remaining neutral), that the charter of the Lodge of Scotland should be returned to Scotland, and that the society in the meantime work under the Free Gardeners' Rules locally as the St. John's Benefit Society, pending a final decision, a minority of eight voted against it, amongst whom were the petitioners. At a subsequent meeting held in September last, it was agreed by a majority of members that the society in future work under the charter of England, and that the sum of £10 be paid out of the funds of the society for the purpose of paying the expenses of initiating 12 of the members into the British Order of Free Gardeners. Petitioners lodged an objection to the diversion and misappropriation of the sum from the funds of the society for an object not contemplated by the rules or by members who had originally contributed to the society; wherefore petitioners prayed that the Court would grant an order declaring the resolution void, and grant an interdict as prayed.

Mr. W. P. Buchanan appeared for petitioners and Mr. De Villiers for respondents.

Maasdorp, J., said that if this money was appropriated by anybody for an illegal purpose, it could be recovered. Why should the Court interfere with the administration of the society.

Mr. Buchanan: What they intend to do is to change the lodge from what it is to one of a different charter. We say amongst other things that they cannot do that without their changing our contract without consent. We do not want to go into the charter.

[Maasdorp, J.: Can't you resign?]

We have made certain payments up to date, and we have certain vested interests. We would resign if they would pay us out.

[Maasdorp, J.: Have you any authority for a Court interfering with a society of this kind. It is not a partnership or a company.]

That is the reason why all the members must agree.]

[Maasdorp, J.: But the Court cannot interfere with the society in what they do at these meetings.]

An application is very often made under the company law for an injunction.

[Maasdorp, J.: But they have their registered legal rights.]

But we also have an act dealing with these friendly societies. This society has not been registered under the Friendly Society Act.

[Maasdorp, J.: Then how can the Court deal with it?]

Because it is the only body we can come to. The society is a body, and they seek to change the whole constitution of the society: to which we object.

[Maasdorp, J.: How can the Court give orders as to the rules they have made? The Court will want a good deal more information before it can decide this matter. They have decided to act under another charter, and the Court will have to go into that charter. You cannot proceed on motion.]

But there must be some remedy?

Maasdorp, J.: The case had better stand over until February, and in the meantime the society had better try and adjust their differences, or, if not, decide whether an action is necessary.

HAES AND CO. V. MCINTOSH AND STEWART.

This was an application on notice of motion for the release of certain goods for attachment.

The affidavit of Joseph Frederick Warren, general representative in South Africa of the plaintiff firm, stated that about September 12, Mr. Haydn Cooke, of Cape Town, entered the employ of his firm as a traveller. On that date he forwarded to Cooke from Johannesburg seven cases of samples for him to use on the firm's business in Cape Town. About November 29 he found

that the samples had been attached by the Deputy-Sheriff, on the application of the respondents against Cooke. The plaintiff firm were not responsible for the personal liabilities of Cooke.

The affidavit of Alexander McIntosh stated that his firm were local shipping and clearing agents for Messrs. Branch and Co., manufacturers of the "Beehive" boot, and had cleared Customs dues on all boots and samples of boots consigned to W. Haydn Cooke, local agent and traveller for Messrs. Branch and Son. Cooke had had a running account with witness's firm for clearing charges. Between November, 1904, and October, 1905, the respondent firm cleared a quantity of samples of "Beehive" boots, consigned to Cooke. In November last Cooke took an office in Cape Town, and put his name outside the door. Respondents were informed that Cooke had left Cape Town for Australia, and they applied for an order restraining the removal of any goods, which was granted.

A replying affidavit by Warren stated that, when Cooke entered his firm's employ, his firm, by arrangement with Messrs. Branch, purchased from them all their samples then in possession of Cooke, and which consisted solely of Beehive boots. The samples were left with Cooke. Applicants submitted that respondents had no lien on any of the samples.

Mr. Benjamin appeared for applicant, and Mr. Lewis for the respondent.

Maasdorp, J., made an order for all the property, except the Beehive boots, to be released from the attachment, with leave to the applicants to proceed by action to recover the Beehive boots. The question of costs to stand over.

WILMOT V. WALTER.

Mr. Jones moved on behalf of Fred. Wm. Baynes Wilmot for an order for personal attachment against John Orlando Walter, for failing to comply with the terms of an order of Court.

Mr. Burton opposed the application.

The applicant's affidavit stated that an order of the Court had been issued ordering the respondent to allow the applicant access to all the books, title-deeds, etc., in his possession, relating to the insolvent estate of Thomas Dicker, and that he had ignored the same, and had continually put applicant off from day to day with regard to completing the account.

The respondent stated in his affidavit that owing to illness he was unable to oppose the original motion. The applicant had always had access to the papers in the estate; that the applicant had received £400 out of the sale of the immovable property, and had not placed the money to the credit of the insolvent estate in the Standard Bank, and had

repeatedly refused to pay out to one Abraham Wentzel, a preferent creditor in the estate.

Mr. Jones said he would withdraw the application for personal attachment, but would press for costs.

Masendorp, J., said it seemed to him that the respondent had raised matters in this application which had already been disposed of by the Court. He stated in his affidavit that the applicant had always had access to the books and papers, but the Court found it necessary to grant an order that access should be granted. He said he was not present to oppose the first application, as he was ill. Whether he was ill or not, he could have obtained assistance. In many respects, the affidavit of the respondent did not answer the matters contained in the applicant's affidavit, who alleged that ever since the order was granted he was unable to obtain access to the books, and that it was only after the personal notice of motion was given, that the order was obeyed. As far as it appeared, the only question before the Court was that of costs, and under the circumstances, the respondent would have to pay the costs of the motion.

Ex parte BOYCE.

Dr. Greer moved as a matter of urgency for leave to raise a bond of £750, the purchase price of a property bought by applicant for his minor daughter in Sterling-street, Cape Town.

The matter was referred to the Master for his report.

SUPREME COURT

IN CHAMBERS.

[Before the Hon. Sir JOHN BUCHANAN.]

REX V. TROMP. { 1905.
{ Dec. 29th.

Bail—Charge of murder.

Where a person charged with murder applied for bail, and the Crown opposed the application, the Court refused to grant bail, but gave leave to renew the application after the accused should have been committed for trial.

Mr. Burton applied on behalf of Petrus Nicholas Tromp, a farmer, of the Calvinia district, for an order of release from imprisonment on bail. The accused, it appeared, was arrested on a charge of murdering a shepherd in his employ, named Jan Tys, near Middelpost, and was at present confined in the Calvinia gaol. Counsel related the evidence of the preliminary examination, which, he said, was purely circumstantial, and he pointed out that while the accused was detained his stock was suffering, as there was only his wife and a boy to attend to it.

Mr. Nightingale, who appeared for the Crown, said that the Attorney-General could not consent at present, as further investigations were being made.

Buchanan, J., said that under the circumstances no order would be made at present. The application could be renewed after the final commitment.



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<i>C. had been admitted as an attorney in July, 1905, under Sec. 17 of Act 27 of 1883. On its being discovered that this section had been repealed by Sec. 1 of Act 11 of 1903, the admission was withdrawn.</i>	
<i>Held, that as the applicant was not articulated prior to the date of the passing of the former Act, he was not entitled to admission.</i>	
<i>Ex parte</i> Clark	592
Attorney—Lien on documents entrusted to him.	
<i>An attorney has no lien for costs on documents entrusted to</i>	

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<i>him, unless he has drafted, or done work on those documents.</i>	
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Attorney — Admission — Service of articles—Breach of continuity.	
<i>B., an articulated clerk, had served upwards of two years with a firm of attorneys in this Colony. He then joined the Imperial forces and now applied for leave to complete the remainder of his service in the Transvaal.</i>	
<i>Held, that the breach of continuity of service must be condoned, but that leave could not be granted to complete service in the Transvaal.</i>	
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<i>Beneficia S. C. Vellejani et Authentica si qua mulier</i> —Promissory note—Endorsement by women—Act 19 of 1893.	<i>contravention of such rules and regulations.</i>
<i>P., a married woman, had signed a promissory note made by her husband on the back "as surety and co-principal debtor," without expressly renouncing her benefits under the S C. Vellejani et Authentica si qua mulier. When sued on the note in an R.M. Court, she pleaded these benefits and further urged that the note was not presented to her and noted at the due date.</i>	<i>Held, that the appellants had been properly convicted of a contravention of the 18th section of Act 36 of 1902, and that they were not protected by the 21st section of the Act.</i>
<i>Held on appeal, that by Sec. 20 of Act 19 of 1893, it is not necessary that a woman, who accepts or endorses a note or a bill, should renounce the said benefits, in order to be held liable.</i>	<i>Rex v. Ham and others</i> ... 988
<i>Held further, that a surety who binds herself in solidum and as co-principal debtor, incurs the same responsibilities as the maker of the note (dis. Maasdorp, J.), and that presentation is not necessary, in order to render such surety liable.</i>	<i>Bona fides, evidence of, see Magistrate's jurisdiction</i> ... 574, 758
<i>Priest v. Stegman and others</i> 407	<i>Brick-making machinery — Misrepresentation—Article supplied for a special purpose.</i>
<i>Beneficium divisionis, see Promissory note</i> ... 833	<i>S. had supplied certain brick-making machinery to M., guaranteed to be capable of doing certain work. M. tested the machine, but found that it could not do the work guaranteed. Plaintiff now sued for the price of the machinery and cost of its erection.</i>
<i>Betting-house—Act 36 of 1902—Horse racing—Jockey Club of S. Africa.</i>	<i>Held, that he was not entitled to recover.</i>
<i>The appellants authorized the use of a totalizator for purposes of betting at a race meeting held by them, but they had no licence from the Jockey Club of S. Africa and, although they professed in their advertisements of the race meeting to act under the rules and regulations of the Jockey Club, they allowed jockeys, who had been warned off the course, and horses which had been disqualified by the Jockey Club, to run at such race meeting, in</i>	<i>Stone v. McKenzie</i> ... 637
	<i>Brothel, see Keeping</i> ... 57
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	<i>Cape Town Municipal regulations, No. 143—Fine.</i>
	<i>Rex v. Fletcher</i> ... 547
	<i>Carrier—Negligence.</i>
	<i>D. hired F.'s wagon to carry certain grain and saw it loaded on the wagon, and also saw that there was a sail cloth wherewith to cover it. The</i>

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wagon was in charge of F.'s brother. On arrival at the store of D.'s agent, the grain was found to be wet, and the agent refused to accept delivery.	less the claim is specifically pleaded.
Held on appeal, that as there was no evidence of negligence against F. or his servants, D. was not entitled to recover damages.	De Wet v. Japhtha ... 130
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Van der Merwe v. Colonial Government (15 C.T.R., 456) distinguished.	Colourable imitation, see Trade mark ... 383
Fumba v. Dickerson ... 768	Comity, see Insolvency (foreign) 563
Chemist and druggist—General dealer—Licensing Acts 15 of 1877 and 38 of 1887.	Commission—Conditional promise to pay.
A licence to deal as a chemist and druggist does not under Act 38 of 1887 include the right to deal in any articles not directly connected with the business "as such."	Boswarva v. Palmer... 842
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Claim in reconvention.	Concession—Judgment of Concession Court—Declaration of rights.
Whatever may be a Magistrate's opinion as to the merits of a defence, he cannot give judgment in reconvention un-	The chief of a native territory made a concession to C. of the right to prospect, dig for and convert to his own use all precious stones and minerals found within the limits of the concession. C. ceded his rights to the plaintiffs. The British Government annexed the territory and appointed a Court, under a Proclamation, giving such Court full judicial powers to decide upon the validity of all concessions with an appeal to the Privy Council. The Court allowed the claim to the concession in question, but "subject to all laws and regulations of British Bechuanaland relating to mines and minerals, and otherwise in force in the said territory." There was no appeal against this judgment.

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Held, in an action for a declaration of rights, that the plaintiffs were not entitled to any declaration inconsistent with the laws and regulations in force in the territory at the time when the judgment of the Commission was given.		Contract—Verbal—Inchoate.	
Villander Concessions v. Colonial Government ...	207	Though a verbal contract is binding on the parties, yet if it be agreed that the contract should be reduced to writing, in order that the parties may discuss the terms thereof, the preceding verbal contract must be regarded as inchoate.	
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Contempt of Court, see Agent ...	213	Hodgson v. Van Schalkwyk	759
Contract—Acceptance by letter.		Costs of excussion, see Surety ...	755
B. had agreed, verbally, to sell a house to D., and D., by letter posted at 5.10 p.m. on the same day, accepted B.'s offer. At 5.47 p.m. and before receiving D.'s letter, B., by telegram, revoked his offer.		Counterclaim, see Magistrate's jurisdiction ...	574, 758
Held, that B. was bound by his contract.		Creditors, see Interdict ...	477
Baily v. Drummond...	827	Creditors, preferent and concurrent, see Insolvency ...	387
Contract—Breach—Measure of damages.		Criminal trial on Circuit—Removal.	
Halverson v. Anderson ...	750	The Supreme Court has no power to remove a criminal trial from one circuit to another. Application should be made to the Circuit Court.	
Contract, fraudulent and immoral.		Rex v. Goldman ...	237
Grassick v. B.S.A. Asphalt Co. ...	575	Cruelty to animals—Emasculation—Act 18 of 1888, Sec. 2.	
Contract, verbal—Breach—Measure of damages.		Under Sec. 2 of Act 18 of 1888, a person may not be prosecuted for emasculating an animal provided he has reasonable cause for so doing.	
Carr & Co. v. Lenders & Co.	657	Rex v. Josling ..	969
Contract—Arrangement terminable at the discretion of one party.		Culpable insolvency — "Proper books."	
Nuttall & Co. v. Cape Town Gas Light and Coke Co. ...	432	There is no positive legal standard as to what are "proper books." But the books kept	

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<i>must show all transactions of the business, its assets and liabilities: or at least give data from which these can be ascertained.</i>	
Rex v. Jaffe	403
Damages for non-delivery of shares, <i>see</i> Mining Company	217
<i>Dammum injuriarum</i> — Artificial change of course of river.	
Domingo v. Colonial Government	190
Declaration of rights, <i>see</i> Concession	207
Deed of repudiation of inheritance—Deed of donation—Registration—Consideration.	
<i>O. and his wife, by their mutual will, bequeathed certain property to their son P., which was to remain under the administration of O. The wife died, and O. adiated under the will. P. became a man of intemperate habits and a spendthrift, and O., to protect P. against himself, induced P. to execute a deed, repudiating his inheritance and relieving O. from the obligation of paying the same over, but by another instrument executed two days afterwards and termed by the parties a "deed of donation," O. made another settlement on P. in substitution for the inheritance. The so-called deed of donation was not registered.</i>	
<i>Held, after the death of O. and of P. that, as there was full consideration for the settlement, the absence of registration did not deprive the heirs of P. of the right to recover the benefits of the settlement from the estate of O.</i>	
Matthews v. Oosthuizen	46
Deed of grant—Rectification—Tribal tenure—Trust.	
<i>One Manguzela, a native Chief, had purchased two farms with</i>	

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<i>subscriptions raised among the people of his tribe for the purpose of extending his location. At the suggestion of the R.M., the property was transferred to the Chief, his Headmen and Councillors, without mention of any trust. Two of these people now claimed dominium in pro rata undivided shares of the farms purchased.</i>	
<i>Held, that the farms had been transferred to them only in trust for their tribe: and that the deed of grant must be so amended as to express that trust.</i>	
Mzubelo and others v. Ndaba and another	796
Defamation—Privilege—Express malice—Recklessness.	
Bain v. Hammersley-Heenan	603
Default of plea, <i>see</i> Practice	390
Delivery, <i>see</i> Negligence	421
Demolition of buildings, <i>see</i> Municipal regulations	166
Demurrage, <i>see</i> Harbour Board	980
Deportation, <i>see</i> Undesirable alien	582
Description of spouses, <i>see</i> Marriage Ordinance	513
Divisional Council—Voters' list—Act 40 of 1889.	
<i>Where applicant's name had, per incuriam, been omitted from the list of voters for a Divisional Council. The Court granted an order authorizing its insertion.</i>	
<i>Ex parte Gowan</i>	826
Divisional Council—Election.	
<i>R. was one of two candidates for election as representative of a certain district on a Divisional Council. R. was unsuccessful. It was supposed that the district in question was entitled to return only one member, and nominations were</i>	

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<p>invited for candidates to fill the one vacancy. After the election it transpired that the district was entitled to return two members, and R. claimed the second seat.</p> <p>Held, that as there was only one seat contested, and that as R. had not been elected, he was not entitled to the seat which he claimed.</p> <p>Reinecke v. Civil Commissioner of Ceres ... 934</p> <p>Divisional Council—Negligence—Damages—Notice—Divisional Councils' Act.</p> <p><i>Respondent's wagon had met with an accident traceable to the negligence of a Divisional Council. The Council pleaded (1) Respondent had not given notice specifying the time at which the accident had occurred. (2) That all the funds in their hands available for road repairs had been exhausted.</i></p> <p>Held on appeal, that as respondent had given notice within 14 days, and as they subsequently repaired the road and could have obtained more money by raising the rates, both defences must fail.</p> <p>Divisional Council of Clanwilliam v. Peters ... 126</p> <p>Divorce—Forfeiture of benefits—Division of joint estate.</p> <p><i>In actions for divorce, where the parties have been married in community, but the plaintiff has not contributed anything to the common property, division of the joint estate and not forfeiture of benefits should be claimed.</i></p> <p>McGregor v. McGregor ... 114</p> <p>Divorce—Substituted service—Authentication.</p> <p><i>The Court granted a decree of divorce on the faith of an affidavit sworn by a clerk of a certain firm of attorneys in</i></p>	<p><i>Chicago, but stated that in future all similar affidavits must be duly authenticated.</i></p> <p>Butler v. Butler ... 239</p> <p>Divorce—Domicile.</p> <p><i>Where a wife, who had come to this Colony, sought to sue her husband for restitution of conjugal rights; the husband having promised to follow her to the Colony, but never having done so: the Court refused to assume jurisdiction.</i></p> <p>Linley v. Linley ... 564</p> <p>Divorce—Domicile.</p> <p><i>Ex parte Keating</i> ... 959</p> <p>Divorce—Order for restitution of conjugal rights.</p> <p><i>Before divorce can be granted for failure to comply with an order for restitution of conjugal rights, service of the rule nisi must be proved by affidavit. It is not sufficient to show that the rule must have come to the defendant's knowledge in some way or other (e.g.) because he or she was present in Court when it was granted.</i></p> <p>Raubenheimer v. Raubenheimer ... 451</p> <p>Dog — Injury — Knowledge of vicious propensity — Master of passenger ship.</p> <p><i>The plaintiff, a foreigner, being a third-class passenger on board a mail steamer, was bitten by a dog which had been tied up at a spot from which it could reach the part of the ship ordinarily occupied by third-class passengers. The master of the ship was aware of the vicious propensity of the dog, and had put up a notice in English that it was dangerous.</i></p> <p><i>Held, that the owners of the ship were liable in damages for the injury.</i></p> <p>Kuit v. Union-Castle Steamship Co. ... 69</p>

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<i>Dominium, see Sale and delivery...</i>	123
<i>Dominium, see Sale and purchase</i>	655
<i>Dormant partner, see Partnership</i>	21
<i>Ejectment, see Mission station ...</i>	943
<i>Ejectment, see Native reserve ...</i>	717
<i>Ejectment—Rights of joint tenants—Acquiescence.</i>	
<i>Harris v. Lee...</i>	230
<i>Election, see Divisional Council</i>	826, 934
<i>Employer and employee—Monthly notice.</i>	
<i>D. had contracted to serve M. for a certain monthly salary, the engagement to be terminable on a month's notice on either side. D. asserted that it was understood between himself and one B. that the notice must expire on the last day of the month. M. had given D. notice on the 9th December, 1904, and tendered plaintiff's salary to January 9th, 1905. B. was not called for the defence, and it was admitted that D. was in the habit of rendering his accounts at the end of each month. D. now claimed salary for the entire month of January.</i>	
<i>Held, that judgment must be given for D., with costs.</i>	
<i>Davis v. McDonald ...</i>	919

Estate of deceased spouse—Minor heirs — Executor — Advance by survivor to enable executors dative to bring an action against himself.

C. and his wife were married in community and had issue. At the time of Mrs. C.'s death these children were minors, but C. took no steps to protect their interests, and remained in possession of the entire joint estate. Subsequently, when about to re-marry, he made a declaration that the value of the joint

estate was under £100. The executors dative to the estate of the deceased now applied for an order, calling upon C. to pay certain moneys to enable them to bring an action to have it declared to what sum the heirs of the deceased were entitled.

Held, that although in ordinary cases a plaintiff cannot compel a defendant to advance money to meet the costs of an action; yet, as these executors represented a wife married in community, an order must be granted as prayed.

Cowling's Estate v. Cowling 933

Estoppel, see Martial law ... 521

Estoppel, see Purchase and sale ... 280

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Excise duty—Acts 36 of 1904, Sec. 18, and 26 of 1905, Sec. 4.

Rex v. Gourlay and Cavanagh ... 747

Excussion of principal debtor, see Provisional sentence... .. 111

Excussion of principal debtor, see Promissory note 833

Executor, see Estate of deceased spouse... .. 933

Failure of conditional legacy, see Will 551

Fire insurance — Conditions of policy.

V. had insured against fire with the N.Z. Co., and subsequently his premises were burned. By the conditions of his policy he was bound (1) to

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<p>give notice to the company of the fire forthwith; and (2) within 15 days to furnish them with an accurate and particular account of his losses. (3) It was further provided that no action should be sustainable against the company unless brought within six months after the loss or damage. V. had not complied with the second condition, and more than 18 months after his fire his trustee in insolvency brought an action to recover the insurance from the company.</p> <p>Held, that as these conditions were fair and reasonable and had been duly brought to V.'s notice, judgment must be given for the defendant with costs.</p> <p>Insolvent Estate Vink v. New Zealand Insurance Co. ... 684</p> <p>Fire insurance — Conditions of policy—Arbitration.</p> <p>R. had taken out a policy in a certain Fire Insurance Company. His stock and books having been subsequently burned during the currency of this policy, he made his claim and agreed with the company to have his loss assessed by arbitration. The company now sought to have him interdicted from proceeding with the arbitration, on the ground that he had violated one of the conditions of his policy by not having given accounts of his losses as full as could be given.</p> <p>Held, that as the sufficiency of the accounts was a question for the arbitrator to decide, the interdict must be refused, with costs.</p> <p>Atlas Insurance Co. v. Rodrigues... 473</p> <p>Fire—Negligence—Damages.</p> <p>Van Zyl v. Warner ... 346, 392</p> <p>Fidei Commissum, see Will 324, 437</p>	<p>Fire—Railway—Negligence.</p> <p><i>Lategan v. Colonial Government</i> (14 C.T.R., 935) followed.</p> <p>De Kock v. Colonial Government ... 327</p> <p>Forfeiture of benefits, see Divorce 114</p> <p>Forgery, see Theft ... 275</p> <p>Fraud, see Principal ... 479</p> <p>Fraud, see Sale and purchase ... 655</p> <p>Fraudulent misrepresentation, see Will ... 222</p> <p>Game, property in—Animals <i>feræ nature</i>—Trespass.</p> <p>A., being lawfully on the farm of W., shot thereon certain game, although W. had by public notice expressly prohibited the shooting of game on his farm. Thereupon W. summoned A. in the R.M. Court for damages for the game killed and removed by him. The R.M. gave judgment for the plaintiff. On appeal, the High Court held that the Magistrate should have dismissed the case.</p> <p>Held on appeal, that as there can be no property in animals, <i>feræ nature</i>, W. was not entitled to damages for the killing of game on his farm.</p> <p>Semble: that as a person who enters upon land for one express purpose with the consent of the owner and takes advantage of that consent to do something which the owner has never sanctioned, thereby becomes a trespasser: W. might have recovered damages from A. for trespass.</p> <p>Wright v. Ashton ... 544</p> <p>Goodwill, see Sale and purchase... 324</p> <p>Grazing rights, see Municipal regulations ... 104</p> <p>Gross irregularity, see Review ... 95</p> <p>Gross irregularity, see Review 270, 331</p>

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Guarantee—Forged signature.	
Van der Byl & Co. v. Africa 380	
Guarantor, <i>see</i> Sale and purchase 340	
Harbour Board—Graving Dock—Demurrage.	
<i>The plaintiff company agreed with the defendants to hire the use of their Graving Dock for the purpose of painting one of plaintiffs' vessels, from March 27th. On that date plaintiffs were prepared to dock their vessel, but another vessel having meanwhile been placed on the slip, the plaintiff's ship was not docked till April 10th. Plaintiffs now claimed demurrage.</i>	<i>18 Vict., C. 104, which is by Sec. 1 of Act 8 of 1879 also the law of this Colony, and were ultra vires.</i>
Held, that as, under all the circumstances, the Harbour Board had not been guilty of any avoidable or unreasonable delay, they were not liable for demurrage.	Table Bay Harbour Board v. Bucknall Co. (14 C.T.R. 351) distinguished.
The "Stag" Line, Ltd. v. Table Bay Harbour Board 980	Table Bay Harbour Board v. The City Line .. 704
Harbour Board Regulations—Compulsory pilotage—Acts 8 of 1879 and 36 of 1896—English Act 17 and 18 Vict., C. 104.	Hard labour, <i>see</i> Stock theft ... 791
<i>One of the defendants' vessels while leaving Cape Town Docks under the pilotage of a pilot selected by the Harbour Board, whom the Company were under the Board's regulations compelled to employ, struck and damaged one of the dock quays. It was admitted that this damage was not due to any negligence on the part of the Company's servants, but to an error of judgment on the part of the pilot.</i>	Husband and wife, <i>see</i> Will (joint) 255
Held, that so far as the Harbour Board regulations gave the Board a right of action for damage resulting from the misfeasances of their own servants, they were inconsistent with the provisions of British Merchant Shipping law as set forth in Act 17 and	Illegal contract — Prize fight — Boxing prize payable to winner.
	<i>A prize fight is illegal, and consequently the winner would not be entitled to claim the prize from the person who offered it.</i>
	<i>A friendly contest in boxing, not calculated to produce injury to either party, would not be illegal. A prize having been offered by the defendants to the winner in such a friendly contest, the two competitors agreed before the contest to divide the prize between them, whichever side should win. This agreement was communicated to the defendants, and they acquiesced. After the contest the defeated competitor instituted an action against the defendants for half the amount of the prize.</i>
	Held, that as the defendants' offer was to pay the winner, and as their acquiescence in the agreement between the competitors did not amount to a promise to pay the loser anything, the plaintiff was not entitled to succeed.
	Austin v. Morrall and others 183
	Illegal contract, <i>see</i> Provisional sentence ... 82
	Illegal sale, <i>see</i> Title to land ... 361
	Incola—Security for costs—Plaintiff proceeding by motion.
	<i>A person, not resident in the Colony, who makes a claim in</i>

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<i>the Supreme Court is not entitled to be relieved from the necessity of giving security for costs, on the ground that he is proceeding by way of motion and not by action.</i>	
Brearley v. Faure, van Eyk and Moore	20
Income tax—Share of profits made by a foreign syndicate on diamonds found in this Colony—Sec. 42 of Act 36 of 1904.	
<i>The D.B. Diamond Mining Company, carrying on business in this Colony, had arranged to sell their diamonds to a London syndicate, on condition, inter alia, that they should receive a certain percentage of the profits made by the syndicate. Upon this percentage the Colonial Commissioner of Taxes now claimed income tax under Act 36 of 1904.</i>	
<i>Held on appeal from the Court of Review, that as the company's share of the profits made by the syndicate was derived from diamonds found in this Colony, Sec. 42 of Act 36 of 1904 was wide enough to cover this, and that it was, therefore, subject to income tax.</i>	
Commissioner of Taxes v. De Beers Consolidated Mines	619
Indecent assault—Children.	
<i>Children under the age of 7 years cannot be convicted of indecent assault.</i>	
Rex v. T. and J. Louw ...	334
Indorser and drawer, <i>see</i> Accommodation note	66
Injury, <i>see</i> Dog	69
Insolvent Ordinance—Rehabilitation—Release from sequestration.	
Valenski and Lipschitz v. Lategan and wife	87

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Insolvency, foreign—Process in aid—Comity.	
<i>M., who had certain immovable property in this Colony, had been declared insolvent in the Transvaal, where he was domiciled. The trustees in this Colony now applied for leave to administer the estate as far as the property within this Colony was concerned. The Court granted a rule nisi, calling upon all persons interested to show cause why the appointment of trustees by the Transvaal Court should not be recognized within this Colony.</i>	
<i>In re Insolvent Estate Moran</i>	563
Insolvency—Preferent and concurrent creditors—Rights of cessinary of a general covering bond.	
<i>In 1901, C. & Co. agreed to support M. & Co., on the latter firm passing a general covering bond in their favour. C. & Co. supplied goods to M. & Co. from time to time, for which the latter gave acceptances. Subsequently C. & Co. discounted some of these with the Standard Bank, and on December 12th, 1902, ceded to the Bank the said covering bond as security for the acceptances discounted. In 1904, when the estate of M. & Co. was sequestrated, all their current acceptances in the hands of the Bank were of date later than December 12th, 1902. The Bank claimed that debts due on these acceptances were preferent, and the Master having admitted the claim, the trustee filed a liquidation and distribution account accordingly. The petitioner now applied for this to be amended by treating the said debts as concurrent.</i>	
<i>Held, that as the Bank held the bond as security for all the paper of M. & Co. discounted by C. & Co., whether</i>	

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<i>before or after the cession, the application must be refused.</i>	
Heydenrych v. The Trustee of Mackie, Young & Co. and another ...	387
Insolvency—Provisional trustee—Practice.	
<i>In the case of an application for appointment of a provisional trustee to an insolvent estate, the Court must be informed as to the proportion of creditors who support such application.</i>	
<i>Ex parte Marais</i> ...	330
Insolvency of fiduciary, <i>see</i> Will	437
Inspection of documents—Attorney and client—Privilege.	
<i>B. applied for an order to inspect certain letters which had passed between one D. and the New York Mutual Insurance Co. D. was both agent for the Company and also their local attorney.</i>	
<i>Held, that as certain of these letters were written by D. as attorney to the Company and contained statements as to evidence to be produced on their behalf in a pending action, the applicant was not entitled to inspect such letters.</i>	
Brill v. New York Mutual Insurance Co. ...	643
"Instalment system," <i>see</i> Sale and purchase ...	340
Interdict—Creditors—Disposal of property.	
<i>C.'s estate had been placed under inspection, and certain disputed accounts between M. and himself had been referred to arbitration. It was alleged that C. was disposing of, or pledging his property, in such wise, that M. feared he would be unable to meet his liabilities in respect of any award the arbitrator might give against him. M. now applied for an</i>	

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<i>interdict, restraining him for parting with, mortgaging or pledging his property.</i>	
<i>Held, that as the respondent was neither a peregrinus, nor one alleged to be in contemplation of flight, no such interdict could be granted.</i>	
Malcomess & Co. v. Cary ...	477
Interdict, <i>see</i> Nuisance ...	495
Interdict, <i>see</i> Trade mark ...	383
Interdict—Property in Bank.	
<i>At the instance of a wife who contemplated suing her husband for divorce and division of the common property, the Court interdicted a Bank from parting with any of such property in its custody.</i>	
Urmann v. Urmann ...	212
Interdict, <i>see</i> Arbitration ...	673
Interdict—Servitude—Possession— <i>Aqueductus</i> —Sewerage and drainage.	
<i>The applicants, as owners of land, having a right of sewerage and drainage over neighbouring land, laid a pipe thereon for conveying water to their property. After the pipes had been so laid for a year, the respondent bought and received transfer of the neighbouring land, and thereafter cut the pipe on the land so transferred to him.</i>	
<i>Held, that the servitude of sewerage and drainage does not embrace the right of laying pipes for leading water on to the applicants' land.</i>	
<i>Held further, that the acquiescence of the former owner of the respondent's land for less than the period of presumption does not prejudice the respondent as the bona fide purchaser of the land.</i>	
<i>Held further, that although the fact of the pipe having been</i>	

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<i>used for leading water over the respondent's land for a year might afford prima facie proof of the applicants' right so to lead the water, it does not entitle them, in the face of the facts actually proved, to the Praetorian edict de aqua quotidiana.</i>	
Weintroub and another v. Steer	18
Interrogatories—Magistrate's discretion.	
<i>Plaintiff had sued respondent in the R.M. Court of Paarl before the Acting A.R.M. The defendant applied for interrogatories on which to examine his witnesses. As the A.R.M. was about to leave the Paarl and did not consider that the interests of justice would be furthered by granting the application, he refused it.</i>	
<i>Held on appeal, that the A.R.M. had rightly exercised his judicial discretion.</i>	
Botma v. Norton	125
Jockey Club, <i>see</i> Betting house ...	988
Joinder of parties—Magistrate's jurisdiction—Married woman—Public trader.	
<i>D., while under the age of majority and unmarried, leased certain premises for the purpose of her business. She afterwards married in community and was sued for rent amounting to £30. Exception was taken (1) that the amount was beyond the Magistrate's jurisdiction, (2) that D.'s husband and not D. should have been sued.</i>	
<i>Held, (1) That the lease being a liquid document, the sum claimed thereon was within the jurisdiction. (2) That D. was rightly sued for a debt contracted while she was a public trader.</i>	
Davidson v. Sivertsen ...	719

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Joint Stock Company with limited liability—One man company—Dummy and nominee shareholders.	
<i>N., having obtained certain rights under a contract with a company, called the Trades, Markets and Exhibitions Company, for the lighting of stalls at the Exhibition, was unable, through want of funds, to carry out the contract. H. was prepared to join in the venture and supply the necessary funds if he could limit his liability in the matter through the instrumentality of a company, with limited liability. Consequently N. and H., together with five other shareholders, formed a company, in which these five shareholders held only one share each, the bulk of the shares being held by N. and H. N. and H., as directors, managed the entire business of the company without reference to the other shareholders. This business consisted entirely in carrying out the contract above mentioned under agreement between the company and N.</i>	
<i>Held, that there was nothing illegal in the constitution of the company; and that H. was entitled under the law to limit his liability in respect of the business transacted under the contract in the manner adopted.</i>	
Herron v. Torque Co. and others	527
Joint tenant, <i>see</i> Ejectment ...	230
Keeping a brothel—Permanently residing therein—Act 36 of 1902.	
<i>A prostitute, who permanently resides in a brothel, is liable to prosecution under the 22nd section of Act 36 of 1902, as being a keeper of a brothel.</i>	
<i>A woman, who is employed as a servant in a brothel but sleeps in her own home at nights, does</i>	

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<i>not permanently reside there, and cannot be convicted of keeping a brothel.</i>	
Rex v. Daly and Hallan ...	57
Landlord—Agent with power of attorney—Divisional Council—Sanitation—Nuisance—Act 23 of 1897, Sec. 50.	
<i>One A. had built some 20 cottages on his property, which was not within a municipal boundary, for none of which he had provided sanitary accommodation. He was not resident within the Colony, but had left his power of attorney with F., F. having been summoned in the R.M. Court at the instance of the Divisional Council of W. under Secs. 50 and 51 of Act 23 of 1897, was ordered to provide the accommodation required.</i>	
<i>Held on appeal, that as the Divisional Council, as the local authority, had a locus standi in judicio, and that as the absence of the sanitary accommodation demanded led directly to a common nuisance, the appellant was bound to carry out the order of the Court below.</i>	
Rex v. Findlay ...	630
Lashes—Previous conviction—Act 43 of 1885.	
Rex v. McLaughlin ...	276
Lashes, see Magistrate's jurisdiction ...	396
Lateral support—Damages—Interdict.	
Abrahams v. Estate Bassen-dien ...	835
Law Society—Attorney—Admission.	
<i>Where the Law Society raises difficulties in respect of the admission of an attorney: it should directly oppose and produce definite facts in support of its opposition.</i>	
Jones, Ex parte ...	12

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Lease of licensed premises—Licence—Removal of business—Transfer of licence.	
<i>The plaintiff, the holder of licences for two hotels, and owner of the land with the hotels thereon, sold the lease, licences, goodwill, furniture, and all contents thereof, and executed a lease of the hotels for five years, with a right of renewal for another five years in favour of the defendants, who obtained from the Licensing Court a transfer of the licence to themselves.</i>	
<i>Held, affirming the judgment of a Divisional Court, that the defendants had no right, during the currency of the lease, to remove the business and the licence connected therewith to other premises.</i>	
Bosman, Powis & Co. v. Norden ...	192
Lease, see Provisional sentence ...	277
Letting and hiring—Duties of hirer.	
<i>P. F. had hired certain wagons and oxen from P. and others, with the object of sub-letting them to the Military. He took them up to the front and handed them over to the Military on certain terms. He was afterwards succeeded by his brother F. F. as conductor. P. F. was duly paid for their use, and in turn settled with P. and others. After some months the wagons, &c., were discharged by the Military. F. F. and P. F. failed to return them to their owners, as they held that their responsibility for them ceased on their discharge. P. subsequently sued F. F. and P. F. in the Magistrate's Court for their return, or their value, and for damages for illegal detention. P. F. claimed in reconvention for certain moneys which he had disbursed on behalf of P. The Magistrate gave judgment</i>	

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<i>for the defendants in convention and for P. F. in reconvention. On appeal, the E. D. Court reversed this judgment as to F. F. and gave judgment for P., but upheld the claim of P. F. Against that judgment F. F. now appealed.</i>	
Held, affirming the judgment of the E. D. Court, that F. F. was bound to return the wagons and oxen to P., or pay value.	
Freemantle v. Pama...	493
Lessor and lessee—Mental capacity of lessor.	
Jacobsohn v. Schultz	441
Libel—Privilege—Legal malice—Damages.	
<i>The defendants had, without express malice, falsely stated in a paper privately circulating among some 3,000 subscribers, that a judgment had been obtained against the plaintiff in a certain R.M. Court. They pleaded the absence of malice and privilege.</i>	
Held, that as they had been guilty of legal malice and as the statement in their paper was not privileged; the plaintiff was entitled to recover substantial damages, even though he had not proved special damage.	
Pickard v. The S. A. Trade Protection Society and another	155
Licence (liquor), see Lease of licensed premises	192
Licensing Court—Objections to granting of licence—Gross irregularity.	
<i>On the hearing of an application for a retail liquor licence, one of the members raised the objection that there was a sufficient number of licensed houses in the district, and, a discussion on the point thereupon arose in the presence of the applicant and his agent,</i>	

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<i>neither of whom requested an adjournment for the further consideration of the application. The application for a licence was refused.</i>	
Held, that the more formal course would have been to inform the applicant of the definite objection, but that, in the absence of any evidence to shew that an adjournment would have enabled him to meet the objection, he was not entitled to have the proceedings set aside.	
Norton v. Victoria East Licensing Court	59
Liquid and illiquid claims, see Provisional sentence...	306
Liquid document, see Provisional sentence	321
Liquor Licensing Acts—Transfer of licence—Dissolution of partnership.	
<i>A licence to sell liquor by retail was granted to G., who was then in partnership with the appellant. The partnership was dissolved, and the appellant continued to carry on the business on his own behalf, although no transfer of the licence had been granted to him in terms of the 55th section of Act 28 of 1883.</i>	
Held, that the appellant had been properly convicted of selling liquor without a licence.	
Rex v. Hoffman	58
Liquor licence—Magistrate's discretion—Withholding of certificate.	
<i>S. had applied for a new liquor licence in respect of certain premises, and the licence was granted. The Magistrate withheld his certificate on the ground that some of the signatures to the petition were forgeries.</i>	
Held, that as after the forged names were struck off, there	

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<i>was still a majority in favour of the licence, the Magistrate was bound to grant his certificate.</i>		<i>to pay that sum, he wished to vary his contract by paying less.</i>	
Stevenson v. Cape Town Licensing Court ...	384	Held, that as his contract was not for any definite time, he could not be sued thereon.	
Liquor Licensing Acts—Selling to native—Permit.		Held further, that by Sec. 69 of Act 1 of 1897, he was liable for the actual cost of his wife's maintenance.	
<i>The appellant, having been charged in a Magistrate's Court with having on divers days during the month of January, 1905, sold liquor to natives, who had no permit from their master, in contravention of a condition in his licence, it was proved that the natives showed permits from their mistress, in whose service they were for the greater part in each week, and that some permits were given by an adult daughter of their mistress, but it was not clear that any of the permits was given on days on which the natives were not in service or that those given by the daughter were acted upon on any of the days mentioned in the summons.</i>		Colonial Government v. Silver	501
Held, that a conviction of a contravention on each of the days specified in the summons could not be supported, and that as it would be difficult for the Court of Appeal, without some further evidence, to ascertain on which particular days there might have been a contravention, the conviction should be set aside.		Magistrate's Court—Amendment of summons—Service.	
Rex v. Le Grange ...	273	<i>The respondents carried on business as Barnes, Van Staaten and Deans. The appellant sued the firm under that name in an R.M. Court, and the summons was personally served on one of the defendants. Plaintiff's attorney had applied to defendants to disclose the full names of all members of their firm, but this request was not complied with. When the case came into Court, a power of attorney in the name of all and singular the defendants was filed. Plaintiff's attorney craved leave to amend his summons accordingly, but this leave was refused and the exceptions (1) That no proper summons had been issued; (2) That due service had not been effected were upheld.</i>	
Lobola, see Native ...	742	Held on appeal, that the service was good and that the Magistrate ought to have allowed the summons to be amended.	
Local authority, see Slaughter house ...	272	Lafayette v. Barnes and others ...	127
Lunatic—Husband's liability for maintenance of wife in an asylum—Act 1 of 1897, sec. 69.		Magistrate's Court—Exception to summons—Vague and embarrassing.	
<i>S. had engaged to pay at the rate of 4s. 6d. a day for the maintenance of his wife in a lunatic asylum, but subsequently finding himself unable</i>		<i>It is a good exception to a civil summons in a Magistrate's Court which is unintelligible and does not give a sufficient indication of the case the defendant has to meet, that it is vague and embarrassing.</i>	
		Feltman v. Buirski ...	124

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Magistrate's discretion, <i>see</i> Liquor licence	384
Magistrate's discretion, <i>see</i> Interrogatories	125
Magistrates's finding on evidence. <i>The Court refused, on appeal, to reverse a Magistrate's finding on the evidence, though it did not consider his reasons for judgment satisfactory.</i>	
Madolo v. Mlijimi	129
Magistrate's inferences from facts. Sterrenberg v. North	98
Magistrate's finding on facts overruled. Rex v. Jellimen	399
Magistrate's finding on facts. Rex v. Verwey	549
Magistrate's jurisdiction—Counterclaim—Evidence of <i>bona fides</i> —Set off. Bakker v. Ludolph	758
Magistrate's jurisdiction—Judgment to pay debt by instalments. Fowler v. Joubert	710
Magistrate's jurisdiction—Counter-claim. <i>Where a counter-claim in excess of the jurisdiction is brought in a Magistrate's Court, the Magistrate must take evidence as to the bona fides of the counter-claim.</i> Kruger v. Du Pisani	574
Magistrate's jurisdiction, <i>see</i> Joinder of parties... ..	719
Magistrate's jurisdiction—Title to land. Loxton v. Le Haine... ..	832
Magistrate's jurisdiction—Lashes—Act 43 of 1885. Rex v. Hans Pekeur	396

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Malicious injury to property. <i>M. and F. had killed a certain ox, the property of complainant. The ox was sick, complainant was absent, and the accused told complainant's son that they killed the ox to avoid quarantine.</i> Held on appeal, that this statement negatived any presumption of malice. Rex v. Malaza and Fundakubi... ..	550
Malice (legal), <i>see</i> Libel	155
Malicious desertion—Character of party deserted—Amount of maintenance. Rex v. Kili	59
Managing agent of mercantile firm—Salary—Share of profits—Agreement with principals—Goodwill. <i>Where the managing agents of a certain firm had considerably extended their business, and had invested considerable sums of money therein: on the termination of their agreement the Court held that the plaintiffs were entitled to a statement of account and to the percentage specified in the contract.</i> Waite v. Hansen and Schrader; Bracht v. Hansen and Schrader	134
Managing director, <i>see</i> Principal	479
Marriage, <i>see</i> Native	742
Marriage—Bigamy—Decree of nullity. <i>The Court refused to grant a decree of nullity of marriage on motion; though the respondent had been convicted of bigamy by intermarrying with the applicant, his wife being still alive.</i> Donaghy v. Donaghy	248
Marriage Ordinance—Description of status of spouses. <i>S. and his wife had been married according to Hebrew</i>	

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rites at Norvals Pont by the Rabbi of Bloemfontein. S. was domiciled in this Colony. Having some doubt as to the civil validity of their marriage, they wished to be re-married by a Colonial Magistrate, but having some scruples as to describing themselves as "bachelor" and "spinster," in view of their previous marriage, they now asked for an order authorizing a Magistrate to marry them without their so describing themselves. The Court refused to make any order.	him; but the Department nevertheless dismissed him. He was paid salary up to the time that he was deported. He now claimed salary for the entire period covered by his suspension.
<i>Ex parte</i> Sacks and another 513	Held, that the plaintiff was by his action estopped from claiming salary for the time during which he was prevented by the military from performing his duties.
Marriage of minor—Consent of parent.	Lubbe v. Colonial Government 521
Where a parent raises no objection to the marriage of a minor child, but refuses to give express consent, such lying by cannot be construed as tacit consent.	Master of Supreme Court—Proof of debt.
Should the parent unreasonably refuse or withhold consent, the minor may apply to the Chief Justice, in Chambers, to authorize the marriage.	Jeanneret v. Estate Sharpe... 85
Duncan v. Resident Magistrate of Mossel Bay ... 927	Massing, <i>see</i> Will (joint) 255, 631, 691
Martial "Law"—Scab inspector—Refusal of facilities by military—Suspension—Salary—Estoppel.	Measure of damages, <i>see</i> Contract 657, 750
L., a scab inspector, was during the late Martial Law regime, prevented by the military authorities from performing his duties, and was notified by the Agricultural Department that the payment of his salary would be suspended until he should again be allowed to perform such duties. The Court found, as a fact, that the plaintiff had acquiesced in this arrangement. Thereafter the Agricultural Department discovered that he had been deported by the military as an "undesirable." No specific offence was alleged against	Medical and Pharmacy Acts—Chemists' and druggists' assistant practising as chemist and druggist.
	The appellant, who was not duly licensed as a chemist and druggist, prepared medicine, as it was his habit of doing, according to the prescription of a medical practitioner, during the temporary absence of his employer S., who was duly licensed and was the owner of the chemists' shop in which the appellant was employed.
	Held, that the appellant was guilty of a contravention of the 35th section of Act 34 of 1891.
	Rex v. Jansen 269
	Medical attendance, <i>see</i> Traveller 162
	Messenger of R.M. Court—Attachment—Sale in execution.
	It is the duty of a messenger who has been entrusted with a writ of execution to attach the goods named therein and sell them on the due date, even if they are claimed by a third

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<i>person. In such case he should take security for indemnity from the judgment creditor.</i>		<i>aries, to which all persons who settled on the land were required to assent. These rules were read to the people from time to time, but were not printed for many years. In 1881, these rules (with a few unimportant modifications) were printed and circulated. The rules provided, inter alia, that any erf holder on the station could be ejected from his holding on a month's notice subject to his right on a fixed scale of compensation for his improvements. Three of the defendants who had persisted in breaking certain rules of the station received such notice, but refused to comply therewith. Other two had received no such notice but had transgressed the rules by refusal to pay rent, on the ground that they had a quasi proprietary right in their holdings. The Society now claimed a declaration of rights as against the defendants, an order of ejectment and arrears of rent from those who had refused to pay, tendering at the same time compensation for improvements as fixed by the rules.</i>	
Smith v. Watney	767	<i>Held (1) that the rules, as printed, formed the basis of the contract between the Missionaries and the people; (2) that the Society was, therefore, entitled to an order of ejectment against the defendants; (3) that the defendants were entitled to compensation for their improvements, such compensation to be subject to set-off for rent due, or other legal liabilities.</i>	
Mining company—Agent—Remuneration—Damages for non-delivery of shares.		<i>Held</i> (1) that the rules, as printed, formed the basis of the contract between the Missionaries and the people; (2) that the Society was, therefore, entitled to an order of ejectment against the defendants; (3) that the defendants were entitled to compensation for their improvements, such compensation to be subject to set-off for rent due, or other legal liabilities.	
<i>The defendants engaged to remunerate M. for his services with a certain money payment and certain mining shares. These shares were not delivered, and M. now sued for delivery and also for damages for non-delivery.</i>		Trustee of the Rhenish Mission Society v. Barron and others	943
<i>Held, that he could not succeed on both claims.</i>		Municipal Council—Administrative acts—Interdict—Illegality— <i>Ultra vires.</i>	
<i>Held further, that he was not entitled to damages for delay in the delivery of the shares, though they had greatly fallen in value.</i>		<i>The Supreme Court will not, by interdict, interfere with the administrative acts of any</i>	
Philip v. Metropolitan Railways (10 Juta, 52) followed.			
Mitchell v. Sam Weil Syndicate	217		
Minor heirs, <i>see</i> Estate of deceased spouse	933		
Minor fidei-commissories, rights of, <i>see</i> Will	437		
Misjoinder of parties, <i>see</i> Sale and purchase	302		
Mission station—Grazing rights.			
Rex v. Adams and others	401		
Mission station—Rules—Ejectment.			
Africa v. Rhenish Missionary Society	170		
Mission station—Rules—Contract—Declaration of rights—Ejectment.			
<i>A certain Missionary Society had acquired the absolute dominium of a certain farm for the purpose of a mission station, and had established thereon a settlement for coloured people. Rules for the good government of the settlement were drawn up by the Mission-</i>			

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<i>Municipal Council unless such acts are ultra vires or otherwise illegal.</i>	
Cape Town Ratepayers' Association and others v. Cape Town Town Council	...1012
Municipal Council — Election — Act 45 of 1882, Sec. 17 — Office of profit.	
<i>N. had been elected as a Councillor of the Municipality of A. At the time he was municipal poundmaster, for the duties of which he was remunerated by fees.</i>	
<i>Held, that as this was an office of profit under the Municipality, he was disqualified from being elected by Sec. 17 of Act 45 of 1882.</i>	
Reich v. McNally and Aliwal North Municipal Council...	787
Municipal regulations — Grazing rights—Illegal enclosure of commonage.	
Commissioners, Adendorp Municipality v. Kingwell...	104
Municipal Regulations — Powers of Council — Demolition of buildings — Measure of damages.	
<i>Certain Municipal Regulations provided that "where a building is considered by the Council to be ruinous or so far dilapidated as thereby to have become and to be unfit for use or occupation," the Council may, on failure by the owner to obey an order for its demolition, proceed to demolish the building and claim the cost from the owner.</i>	
<i>Held, in an action by the Council for the cost of the demolition of certain cottages of the defendant, that the Council had no power under such regulations to demolish buildings which were structurally fit for use and occupation, although from a sanitary point of view, they were not so fit.</i>	

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<i>In ordering the demolition, the Council acted bona fide and in the interest of the inhabitants of the town at a time when the plague was raging there, and the defendant was proved to have been generally neglectful of his duties as landlord.</i>	
<i>Held, in the defendant's claim in reconvention for damages, that, in the absence of any circumstances of aggravation, the measure of damages which should be applied was the diminution in the selling price of the land by reason of the unlawful act of the Council.</i>	
Reid v. Port Elizabeth Town Council	... 166
Municipality — Negligence — Personal injury.	
Van Niekerk v. Wynberg Municipality	... 61
Murder—Bail.	
Rex v. Broodryk	... 807
Rev v. Tromp	...1022
Native — Marriage — Lobola — Interpleader.	
<i>D. W. M. had obtained a judgment in a Transkeian R.M. Court against A. M. D. W. M. took out a writ of execution and thereunder attached certain cattle in possession of B. B. asserted that these cattle had been paid to him as "Lobola" by A. M. The marriage, however, between A. M. and B.'s daughter not having taken place, the Magistrate decided that the dominium of the cattle was in A. M., and that they were, therefore, attachable for his debts. On appeal, the Circuit Court reversed this decision of the R.M.</i>	
<i>Held on further appeal to the Supreme Court, that the judgment of the Circuit Court must be affirmed.</i>	
Peacock v. Ben Rango (12 C.T.R., 545) distinguished.	
Mills v. Bidli...	... 742

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Native reserve — Ejection — Criminal proceedings — Act 37 of 1884.		
<i>The appellants, Europeans, had been ejected from a certain native reserve on a Magistrate's order granted against them after criminal proceedings had been taken. There was no evidence that any natives were living on these lands.</i>		<i>goods were lying there at their disposal. When they were removed by the plaintiffs, it was observed that the case containing them was broken, and the machinery was afterwards found to have been injured: no claim, however, was made on the department till nearly four months after delivery had been taken. The Court found, as a fact, that the machinery had been damaged while in the custody of the department.</i>
Held, that as the place was not a native location in terms of Act 37 of 1884, the appellants were not liable, either civilly or criminally, and that the proceedings taken against them were irregular and must be quashed.		Held, however, that clause 145 was fair and reasonable, and as the plaintiffs had entrusted their goods to be carried, subject to its provisions, they were not entitled to damages.
Rex v. Martin and others ...	717	
Negligence, <i>see</i> Carrier ...	768	
Negligence of administrators— Abuse of trust.		<i>The plaintiffs also claimed damages in respect of certain cases of grapes entrusted to the defendants for carriage to Cape Town and export to Europe. The grapes were not forwarded by the usual fruit train but by a later train, and arrived too late to be accepted for carriage by the steamship company.</i>
Estates Swart and Basson v. Greeff and Walter ...	131	
Negligence, <i>see</i> Divisional Council	126	
„ <i>see</i> Municipality ...	61	
Negligence—Railway regulations—Contract—Delivery.		Held, that as the department had not contracted to carry the fruit by any special train, and as they took them to Cape Town in time for despatch by the steamer, which had refused to receive them in consequence of regulations not known to the department, judgment must be given for the defendants on this claim also.
<i>The plaintiff company sued the defendants for damages to certain machinery resulting, it was alleged, from the negligence of the servants of the Railway department. By clause 145 of the Railway regulations, it is provided that "all damages to, defect, or deficiency in a consignment must be pointed out in writing at the time of delivery, and that no claim will be admitted unless made within three days after delivery." These conditions were embodied in a consignment note signed by the plaintiffs' agent. The truck containing the goods was left by the department at a siding where none of their servants were in attendance, and plaintiffs were notified that the</i>		Cape Orchard Co. v. Colonial Government ...
		421
		Negligence — Railway Department—Damages.
		Van der Merwe v. Colonial Government ...
		456
		Negligence, <i>see</i> Fire 327, 346, 392
		New trial—Insufficient damages.
		<i>Where a case involving only questions of fact has been tried before a jury which, in the opinion of the judge who pre-</i>

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<i>sided, has not acted perversely or unreasonably, the Court will not order a new trial, on the ground that the verdict was against the weight of evidence, and that insufficient damages were awarded.</i>	
Van Zyl v. Warner ...	392
Notice of Bar, <i>see</i> Affidavit of service... ..	427
Notice of withdrawal of pupil, <i>see</i> School	406
Nuisance—Interdict.	
<i>The close proximity of a blacksmith's shop to a family private residence is not per se a nuisance.</i>	
Blacker v. Carter	495
Nuisance, <i>see</i> Public washing ...	336
Nuisance, <i>see</i> Landlord	630
Nullity (decree of), <i>see</i> Marriage	248
Office of profit, <i>see</i> Municipal Council	787
"One Man" Company, <i>see</i> Joint-stock Co., Ltd.	527
Onus of proof—Criminal offence—Proof of want of consent.	
<i>Under the Transkeian law it is an offence for any native in certain locations to erect a hut within such locations without the consent of the Resident Magistrate. The accused were convicted of a contravention of the law, but no evidence had been produced of such want of consent.</i>	
<i>Held, that the burden of proving the want of consent lay on the prosecution, and that the accused had been improperly convicted.</i>	
Rex v. Mabanti and others...	991
Ordinance 9 of 1836, <i>see</i> Village commonage	661
Ordinance 6 of 1843, <i>see</i> Sequestration	847

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Ordinance 10 of 1845, <i>see</i> Concealment of birth	606
<i>Pactum de non petendo, see</i> Provisional sentence	31
Partnership—Account—Participation in profits.	
Trott v. Trott	115
Partnership—Dormant partner—Insolvency—Sharing of profits—Proof by solvent partner.	
<i>By agreement between A. and D., the former advanced £300 to the latter, to be utilized for the purpose of a tailoring business, which was to be managed by D. at a fixed salary in addition to a half share of the profits. D. was to keep the books which A. was to be allowed to inspect. In consideration of the advance, D. was to pay to A. one half share of the annual profits in lieu of interest, and D. was to have the option of repaying the £300 in two years, and on such repayment A.'s share in the profits was to cease, but until such repayment A. was to receive his half share.</i>	
<i>Held, that the agreement furnished prima facie proof of the existence of a partnership between A. and D.</i>	
Estate Davidson v. Auret ...	21
Partnership—Joint and several liability of partners.	
Kruger v. Venter and Naude	201
Partnership—Receiver—Distribution of assets.	
<i>A provisional order of sequestration having been made against a partnership, the creditors and partners signed a consent paper that the sequestration should be discharged and that receivers should be appointed to realise the estate and distribute the proceeds in accordance with the legal order of preference in insolvency. The Court having appointed</i>	

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<i>the applicants as receivers in terms of the consent paper, the receivers proceeded to realise the assets. The respondents, who, as creditors, had signed the consent paper, proved their claim, but refused to place a value on certain securities which they held for their debt in terms of the 30th section of the Insolvent Ordinance.</i>		<i>partnership, but transferred into the names of such individual partners.</i>	
<i>Held, that the applicants were entitled to insist upon a value being placed on the security.</i>		Receivers of Grand Junction Railways v. Walker and others	994
In re Grand Junction Railways	171	Partnership—Dissolution—Liability of retiring partner.	
Partnership—Salaried partner—Sequestration — Remuneration.		Kelly & Co. v. Herman ...	337
<i>On the sequestration of a partnership estate a salaried partner cannot claim payment of his salary out of the assets in competition with other creditors, but if after the provisional order of sequestration he has continued to perform valuable services in the administration which he was not legally bound to perform, the trustee may, with the sanction of the Court, award to him a fair remuneration for his services as part of the costs of sequestration.</i>		Patent—Infringement—Specification—Repeal.	
Walker v. Receivers Grand Junction Railways ...	93	<i>In December, 1902, A. deposited a specification describing an invention for an acetylene generator; in March, 1903, R. deposited a specification describing an invention for a machine of the same class; in April, 1903, A. deposited an amended specification of his machine; letters patent were granted to A., and subsequently to R.</i>	
Partnership—Receivers—Realization of assets.		<i>Held, that R. could not succeed in an action for infringement against A. in respect of machines made and sold by A., which were covered by R.'s specification and by A.'s amended specification, but not by A.'s first specification.</i>	
<i>The plaintiffs having been appointed, with the consent of the defendants, as receivers of a partnership concern, for the purpose of realizing the assets and distributing the same according to the legal order of preference in insolvency.</i>		<i>Held further, that R.'s machine was covered by A.'s previous patent, and that R. was not the first inventor, and consequently that R.'s subsequent letters patent should be repealed.</i>	
<i>Held, that for the purpose of such realization the plaintiffs were entitled to claim from the individual partners any properties acquired by them out of the funds of the partnership and for the purposes of the</i>		Rutter v. Ashenden	368
		Payment of costs by telegraphic money order.	
		<i>Payment of costs by telegraphic money order is a good and sufficient payment.</i>	
		Smuts v. Poole	405
		Peregrinus, see Removal of trial ...	38
		Permit (to Native), see Liquor Licensing Acts	273
		Personal injury — Contributory negligence.	
		Werner v. Mills	353

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Plea—Vague and embarrassing—Exception.

It is a good exception to the form of a plea, that it does not confess or avoid material facts alleged in the declaration, and is otherwise vague and embarrassing.

Heydenrych v. Frame ... 178

Plea—Document relied upon in defence—Exception.

A declaration set forth the terms of a contract upon which the plaintiffs relied, and the plea, without admitting or denying that the terms of the contract had been correctly stated, alleged that they were contained in a certain letter addressed at a certain date to the defendants' agent, but the terms of the letter were not set out, nor was its general purport stated. An exception by the plaintiff to the plea as being embarrassing was sustained.

Houlder Bros. v. Colonial Government ... 319

Pleading—Amendment of plea—Costs.

Macleod v. Joubert ... 295

Pleading—Declaration and replication—Variation.

Coates v. Searle ... 334

Pleading — Exception — Demurrage — Consignee.

H. Bros. contracted under a C.I.F. contract to supply certain coal to the Cape Government. The Government agreed to pay demurrage to the owners of the vessels conveying the coal at certain rates. Plaintiffs alleged in their declaration that this contract had subsequently been varied by a certain letter written by them to the Agent-General for the Colony, but this amendment was not specially pleaded.

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Held on argument on exceptions, that the declaration was irrelevant, embarrassing and bad in law.

Houlder Bros. v. Colonial Government ... 589

Pledge, *see* Sheep lease ... 627

Practice—Default of plea—Setting aside of judgment.

Although it is not necessary to give notice of a set down for judgment to a defendant who has been barred, it is competent for the Court to set aside the judgment upon the defendant giving good reasons for his default and showing that he has a prima facie ground of defence.

Grassick v. B.S.A. Asphalt Co. ... 390

Preferent claim—Last illness.

McNally v. Estate Wiggett...1020

Prescription — Title to land — Transfer.

King Bros. v. Estate Wasserfall ... 356

Principal and agent—Private instructions — Knowledge of third persons.

Van der Hoof and Fisher v. Bechuanaland Estate Syndicate ... 724

Principal — Agent — Company — Managing director—Fraud—Agent making a profit at the expense of his principal.

The managing director of a company, having obtained for the company an option to purchase a house at a certain price, subsequently purchased it for himself at that price, and resold and transferred it to the company at a higher price.

Held, that the company was entitled to recover the excess from the director.

The managing director of a company, being aware that the

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company required for their business a building adjoining their premises, bought the building for himself and re-sold and transferred it to the company at a higher price.	Process in aid, <i>see</i> Foreign insolvency ... 563
Held, that the company was entitled to recover the excess from the director.	Promissory note—Surety—Novation, Nichollas & Co. v. White, Ryan & Co. ... 726
Cowling v. Estate Stableford & Co. ... 479	Promissory note Signature — Mark—Witnesses. <i>It is no valid defence to an action on a promissory note signed with his mark by the maker that the mark is attested by only one witness.</i> Philips v. Nroqoza ... 97
Private property of enemy—Booty—Rebel—Divesting of property—Vindication—Compensation. <i>During the recent war, the plaintiff, a British subject residing within this Colony, joined the republican forces which had invaded the district in which his farm was situated, and accompanied them to the Transvaal. During his absence the British troops entered the district and seized his goods on his farm, including a harmonium, which were sold to the defendant at public auction by order of the Military authorities.</i> Held, in an action for the recovery of the harmonium or its value, that if the seizure of the harmonium was contrary to the usages of modern warfare, the plaintiff should apply to the Imperial Government for compensation, but that, as it had been taken by the Military authorities during the war, with the object of acquiring the ownership thereof from a person who had joined alien enemies, the plaintiff had been divested of his ownership and was not entitled to vindicate the property. Du Toit v. Kruger ... 332	Promissory note—Excussion of principal — Beneficium divisionis. <i>A maker of a promissory note is deemed to have been excussed if he has surrendered his estate, and the sureties at once become liable. They are, however, entitled to the beneficium divisionis if they have not expressly renounced it.</i> Du Plessis v. Greeff and Waller ... 833
Privilege, <i>see</i> Defamation ... 603	Promissory note — Accommodation—Consideration. Du Plessis v. Hauptfleisch ... 283
Privilege, <i>see</i> Inspection of documents ... 643	Promissory note, <i>see</i> Beneficia S. C. Velleijani, &c. ... 407
Privilege, <i>see</i> Libel ... 155	"Proper books," <i>see</i> Culpable insolvency ... 403
Prize fight, <i>see</i> Illegal contract... 183	Provisional sentence — Bill of exchange—Liquid document—Set off. Bank of Africa v. Koenig & Co. ... 321
	Provisional sentence — Bills of exchange — Liquid and illiquid claims. <i>The Court refused provisional sentence upon certain bills of exchange, where it did not clearly appear how far these bills referred to items for which credit had been given.</i> Hartrodt v. McKay & Co. ... 306

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Provisional sentence—Lease.

McNaughton v. Rowe and
Welsh 277

Provisional sentence—Illegal contract.

The defendant had agreed to pay the plaintiffs a certain rental in consideration of being allowed to place certain automatic machines within the Exhibition grounds. The police having objected to these machines, the defendant was ordered by the Exhibition authorities to remove them. Defendant having been sued for provisional sentence on a promissory note given by him for balance of rent.

Held, that as this note was a liquid document, provisional sentence must be granted, though possibly defendant might have an action for damages against plaintiffs.

Trades, Markets, and Exhibition Company v. Hilderbrandt 82

Provisional sentence—Payment by instalments—*Pactum de non petendo*.

Lyons v. Eidelburg 31

Provisional sentence—Promissory note—Excussion of principal debtor.

Duffus & Co. v. Tobias 111

Provisional sequestration—Trustee—Practice.

Where an estate has been provisionally sequestrated, it is not the practice of the Court to appoint a provisional trustee. In cases of urgency application should be made to the Master for the appointment of a curator bonis.

Ex parte Sprigg & Co. v. Fraser and Sons 45

Provisional trustee, *see* Insolvency 330

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Public place — Shop — Abusive words.

The use of abusive words by a person in a shop towards another person, who at the time is also in the shop, does not constitute a contravention of the 10th section of Act 27 of 1882.

Rex v. Crozier 274

Public place.

A shop is not a public place.

Rex v. Celliers 980

Public trader, *see* Joinder of parties... .. 719

Public washing—Nuisance.

The Municipal regulations of C. prohibited "all washing of clothes in any public streams within the limits of the Municipality," and further ordained that "all public washing of clothes shall be done in public wash-houses." A had washed certain clothes, the property of other people, on premises whereof she was a tenant, and had thereupon been convicted by the R.M. of Wynberg of having contravened the aforesaid regulation.

Held on appeal, that in this case there had been no "public washing of clothes," and that the appeal must be allowed.

Armenia v. Claremont Municipality 336

Purchase and sale—Agent—Ratification—Estoppel.

The defendant's daughter, being about to be married, ordered a wedding cake from the plaintiff and directed it to be sent to the house of the defendant. The wedding did not take place, owing to the disappearance of the bridegroom, but the cake was not returned by the defendant, and an account was sent to him by the plaintiff for the price of the cake. The defendant did not repudiate

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<i>his liability, but went in search of the bridegroom. A second and third account were sent to the defendant, and it was only after receiving the third account that the defendant denied having ordered the cake. In the meantime the cake had deteriorated in quality.</i>		<i>1½d. per ton for stone consigned inland, and ½d. per ton for stone consigned coastwards. The Department claimed at the higher rate on carriage from Queen's Town to Stormberg, inasmuch as that portion of the journey was "inland." Held, that the Railway Department were bound under their tariff to carry the said stone through to Cape Town at the lower rate.</i>	
<i>Held, that although the defendant had not authorized his daughter to pledge his credit, he should, under all the circumstances, be held to have ratified her act, and therefore to be liable for the price.</i>		Hopkins & Co. v. Colonial Government 647	
Prince v. Webster 280		Rating of Crown property—Railway buildings—Occupation by individuals.	
Purchase and sale—Stolen property—Refund of price—Eviction.		<i>The Railway Department having to enlarge the Railway station at C., bought a cottage about 400 yards from the station, not on Railway property, for the stationmaster, who proceeded to occupy it as his private residence.</i>	
<i>Certain cattle which the plaintiff had purchased from the defendant were claimed by one M., from whom they had been stolen, whereupon the plaintiff handed them over to M., and informed the defendant of what he had done.</i>		<i>Held, that the cottage and grounds so occupied were liable to be rated under Acts 36 of 1891 and 19 of 1892.</i>	
<i>Held that, upon proof by the plaintiff in an action against the defendant for a refund of the price, that as the cattle had been stolen and that as the defendant would have had no valid defence to a suit at the instance of M., the plaintiff was entitled to succeed, although there had been no judicial eviction.</i>		<i>At the time when the Government took over the Railway there was a cottage at a crossing in N. on Railway property immediately adjoining the land, which was then occupied and continued afterwards to be occupied by a gatekeeper, whose duty it was to open and close the gates for persons wishing by night or by day to cross the Railway line.</i>	
Noonan v. Meyer 281		<i>Held, that the gatekeeper's cottage was not liable to be rated under the above Acts.</i>	
Railway department, <i>see</i> Negligence 456		Claremont Municipality v. Colonial Government ... 204	
Railway regulations, <i>see</i> Negligence 421		Receiver, <i>see</i> Partnership... .. 171	
Railway Department—Contract—"Coastwards."		Reconvention, <i>see</i> Review ... 331	
<i>Plaintiffs had contracted with the Cape Government Railways for the carriage of certain stone from Queen's Town to Cape Town. The rate specified by the Department was</i>		Rehabilitation, <i>see</i> Insolvent Ordinance 87	

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Removal of trial—*Peregrinus*—
Security for costs.

The Court refused the application of a defendant, a peregrinus, to remove a trial, as he had not given security for costs.

Diepraem v. Cloete ... 38

Removal of trial, *see* Criminal trial ... 237

Restitution of conjugal rights, *see* Divorce ... 451

Review—Gross irregularity.

In an application by the plaintiff for review of a civil judgment of a Transkeian Magistrate on the ground of gross irregularity, it appeared that the record of a previous judgment between the parties had been sent to the Magistrate by the Chief Magistrate and had been admitted as evidence, and that the only other evidence given in the case fully supported the plea of the defendant.

Held, that even if there was some informality in the manner in which the record had been put in, the plaintiff, who had not cross-examined the defendant's witnesses and had produced no evidence in support of his own case, was not entitled to have the proceedings set aside.

Ntikinca v. Ngcani ... 270

Review of proceedings in inferior Court—Gross irregularity—
Postponement of trial—Withdrawal of action—Claim in reconvention.

The plaintiff sued the defendant in the Supreme Court for £500 for alleged slander, and the defendant pleaded to the declaration and filed a claim in reconvention for £20 for illegal impounding of cattle. The plaintiff thereupon gave notice to the defendant of the withdrawal of the action, and issued a summons against the defendant

in a Resident Magistrate's Court for £20 for the slander. The Magistrate decided to postpone the hearing of the case until the claim in reconvention had been decided by the Supreme Court.

Held, on application for review, that inasmuch as the question whether the plaintiff could withdraw proceedings in the Supreme Court after filing of the claim in reconvention, was an important question of practice for the Supreme Court to decide, the postponement of the case did not constitute a gross irregularity.

Ackerman v. Smuts ... 331

Review—Gross irregularity—Adjournment of Resident Magistrate's Court.

In an action to recover certain sheep or their value in a Transkeian Magistrate's Court, it appeared that the plaintiff was too old and infirm to attend, and, on the application of the plaintiff's agent, the Magistrate adjourned the hearing to the plaintiff's residence, which was in the same district, for the sole purpose of taking his evidence. Due notice of the time and place was given to the defendant, but he refused to appear either at the plaintiff's residence or at the subsequent hearing in the Courtroom, of which he also had notice. There was evidence without that of the plaintiff to justify the defendant being called upon to produce his evidence, but he tendered none. The Magistrate having given judgment for the plaintiff, the defendant applied to have the proceedings set aside on the ground of gross irregularity.

Held, that the irregularity—if such it was—was not of such a nature as to justify a review.

Mafeke v. Mpambane ... 95

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Revocation, <i>see</i> Sale to minor children	214
Rules, <i>see</i> Mission station	170
Salaried partner, <i>see</i> Partnership	93
Sale and delivery—Dominium—Rent—Sale in execution.	
<i>The claimant, a collector of rents, who was personally responsible to the lessor of certain premises for the payment of the rents thereof, purported to buy from the lessee certain furniture in satisfaction of the rent due, but the furniture was not delivered to the claimant.</i>	
<i>Held, that upon the attachment of the furniture in execution of a judgment obtained by a creditor against the lessee, the claimant was not entitled to claim the furniture as being his own property.</i>	
Pinkus v. Fenster	123
Sale and purchase.	
Gibbs v. The B.S.A. Asphalt Company	159
Sale and purchase—Suspensive condition.	
<i>Goods sold under a suspensive condition remain the property of the seller, even if delivered to the purchaser, until the condition is fulfilled.</i>	
Albertyn v. Basson	118
Sale and purchase—Weight of evidence.	
Gous and Koeser v. Ritter	131
Sale and purchase—Agent.	
S.A. Bible Union v. Cosay	292
Sale and purchase—Brokerage—Rectification of contract—Misjoinder of parties.	
Parry v Lang and another	302
Sale and purchase—Goodwill—Sub-tenancy.	
Heynes, Mathew & Co. v. Cooper	324

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Sale and purchase—Guarantor—Suspensory condition—"Instalment system."	
Burroughs and Watta v. Campbell	340
Sale and purchase—Suspensory condition.	
Palmer v. Cape Cold Storage and Supply Co.	290
Sale and purchase—Raw goods to be worked up—Suspensory condition—Special contract.	
<i>One B. purchased certain timber from defendants on credit, subject to the condition that this timber was to be used for the purpose of building a boat, and that when that boat was completed it should be the property of the defendants and should remain so until the timber was paid for. B. was allowed in the meantime to sell the boat through defendants, on condition that he should pay over the price received to them. B. sold the boat to plaintiff who, bona fide, bought it as B.'s property. B. appropriated the proceeds and absconded. Defendants thereupon claimed the boat, and obtained possession of it by due process of law. Plaintiff now brought an action to recover it, or (in the alternative) its value.</i>	
<i>Held, that as this was not a case of a sale under a suspensive condition, the Court was not called upon to decide whether a sale of raw materials, subject to that condition, would vest the dominium of the finished article in the vendor or not.</i>	
<i>Held further, that as B. was bound by his special contract with defendants and never had dominium of the boat, he could not pass property therein to plaintiff, and that judgment must, therefore, be given for defendant, with costs.</i>	
Skalabrino v. W. and G. Scott, Ltd.	460

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Sale and purchase—Broker— Identity of property sold.	
Greenwood v. De Villiers ...	538
Sale and purchase—Conditional sale.	
Rigg v. Gericke ...	680
Sale and purchase— <i>Dominium</i> — Fraud.	

One S. had obtained certain goods from K. by means of fraudulent misrepresentations. S. thereafter sold them to Z, from whom K. now claimed them.

Held, that as the dominium of the goods had never vested in S., K. was entitled to vindicate his goods and to recover damages for such of them as had passed out of defendant's control.

McKillop v. Zuckerman ...	655
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Sale — Specific performance — Damages—Shares.	
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The defendants agreed to take on the plaintiff company for the purpose of amalgamating it with other companies of a similar character. Part of the purchase price was to be paid in cash, and the remainder in shares in the new company. The cash was paid, but the shares were kept over pending transfer. In an action for specific performance and the delivery of the shares, the defendant company alleged misrepresentation on the part of the vendors, but at the trial failed to establish this defence. Judgment was given for the delivery of the shares, or in the alternative for the payment of damages equal to their full value. A further sum was also awarded as damages suffered by the delay in making delivery: the shares being now unsaleable. On appeal, the latter sum awarded as damages was disallowed as no specific loss had been proved.

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Semble (per Buchanan, A.C.J.): <i>Where specific performance of a contract of sale is decreed, damages immediately arising out of and consequent on the mora of the vendors may be recovered.</i>	
Rhodesia Cold Storage Co. v. Beira Cold Storage Co. ...	881

Sale to minor children— <i>Revocation</i> .	
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V., wishing to provide for certain minor children, sold certain land to them jointly for £600. His wife having subsequently admitted that two of these minors were illegitimate. V. made another disposition of his property, excluding these two children from all share in his property.

Held, that as the Court had refused to find that these children were illegitimate, they could not be deprived of their rights under the sale, but as their curator had stated that they were willing to accept £100 each in satisfaction of their claims, the Court ordered transfer to be passed to the remaining beneficiaries, on condition of their paying out this sum.

Venter v. Venter and others	214
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Sale by survivor, <i>see</i> Will (mutual)	691
Sale <i>intra familiam</i> , <i>see</i> Will (joint) ...	515
Sale in execution, <i>see</i> Messenger of R.M. Court ...	767
Sanitation, <i>see</i> Landlord ...	630
Scab inspector, <i>see</i> Martial law ...	521
School—Sale of former public school buildings.	
<i>Ex parte</i> The Hex River School ...	644

School—Notice of withdrawal of pupil.	
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Notice of withdrawal of a pupil given to the secretary of

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<i>a public school is sufficient notice to the head master. Where, however, the school authorities stipulate for a quarter's notice, such notice must be given at the beginning of a school quarter.</i>		<i>is not bound to receive water which the upper proprietor has collected by artificial drainage at any point of his land at which the upper proprietor may elect to discharge it.</i>	
Hart v. Forman	406	Myburgh v. Decker	960
Scottish marriage—Married Women's Property Act—Community of property.		Service of Articles, <i>see</i> Attorney	809
<i>Husband and wife domiciled and married in Scotland prior to the passing of the Married Women's Property Act of 1882, are married in community as to movable property but not as to immovable.</i>		Service of summons, <i>see</i> Magistrate's Court	127
<i>Ex parte Stewart and Wife...</i>	327	Set off, <i>see</i> Provisional sentence...	321
Security given by wife— <i>Senatus consultum Velleiani</i> .		Share of profits, <i>see</i> Managing agent	134
Heydenrych v. Frame	99	Shares, <i>see</i> Sale	881
Security for costs, <i>see</i> <i>Incola</i>	20	Sheep lease—Pledge—Insolvency—Preferent and concurrent claims.	
Sequestration, compulsory—Ord. 6 of 1843, Sec. 5.		Estate Van Niekerk v. Sandilands	627
<i>A creditor cannot oppose the compulsory sequestration of the estate of an insolvent debtor on the grounds that he has no security for his debt, that he is willing to give time and that the time is inopportune for realizing the estate.</i>		Shop, <i>see</i> Public place	274, 980
Mouillot and De Jong v. Koenig	847	Slaughter house—Local authority— <i>Ultra vires</i> .	
Service, affidavit of—Notice of bar.		Rex v. Joos	272
<i>Judgment cannot be granted under Rule 319, unless an affidavit of service of bar is produced. The mere service is not sufficient.</i>		Smelting pot, <i>see</i> Act 10 of 1895...	629
Gabier v. Ajam	427	Special contract, <i>see</i> Sale and purchase	460
Service of summons, <i>see</i> Summons	475	Specification, <i>see</i> Patent	368
<i>Servitus fluminis recipiendi.</i>		Specific performance, <i>see</i> Sale	881
<i>Although a lower proprietor is bound to receive on his land such water as finds its way there from the land of an upper proprietor by natural flow: he</i>		Spoliation—Compensation for improvements.	
		<i>Certain land in the village of A. remained registered in the name of one D. (now deceased). Some 30 years ago D. sold the land to one K., who paid for the same but never took possession. He gave to one H. a right to occupy a house on the property. This house gradually fell into such a state of dilapidation as to become a public nuisance, and no Divisional Council rates had been paid on the property for 6 years. The Council, instead of attaching the property and selling for arrears of rates, gave W. leave to occupy the</i>	

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<i>house. He did so, paid arrears of rates and made the place habitable. After he had been in undisturbed possession for some years, H. alleged that he had purchased the house from K., and in W.'s absence made forcible entry.</i>	
<i>Held, that H. had committed an act of spoliation that he must give up possession to W. and might then (if so advised) bring an action of ejectment against him.</i>	
<i>Semle, even in the event of H. succeeding in such action, he would be bound to compensate W. for his improvements and to refund to him the money paid for arrear rates.</i>	
Wilsnach v. Van der Westhuizen and another ...	940
Stock theft—Hard labour—Act 7 of 1905, Sec. 4.	
<i>Where a prisoner is sentenced to pay a fine under Sec. 4 of Act 7 of 1905, or in the alternative to a further term of imprisonment, the Act does not authorize the imposition of hard labour during such additional term.</i>	
Rex v. Hendrik Juel and Tol Juel ...	791
Stolen property—Bona fide holder for value.	
<i>The appellant had agreed to let H. have certain rings for half an hour, in order that he might find a purchaser for them. H. sold them to L., appropriated the proceeds and absconded.</i>	
<i>Held on appeal, that as H. must be held to have stolen the rings, and as by our law the appellant was not bound to prosecute the thief to conviction before he could recover his property, judgment must be given for the appellant for the return of the rings or payment of £20, their value.</i>	
Harris v. Lentin ...	416

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Stolen property, see Purchase and sale ...	281
Storm water, see Water ...	901
Substituted service, see Divorce ...	239
Sub-tenancy, see Sale and purchase	324
Succession ab intestato—Wife and husband.	
<i>By the law of this Colony, wife and husband can under no circumstances succeed either to other ab intestato. Failing blood relations of the deceased, the property vests in the Government 40 years after his or her decease.</i>	
Ex parte Leeuw ...	508
Succession duty—Secs. 1 and 15 of Act 5 of 1864—Act 4 of 1895.	
<i>S., domiciled in Scotland, died intestate in India, leaving certain movable property in this Colony, which, in virtue of a certain antenuptial contract entered into here, devolved upon certain heirs, ab intesto, who were also domiciled in Scotland. Letters of administration had been taken out here, and the Master claimed that the movable property was liable to succession duty under Sec. 1 of Act 5 of 1864.</i>	
<i>Held, that as these heirs succeeded to a settled estate in this country under a settlement executed here, the estate was liable to succession duty.</i>	
<i>Held further, that by Sec. 15 of Act 5 of 1864, such succession duty was to be assessed at the rate of five per cent.</i>	
Stewart's Estate v. The Master ...	310
Summons—Principal—Managing agent.	
<i>Though the principal of a shop is the proper person to sue and be sued, the Court will not interfere on appeal where the managing agent of a branch</i>	

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shop, who had previously taken legal proceedings in his principal's interest, has been sued, provided no substantial injustice is done.

Seymour v. Tukisi and another ... 129

Summons in criminal case—Description of offence.

A summons charged the defendant with cutting wattles and saplings in violation of regulations made by the Government in that behalf, but did not allege that the defendant had done so without a licence or permit from the Government. The particular regulation was not mentioned in the summons, nor was it produced at the trial, but it was produced at the hearing of the appeal, from which it appeared that a person cutting such wattles and saplings without the licence or permit provided for in section 1 of these regulations, shall be liable to the penalties of section 16 of Act 28 of 1888.

Held, that as the specific regulation was not mentioned in the summons, it was necessary that the summons should contain a full description of the offence charged.

Rex v. Van Niekerk... 122

Summons—Service.

The posting of a summons on the door of the Supreme Court is not sufficient service.

Zeederberg and Duncan v. Alperowitz... 232

Summons—Arrest—Particulars of charge—R.M. Court.

K. was charged with stock theft. The evidence of the first witness for the prosecution implicated also M. (K.'s son). M. was thereupon arrested without summons and placed in the dock. He did not except to the want of summons and did not appear to be prejudiced

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thereby. That portion of the evidence which had been taken was read over to him, and he was convicted.

Held on appeal, that the appeal must be dismissed.

Rex v. Kobose and Mkebo... 966

Summons—Service on a non-existent company.

Certain goods said to be the property of a company (B.) had been attached for debt. Another company (A.) now asked for their release, on the ground that the goods were their property, and no summons had ever been served on them. It appeared that the company A. had, since the summons was served, changed its name to B., and that at that very time the change was in contemplation.

Held, that as the two companies were virtually the same and did not appear to have any defence on the merits, leave must be granted to amend the summons by the insertion of A. instead of B.

Plate Wall Syndicate, Ltd. v. Cape Times, Ltd. ... 475

Surety—Insolvency of principal—Costs of excussion.

S. had guaranteed certain debts of C. to the amount of £30. Shortly after S. had given his guarantee, C. made further purchases from the same dealer to the amount of nearly £5. A few days after entering into this latter transaction, C. paid to the vendor of the goods some £7 10s., and thereafter her estate was sequestrated. Some £2 costs were incurred in excussing her for the principal debt. In the Court below the Magistrate refused to give judgment for these costs.

Held on appeal, that a surety is liable for costs of excussion.

Ross & Co. v. Smith ... 755

**Surety and co-principal debtor—
Consideration — Conditional
settlement.**

P. had signed a promissory note for £700 as surety and co-principal debtor in favour of O. and K. Various payments reduced this debt owing to plaintiffs to £385. Subsequently O. paid off £150. One D., who owed £75 to O. and K., paid it by special agreement to W. on their behalf. A further note was given for the balance of £85. Plaintiffs now sued defendant for an outstanding balance alleged to be still due on one of the notes given to meet a portion of the original note. P. pleaded want of consideration.

Held, that inasmuch as the plaintiffs had advanced the money to the principal debtors on the faith of P.'s suretyship, he had received full consideration.

Held further, that his obligation in respect of the original note had been fully discharged by the note for £85, inasmuch as by that note a provisional settlement was effected, notwithstanding that the respective rights of K. and W. as between themselves were left undermined.

**Greef and Walter v. Du
Plessis 496**

**Suspensory condition, see Sale and
purchase ... 290, 340, 460**

**Suspensive condition, see Sale and
purchase 118**

Theft—Forgery.

The appellant, being an agent employed by R. to collect a debt for him, received payment of the debt by means of a crossed cheque made in favour of R. The appellant being about to be arrested on a decree of civil imprisonment, wrote the name of R. on the back of

the cheque and gave it to B., who received payment of the amount. B. devoted a few shillings towards payment of food for the appellant and kept the balance for him.

Held, that the appellant had been properly convicted of theft of the cheque and forgery of R.'s name.

Rex v. Bindeman 275

Theft—Technical exception.

Where certain prisoners were accused of stealing napery from R., the exception was taken that the goods were not the property of R., but of a firm in which he was only a partner.

Held on appeal, that the exception was purely technical, and that as the goods were in the lawful possession of R., the appeal must be dismissed.

Rex v. Bavooka and others... 402

**Title to land — Registration —
Illegal sale.**

One F. B., acting under an alleged power of attorney from P. B., had sold certain land to W., and the sale was duly registered and endorsed on the title deeds, and W. thereafter dealt with the land as his own. Subsequently P. B. repudiated the sale, on the ground that he had not been paid the purchase price, and sold it to the plaintiff, who took possession and applied to have it registered in her own name. Her application was refused. A man who alleged that he was W.'s partner, and had formerly held possession of the farm, having become insolvent, and the farm having been attached, the plaintiff obtained an order restraining the Sheriff from dealing with it, claimed it as her own, and alleged that W. had obtained transfer by forging signatures to the declaration of seller and to the

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<i>power of attorney from P. B. to F. B.</i>	
<i>Held, that these disputed signatures were genuine and that W. must, therefore, be regarded as the legal owner of the farm.</i>	
Van Niekerk v. Will and others	361
Title to land, <i>see</i> Prescription ...	356
Town Council—Regulations.	
<i>The Town Council of Cape Town has no power to make regulations fixing the charges to be made by drivers of cabs outside the limits of the Municipality, or compelling the drivers to take fares outside such limits.</i>	
Rex v. Bouwers	271
Town Council—Contract—Interdict.	
<i>The Court granted a rule nisi on the ex parte application of certain councillors and other ratepayers, calling upon the Town Council of C. T. to show cause why they should not be restrained from entering into a certain contract.</i>	
Cape Town Ratepayers' Association and others v. Cape Town Town Council ...	951
Trade mark—Colourable imitation—Interdict.	
Policansky Bros. v. Hermann and Canard	383
Transfer of licence, <i>see</i> Liquor Licensing Acts	58
Traveller—Contract of service—Travelling expenses—Medical attendance.	
Robertson v. Holt and Holt	162
Trespass—Assault.	
Rex v. Rossouw	279
Trespass, <i>see</i> Game	544

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Trespass—Damages—Beacons—Prescription.	
Brink v. Avenant	51
Trustees, <i>see</i> Provisional sequestration... ..	45
Tribal tenure, <i>see</i> Deed of grant	796
Ultra vires, <i>see</i> Municipal Council	1012
Ultra vires, <i>see</i> Slaughter-house...	272
Undesirable alien—Act 47 of 1902—Deportation.	
<i>Act 47 of 1902 makes no provision for the deportation of an undesirable alien who having been permitted to enter this Colony and having been naturalized therein has not subsequently acquired any domicile of choice elsewhere.</i>	
Rex v. Harris	582
Lis v. Colonial Government...	1011
Rex v. Crystal	1001
Variation, <i>see</i> Pleading	334
Vesting, <i>see</i> Will	515
Village Commonage—Ord. 9 of 1836—Act 45 of 1882.	
<i>In 1856 the farm B. was transferred to the Kerkeraad, for the time being, of the D.R. Church of Aberdeen. The Kerkeraad sold various erven under conditions, whereby the vendors reserved their right to sell more erven and to impose such regulations on the purchasers as might from time to time be made either by the Kerkeraad or other local authority which might succeed them for the management of the township. The Municipality subsequently acquired some 5,000 morgen as additional grazing land, and now complained that the Kerkeraad were selling portions of the commonage as erven, and thereby restricting their grazing rights, and claimed a declaration that the defendants should not be entitled to sell further</i>	

erven. They further asked for a declaration that the Town Commonage was under their exclusive control.

Held, that (1) the grazing rights of the owners of erven extend over the farm subject to any rights which the Kerkerad may possess. (2) That as the original lands of B. were insufficient to depasture all the cattle, the inhabitants were entitled to place thereon: the defendants were not entitled to sell such portion of the commonage as would appreciably affect the plaintiffs' rights. (3) That Ord. 9 of 1836 and Act 45 of 1882 did not apply to the commonage in this case, inasmuch as the inhabitants had acquired only a common right to the servitude of grazing stock on the commonage, but not to the solum thereof.

The Aberdeen Municipality
v. The Aberdeen Church... 661

Vindictin, *see* Private property
of enemy ... 332

Voters' list, *see* Divisional Connoil 826

Water—Right to lead over the
lands of another—Acts 24 of
1876, 26 of 1882 (Sec. 2), and
40 of 1899 ... 958

Water—Storm water—Respective
rights of upper and lower
riparian proprietors.

When water flowing into the channel of a river has once entered therein and joined the stream within the river banks, whether such water be a portion of the usual flow, or of freshets, or of more considerable floods after heavy rains: such water becomes part of the perennial stream and is subject to all rules regulating the user of the ordinary flow by the riparian proprietors.

The rule that an upper proprietor, after using a reasonable quantity of water for irrigation, must allow the sur-

plus of such water to flow back into the stream, does not contemplate such return being made at any uncertain spot by percolation, but obliges him to return such water by a visible flow at some point in the stream above that at which it joins the property of the lower proprietor.

Southey v. Southey ... 901

Water Act, 1899—Functions of
Water Court—Prescription.

In an application to a Water Court for the distribution of a stream under the 11th section of Act 40 of 1899, it was pleaded that the stream was a perennial one as far as it flowed over the respondent's land, but that they, being upper proprietors, had for upwards of thirty years continuously diverted all the water so as not to allow any to flow to the applicant's land. Evidence was taken in support of the plea, and the application was dismissed.

Held on appeal, that the Water Court was right in taking the evidence, and as the weight of the evidence supported the plea, the appeal was dismissed.

Nel v. Kleinhans ... 120

Water Court—Act 40 of 1899—
Appeal—Review.

Act 40 of 1899 makes no provision for an appeal from a decision of a Water Court thereunder constituted. Such decision may, however, be brought under review by a superior court on any of the usual grounds.

Waite and Harvey v. Young 793

Wife and husband, *see* Succession
ab intestato ... 508

Will—Codicil—Construction—
Bequest by implication.

A testator, by codicil to his will, bequeathed a farm to his grandson A., "upon this under-

standing that he shall not be able to sell the farm, but that after his death and that of his wife it shall devolve upon his eldest son." A. married his first wife after the testator's death, and after her death he was twice married. Upon the death of A., the plaintiff, being his eldest son by his first wife, took possession of the farm.

Held, in an action by A.'s widow, being his third wife, claiming a life interest in the farm, that the wife referred to in the codicil was the mother of the eldest son of A., and that the defendant, as such eldest son, was entitled to the farm after the death of his father and mother.

Kruger v. Kruger ... 316

Will—Fidei commissum—Grandchildren—Renunciation of fiduciary interest.

V. instituted his seven children and their children, by representation, as his heirs, but burdened the inheritance with a life interest in favour of his wife. V. having died, his widow now wished to renounce her life interest in favour of the fidei commissarii.

Held, that as it had been ascertained that no further grandchildren of V. could be born, the portions of the heirs should at once be paid out, notwithstanding the fact that V.'s widow had power to impose further fidei commissa. It was, however, ordered that the shares of the minor heirs were to be paid to the executor for their behoof.

Van Reenen v. Estate Vink 324

Will—Construction—Failure of conditional legacy—Impossibility of performance of condition—Adiation—Family arrangement—Authorization *inunc pro tunc*.

A husband and wife, married in community, owned certain

farms, over 16,000 morgen in extent, in a contiguous block. By a joint will made in 1860, they divided the land into two nearly equal portions, and bequeathed the more valuable half to their eldest son M. for his life, at the price of 10s. per morgen, with strict prohibition against bonding or in any way alienating any portion thereof, the said property to pass after M.'s death to his eldest son for his lifetime for 5s. per morgen, and after his death to his brothers in succession, and on the decease of the last of these then to his eldest and other sons in succession, and on the demise of the last of such great-grandsons of the testator, the property was to be sold, but only among the direct male descendants of the testator, and the money divided among the descendants of M. per stirpes. They bequeathed the less valuable half similarly, but at a less price, to three of their other sons and their male descendants with similar restrictions. As to the residuary estate, the survivor and the children were appointed the heirs of the first dying, and the survivor was appointed executor. The testator died in 1869, leaving his widow and eleven children surviving, of whom M. and two others, not immediately concerned in the land, were then majors. The farms had been mortgaged for £5,100 by the testator in his lifetime, and these mortgages still subsisted at his death. M. was wholly unable to pay the bequest price of £4,000 for his land, and the other three sons, at that time minors, had no prospect of being able at majority to pay the £2,000 necessary to procure their life estate. The estate, unless the land was realised, was unable to meet its liabilities. The widow thereupon determined in 1870 to take over the land at

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a fair valuation, and she liquidated the testator's estate on that basis, but never got the sanction of the Court to such an arrangement, nor did she ever get transfer of the land into her own name. She, however, paid out all the heirs of her husband as they came of age, and resided and farmed on the land, treating it in all respects as her sole property. No protests from any quarter were ever made to this family arrangement. The testatrix died in 1904, having made a will, disposing of the land among her sons, but in a different manner to that laid down in the will of 1860. In an action brought by the executors against the executors dative of her husband's estate and against the curator ad litem for a minor grandson of the testator,

Held, that the arrangement made by the widow in 1870, and acquiesced in by all parties since that date, must be held good, and that it should be sanctioned nunc pro tunc; and that transfer of the land should be given to the plaintiffs, so that they might deal with it in terms of the will of the survivor.

Also held, that the widow had not by her conduct adiated or accepted benefits under the joint will, so as to debar her from treating the land in a different manner from that laid down in the joint will.

Ferreira v. Otto (3 Juta, 193) followed.

Executors of Van Breda v. Executors Van Breda and others ... 551

Will—Construction—Children—Child in ventre matris.

The testator bequeathed property to some of his children and to his "grandchildren, issue of his daughter by L., her husband."

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Held, that the plaintiff, who was a child of the testator's daughter by L., but was born five months and three days after the testator's death, was entitled to share in the bequest.

Estate Lewis v. Estate Jackson ... 180

Will—Interpretation—Substitution.

Lazarus and others v. Estate Lazarus and others ... 936

Will, joint—Adiation—Condition *ne exeat familia*—Sale—Fraudulent misrepresentation.

Fourie and others v. Mostert and others ... 222

Will, joint—Fidei Commissum—Insolvency of fiduciary—Rights of minor fidei-commissories.

The late P. and his wife made a mutual will, by which their landed property was bequeathed to their two sons by a fidei-commissary bequest subject to a life interest in favour of the survivor, "in order that he or she may be better enabled to maintain, support and educate our children, &c." After the death of P., his widow married B., and subsequently the estates of B. and his wife were sequestrated. Their trustee claimed the life usufruct of Mrs. B. in the estate of her former husband. The defendants claimed that the words of the will "in order that, &c., amounted to a prohibition against alienation of the usufruct.

Held, that these words only implied an expression of desire on the part of the testators as to the way in which the usufruct should be employed, and that the trustee was entitled to judgment for the same.

Visser v. Baker and others ... 437

**Will, joint—Husband and wife—
Massing of joint estate -
Confirmation by survivor of
joint will.**

The testators, being husband and wife, made a joint will, by which the testator instituted as his heirs the testatrix and his children by her, and the testatrix instituted the testator and her children by him, and of a previous marriage, and they directed that the survivor was to remain in full and free possession of the whole of the joint estate. The testator died first, and after him his son William, who left one child, namely, the plaintiff. The testatrix made a will, revoking all former wills, except the joint will.

Held, that even if there was no such massing of the joint estate as to make the joint will binding on the survivor after adiation, the effect of the recognition by the testatrix of the joint will was to shew that she intended by her separate will to treat the joint will as binding and to deal only with her after acquired property, and that the plaintiff was entitled to the share of the joint estate, which would have accrued to her father if he had survived his mother.

Held further, that under the joint will the survivor was entitled to deal with her child's portion as her own, and that it consequently forms part of the property disposed of by her separate will.

Maskew v. Estate Maskew ... 255

**Will, joint—Sale intra familiam—
Vesting.**

S. and his wife made a joint will, whereby they bequeathed their entire estate to the survivor and the children of their marriage as their sole heirs. By a codicil to this will the testators directed that a certain

farm in their estate should not fall under the provisions of the will, but should be bequeathed to their five sons for £500; which amount was to be paid after the death of the survivor to the three daughters of the testators. In a special case stated the plaintiffs contended that no portion of the inheritance vested in either of the two minor sons who predeceased the survivor, and that subject to payment, pro rata, of their share of the £500, the plaintiff, through his wife, as a beneficiary under the will, was now entitled to a share in the inheritance of the minor sons deceased. The defendants denied that on the death of the survivor the deceased minors acquired any vested interest in the said farm.

Held, in favour of plaintiff's contention.

Olivier v. Schoombee and others ... 515

Will, joint—Massing—Debts due to estate.

By a joint will, V. and his wife bequeathed to their daughter A. a life interest in £1,000, with fidei commissum to their other five children and the legitimate issue of these per stirpes. They also bequeathed to these five children certain land, the survivor of the testators to enjoy a life usufruct thereof. After the death of the survivor, each of these heirs was to mortgage his portion for £200 to the said A., the interest to be paid to her half-yearly. The testator and testatrix instituted each other mutually, together with their children, as heirs of the residue of the joint estate. Mrs. V. predeceased her husband, who adiated under the will, and subsequently made a will confirming the bequest of land to his children, but imposing certain conditions not embodied

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in the original will. There was a bond on the land bequeathed, and it was contended for the plaintiffs that this represented a debt on the joint estate. The defendants contended that it represented the accumulated debts of the plaintiffs.

Held, that as these debts had been taken over by the testator previous to the death of his wife, the mortgage must be regarded as a burden on the joint estate, and that the legatees were entitled to the farms free of mortgage.

Held further, that a debt incurred in respect of a sum of money paid for stock for one of the sons must be regarded as an asset of the joint estate; and that the executrix must pay costs.

Beneke and others v. Van der Vyver and others ... 631

Will, mutual—Massing—Sale by survivor.

K. and his wife made a mutual will, instituting as heirs the survivor and their daughter (the first plaintiff) and her children: the survivor to enjoy

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a life usufruct of the whole estate. K. survived his wife and adiated. Thereafter K. sold three erven, part of the joint estate. Plaintiffs now claimed that the sale be declared invalid as to half of the three erven and that defendant be ordered to pay the price of the other half, which they said he had not paid. Or in the alternative that he be ordered to pay the full price of the erven, if the sale could not be set aside, either wholly or in part. The fact of the sale having taken place was disputed, but the Court found, as a fact, that it had gone through. The Court also found that no part of the purchase price had been paid.

The defendant was ordered to pay the full amount of the purchase price (£600): or in the alternative to pay £200, with interest, for half the erven and to re-transfer the remaining half free and unencumbered.

Du Plessis and another v. Van Os ... 691

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